

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WALKER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 259657

Wayne Circuit Court

LC No. 00-013836-01

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of forty to sixty months' imprisonment for a conviction of aggravated stalking, MCL 750.411i, imposed following a determination that he violated his probation.¹ We affirm the trial court's finding that defendant violated his probation, but remand for resentencing.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support the trial court's finding that he violated his probation. We disagree. The prosecution bears the burden of establishing a probation violation by a preponderance of the evidence. MCR 6.445(E)(1). There must be verified facts in the record from which the trial court can find by a preponderance of the evidence that a probation violation occurred. *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998). Evidence is sufficient to sustain a determination of probation violation if, "viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence." *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984).

Here, there was sufficient evidence from which the trial court could have found by a preponderance of the evidence that defendant violated his probation when he fired a gun at the two complainants. The complainants both testified that on September 11, 2001, they saw

¹ The trial court also sentenced defendant to forty to sixty months' imprisonment for his conviction of intentionally aiming a firearm without malice, MCL 750.233, but vacated this conviction after defendant moved for resentencing.

defendant, who was the ex-husband of one of the complainants, driving next to them in a van on Interstate-75. Defendant stuck his hand out the window and fired a gun at the complainants' car, hitting the windshield. Two police officers testified that the damage to the windshield was consistent with a bullet strike. In his defense, defendant presented two witnesses who testified that defendant was at another location at the time of the shooting.

Defendant argues that the evidence was not sufficient to support a finding that he violated his probation because the testimony of defendant's two alibi witnesses was more credible than the testimony of the complainants. However, this Court will not interfere with the factfinder's role of determining the weight of the evidence or deciding the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Defendant also asks this Court to consider the speed with which the jury found defendant not guilty of the charges in determining whether the evidence was sufficient to support a probation violation.² However, the only definite conclusion to draw from defendant's acquittal is that the prosecution did not prove beyond a reasonable doubt that defendant committed the offenses. Because the standard of proof required to support a criminal conviction is higher than the standard required to revoke probation, defendant's acquittal of the criminal charges did not preclude revocation of his probation based on the same facts. *People v McEntyre*, 127 Mich App 731, 732-733; 339 NW2d 538 (1983). Defendant has offered no authority supporting his argument that the speed with which a defendant is acquitted is relevant to the sufficiency of the evidence supporting a finding that the defendant violated his probation.

II. Sentencing

Next, defendant argues that the trial court erred when it determined that the legislative sentencing guidelines do not apply in this case. We agree. "The resolution of whether the legislative sentencing guidelines apply to sentences imposed after a probation violation is a matter of statutory interpretation, which we review de novo." *People v Hendrick*, 261 Mich App 673, 676; 683 NW2d 218, lv gtd 471 Mich 914 (2004). This Court has held that "the legislative sentencing guidelines apply to all enumerated felonies committed on or after January 1, 1999, regardless of whether the sentence is imposed after a probation violation." *Id.* at 679-680. Because defendant committed the crime after January 1, 1999, and aggravated stalking is an enumerated felony, the trial court erred in failing to apply the legislative guidelines to defendant's sentence.

According to defendant's sentencing information report, the minimum sentence range for defendant's aggravated stalking conviction under the legislative guidelines was zero to eleven months in jail. Where the upper limit of a guidelines range is eighteen months or less, the trial court is required to impose an intermediate sanction unless it states on the record that a

² In connection with the shooting, defendant was charged with assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury deliberated for thirty-two minutes before finding defendant not guilty of these charges.

substantial and compelling reason exists to sentence defendant to prison. MCL 769.34(4)(a). Here, the trial court sentenced defendant to forty to sixty months' imprisonment. Because the trial court did not impose an intermediate sanction,³ it was required to state on the record that a substantial and compelling reason exists to sentence defendant to prison.

Our Supreme Court has defined a substantial and compelling reason for departure from the guidelines as requiring “an ‘objective and verifiable’ reason that ‘“keenly” or “irresistibly” grabs our attention’; is ‘of “considerable worth” in deciding the length of a sentence’; and ‘exists only in exceptional cases.’ ” [*People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003)], quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). MCL 769.34(3) requires a court to “state[] on the record the reasons for departure” and the “ ‘substantial and compelling’ circumstances articulated by the court must justify the particular departure in a case” *Babcock, supra* at 259, quoting [*People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001) (emphasis omitted)]. [*Hendrick, supra* at 682.]

A probation violation may constitute a substantial and compelling reason to depart from the guidelines:

When a probationer violates his probation, it is a violation of public trust and can, in exceptional cases, amount to a substantial and compelling reason to depart from the guidelines range. Therefore, when resentencing a defendant after revoking his probation, the trial court may consider the seriousness and severity of the circumstances surrounding the probation violation in determining whether there is a substantial and compelling reason to depart from the guidelines. [*Id.* at 683.]

MCL 769.34(3)(b) provides that

the court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Here, the trial court articulated the following reasons for the sentence it imposed on defendant:

Okay. Well I'd just like to go over this record here. April 4th, 2000, Aggravated Stalking, March 11, 2001, Aggravated Stalking, 10-23-2001 [sic],

³ “An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.” MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

that's the Assault with Intent to Commit Murder[. R]egardless of what the jury [decided], I heard the case. And what I heard was enough to convince me that eventually you are going to kill her or she is going to kill you, plus we have another case of the same thing that's pending. Enough is enough. Lives are at stake here. Guns are being fired. I cannot take any[]more risks.

Our Supreme Court set forth the standard of review of sentences outside the guidelines:

“ ‘[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.’ ” [*People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), quoting *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).]

An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Babcock, supra* at 269.

We conclude that the trial court's reasons for the sentence imposed are not substantial and compelling reasons to depart from the legislative sentencing guidelines. First, references to the defendant's prior criminal history and recidivism are not sufficient and compelling reasons for departure because they are factors already considered in scoring the prior record variables when determining the guidelines range. *Hendrick, supra* at 684. The court did not indicate that these factors were given inadequate weight. MCL 769.34(3)(b); *Hendrick, supra* at 684. Second, the court's conclusion that defendant presents a future danger is not an objective and verifiable factor. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Finally, the court did not state a substantial and compelling reason for giving defendant a prison sentence rather than an intermediate sanction. Accordingly, we vacate defendant's sentence for his conviction of aggravated stalking and remand this case for resentencing. MCL 769.34(11). If the trial court concludes on resentencing that substantial and compelling reasons exist to deviate

from the statutory sentencing guidelines, the trial court must comply with the requirements of MCL 769.34(3) and *Babcock, supra*.⁴

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Pat M. Donofrio

⁴ Defendant also argues that his sentence was disproportionate to his offense. On remand, the trial court should keep in mind that “in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra* at 264. “[I]n departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason.” *Id.*