

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRANCE L. EDWARDS,

Defendant-Appellee.

UNPUBLISHED
February 11, 2003

No. 235277
Wayne Circuit Court
LC No. 00-011794

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE L. EDWARDS,

Defendant-Appellant.

No. 236329
Wayne Circuit Court
LC No. 00-011794

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

In these consolidated appeals, both defendant and the prosecutor appeal as of right following a bench trial that resulted in defendant's convictions on two counts of armed robbery, MCL 750.529, one count of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, to concurrent terms of eight to twenty years' imprisonment on the robbery and carjacking convictions, along with a consecutive two-year term of imprisonment on the felony-firearm conviction. The prosecutor appeals the sentence imposed on defendant, which reflected a downward departure from the legislative sentencing guidelines. Defendant appeals the trial court's determination of guilt on the ground that the court's factual findings were in error. We affirm defendant's convictions, but we vacate defendant's sentence and remand for resentencing.

I. BASIC FACTS

This case arises out of a robbery at a gas station in Detroit at about three o'clock in the morning on October 2, 2000. The male victim, who was at the gas station with his girlfriend and

her three-year-old daughter, entered the station alone while his girlfriend and her daughter waited in the girlfriend's vehicle. The male victim walked around inside the gas station looking for some food items when the perpetrator discreetly approached the victim in an aisle, pointed a handgun at the victim's midsection, and forced the victim to turn over money and all of his personal property, including a cell phone, jewelry, and all of the victim's clothing except his socks. The perpetrator then exited the gas station, went over to the girlfriend's vehicle, threatened her with the gun, took her personal property, and stole the vehicle after first removing the child from the car.

Police responded to the robbery scene, and the victims gave descriptions of the offender and of the stolen vehicle. About thirty minutes after the crime, two police officers patrolling the area in their squad car passed the stolen vehicle and turned to commence a pursuit. However, the driver of the stolen vehicle jumped out of the moving car and fled on foot. The officers gave chase but the perpetrator eluded capture. The officers described the person who fled the vehicle as a black male with medium complexion, wearing dark clothing and a black jacket with a white lining interior. Subsequently, another officer, who obtained word of the foot pursuit and the suspect's description, stopped defendant while he was walking in the street near the vicinity of the pursuit. Defendant matched the general description provided by the officers involved in the original pursuit; however, those officers could not positively identify defendant as the driver of the stolen vehicle. No useable fingerprints were lifted from the stolen vehicle, and the stolen personal property was not recovered.

Later, on the day of the crime, the male victim confidently picked defendant out of a line-up. Initially, the girlfriend could not identify the perpetrator in a line-up; however, as she was leaving the police station, she changed her mind, returned to the officers involved in the line-up, and indicated that defendant committed the crime.

Gas station surveillance tapes did not reveal the face of the offender, but the tapes revealed that the offender had characteristics similar to defendant, and the tapes corroborated the male victim's version of the robbery.

II. TRIAL COURT'S FACTUAL FINDINGS

Defendant argues that the trial court erroneously found that defendant was identified by police officers as the driver of the stolen car, where the officers' actual testimony revealed no such identification. Therefore, defendant concludes, the guilty verdict was defective and must be reversed. We disagree.

In a bench trial, a trial court's findings of fact are reviewed for clear error. *People v Thenghkam*, 240 Mich App 29, 45-46; 610 NW2d 571 (2000). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

We note that defendant's reference to the record is taken out of context, omits relevant findings of fact by the trial court, and is inaccurate. The trial court took significant time in detailing its factual findings regarding the circumstances of the crimes, and the majority of the court's findings related to the male victim's identification of defendant as the offender. The trial court went on to describe the efforts of police officers and their identification of the stolen

vehicle after the crime. The court found that a person bailed out of the stolen vehicle upon police pursuit, and it *specifically acknowledged* the officers' testimony that they could not positively identify defendant as being in the vehicle. The trial court further found, however, that the officers who stopped the stolen vehicle provided a general description of the person who ran from the vehicle, and another officer stopped defendant in the vicinity, while defendant was on foot, based on the description. The court merely made the reasonable inference that defendant had been driving the vehicle.

Even if the trial court erroneously found that the police officer specifically identified defendant as the driver of the vehicle, any error would be harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Once again, the trial court, in support of its guilty verdict, relied principally on the male victim's identification of defendant and his testimony about the circumstances of the crime, and the court found the victim's testimony to be very credible and convincing. Moreover, the female victim identified defendant as the perpetrator, defendant fit the physical descriptions provided by the victims, defendant was found in the vicinity wandering the street in the middle of the night, and video surveillance at the store, although unclear and inconclusive, indicated that the robber had the same characteristics and build as defendant.

There was no error requiring reversal because the unchallenged findings made by the trial court supported a conviction on all counts, and because the court's discussion of the facts surrounding the police pursuit and the arrest clearly did not form the basis of the court's identification of defendant as the offender. We affirm the trial court's guilty verdict.

III. SENTENCING

The crimes for which defendant was convicted occurred on October 2, 2000; therefore, the legislative sentencing guidelines are applicable. MCL 769.34(2). The sentencing guidelines, as provided for by statute, established a minimum sentence range of between 10½ to 35 years' imprisonment. However, the trial court departed downward from the guidelines and imposed a sentence of 8 to 20 years' imprisonment. The prosecutor argues that the trial court's departure from the guidelines was improper because the court failed to provide a reason for the departure. We agree.

MCL 769.34(2)(a) provides that "[i]f a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute." The trial court may depart from the appropriate sentence range "if the court has a substantial and compelling reason for that departure *and states on the record the reasons for departure.*" MCL 769.34(3)(emphasis added). Substantial and compelling reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). The factors relied on by the court in determining whether substantial and compelling reasons exist for departing from the guidelines must be objective and verifiable. *Id.* This Court reviews for an abuse of discretion a trial court's determination that substantial and compelling reasons to depart are present in a particular case. *Id.* at 76.

Our review of the sentencing transcript reveals no explanation for the trial court's downward departure from the guidelines. The court simply did not provide any reason for the departure, let alone a substantial and compelling reason based on objective and verifiable factors. In his appellate brief, defendant as much as admits the trial court's failure to state reasons on the record for the departure. Instead, defendant argues that he and defense counsel presented numerous reasons during allocution supporting departure, e.g., a good employment record prior to drug involvement, a high school diploma, a year and a half of schooling in data processing, involvement in church activities, and strong family support. Defendant concludes that the trial court, having heard the arguments for a downward departure, "received and *apparently adopted* those un rebutted objective factors" However, MCL 769.34(3) does not allow for a departure where the court "apparently adopted" a defendant's arguments; the court must expressly state the reasons for the departure on the record. Without the required expression by the trial court on the record of the reasons for a departure, the prosecutor is left without the ability to properly challenge the decision, and this Court cannot render a substantive opinion with regard to whether the departure constituted an abuse of discretion.

The trial court, prior to rendering the sentencing decision, spoke in general terms about defendant's drug problems and the unfortunate impact that drugs have in causing criminal behavior; however, the court also noted that defendant had opportunities in the past to address his drug abuse and had failed. There is no indication in the record whatsoever that defendant's drug dependency formed the basis for the court's downward departure.

We remand for resentencing at which time the trial court shall articulate the reasons for departure in accordance with the requirements of MCL 769.34 should the court in fact decide to once again depart from the guidelines.

Affirmed in part, and vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff