

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICE TENNIELLE WARREN,

Defendant-Appellant.

UNPUBLISHED

April 10, 2007

No. 267150

Oakland Circuit Court

LC No. 2004-196845-FH

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her conviction for first-degree child abuse, MCL 750.136b(2), and sentence of 10 to 15 years’ imprisonment. We affirm.

Around 7:00 p.m. on July 31, 2003, defendant immersed her five-month-old son in scalding bath water, resulting in a combination of second- and third-degree burns to 20 percent of his body, including his legs, feet, and genitals. When defendant eventually took the baby to the hospital at 10:00 a.m. the following day, his injuries were so severe that he had to be transferred to the pediatric intensive care unit at another hospital. He spent 31 days in the hospital, during which he underwent two operations.

Defendant first argues that reversible error occurred in the admission of evidence concerning her lack of care for the child and the condition of her home, particularly where the evidence came in after the trial court ruled on two prior occasions that similar evidence was not relevant. Defendant initially objected to some of this evidence, which resulted in an instruction from the trial court for the jury to disregard the testimony and to focus only on the elements of the crime. As to some later similar testimony, defendant failed to object to the admission of the evidence at trial; therefore, the latter issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved claims of nonconstitutional error for plain error affecting substantial rights, meaning that we will reverse only if a plain error occurred, and the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

With respect to the instances defendant objected to, there was clearly no error because the trial court sustained the objection and provided a cautionary instruction to the jury. As to the similar testimony that went unobjected, we conclude there was no plain error that affected

defendant's substantial rights. *People v Knox, supra*. Although the evidence regarding the condition of defendant's home and her treatment of the child after the burning incident was, as the trial court ruled, not relevant, the trial court had already instructed the jury that such evidence was not relevant and should not be considered. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Additionally, in light of the overwhelming independent evidence of defendant's guilt, the admission of any or all of this evidence did not constitute a plain error that affected defendant's substantial rights. *People v Knox, supra*.¹

Defendant also argues that defense counsel was ineffective for failing to object to the admission of the above-referenced evidence. Defendant did not move for a new trial or *Ginther*² hearing in the trial court; therefore, her claim of ineffective assistance of counsel is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* If the appellate record does not support defendant's assertions of error, she has waived the issue. *Id.*

A defendant that claims she has been denied the effective assistance of counsel must establish that the performance of her counsel fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sabin, supra* at 659. A defendant must also overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.*

Here, defendant's claims of ineffective assistance of counsel involve matters of trial strategy, and we will not substitute our judgment for that of counsel regarding such matters. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Knapp*, 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). Defendant has not overcome the strong presumption that counsel's failure to object to the admission of the above-referenced evidence constituted sound trial strategy, and has not demonstrated that, but for counsel's failure to object, the result of the proceeding would have been different. *Matuszak, supra* at 59.

¹ Defendant also takes issue with the admission of a detective's testimony that the home was "quite unkept [sic]" and that "there was [dog] feces on the floor." However, that testimony was unresponsive to the prosecutor's question "what did you do when you went to that home?," and "admitting a voluntary and unresponsive answer by a witness does not constitute error." *People v Williams*, 114 Mich App 186, 199; 318 NW2d 671 (1982). Further, the prosecutor immediately refocused the witness' testimony by reiterating the initial question.

Finally, defendant's argument that the prosecutor's comment during closing argument, that defendant did not comfort the baby at the hospital, is essentially a claim of prosecutorial misconduct which defendant did not present for review. MCR 7.212(C)(5); *People v Hawkins*, 245 Mich App 439, 450 n 19; 628 NW2d 105 (2001). Accordingly, defendant has waived appellate consideration of the issue and we decline to consider it. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next argues that the trial court erred in scoring the sentencing guidelines. However, because defense counsel affirmatively approved the guidelines as scored, this issue is waived on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant's final argument is that the trial court abused its discretion in engaging in an upward sentencing departure. We could not disagree more, as the trial court properly articulated objective and verifiable reasons for the departure, and those reasons more than justified the departure given in this case.

A trial court is required to choose a minimum sentence within a guidelines range, unless there is a substantial and compelling reason for departing from the range. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003); MCL 769.34(3). We review for an abuse of discretion 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. *Id.* at 274. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Id.*

Defendant's sentencing guidelines range was 57 to 95 months' imprisonment. The trial court sentenced defendant to 10 to 15 years' imprisonment, a minimum sentence just over two years longer than the upper end of her guidelines range as scored. In engaging in an upward departure, the trial court found that three factors were given inadequate weight in the scoring of the sentencing guidelines: the young age of the victim; the victim's dependence on the mother because of his young age; and the severity and permanence of the injuries sustained by the victim. The trial court also stated two supporting departure factors it believed were not accounted for in the scoring of the sentencing guidelines: defendant's withholding of necessary medical treatment from the victim, and defendant's selfishness demonstrated toward the victim.

Defendant correctly does not dispute that the factors set out by the trial court exist factually and are objective and verifiable. Defendant argues, however, that the trial court failed to articulate substantial and compelling reasons to depart from the sentencing guidelines range. MCL 769.34(3)(b) provides that a trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005). While the victim's age, reliance on defendant, and the severity and permanence of the injuries sustained by the victim were already taken into account by offense variables 10 and 3, the trial court concluded that those reasons were given inadequate weight.

Under MCL 777.40(1)(b) (OV-10), concerning exploitation of a vulnerable victim, ten points are to be assessed if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." Here, defendant exploited the victim's youth and their domestic relationship in inflicting the victim's injuries. While ten points were properly scored for OV-10, the trial court did not err in concluding that the especially young age of the victim (five months old), as well as the victim's reliance on defendant as his mother and primary caretaker, were not adequately accounted for in scoring the sentencing guidelines.

Under MCL 777.33(1)(c) (OV-3), concerning physical injury to a victim, 25 points are to be assessed if “[l]ife threatening or permanent incapacitating injury occurred to a victim.” Here, the baby spent 31 days in the hospital during which he underwent two operations, and as of the time of sentencing still needed more skin grafting and would likely need continuous care for the foreseeable future. While 25 points were properly scored for OV-3, the trial court did not err in concluding that the severity and permanence of the injury were not adequately accounted for in scoring the sentencing guidelines.

MCL 769.34(3) provides that a trial court may depart from the appropriate sentence range if it has a substantial and compelling reason for that departure and states on the record the reasons for departure. A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court’s attention, and must be of considerable worth in deciding the length of a sentence. *Babcock, supra* at 272. Defendant concedes that the trial court’s stated reasons for departure are objective and verifiable. Here, defendant’s withholding of necessary medical treatment from the victim and defendant’s selfishness demonstrated toward the victim keenly or irresistibly grabbed the court’s attention, and the trial court determined that those reasons were of considerable worth in deciding an appropriate sentence length.

The record reveals that defendant inflicted the burns on the baby around 7:00 p.m. and did not take the baby to the hospital until 10:00 a.m. the following day. The trial court noted that the delay in seeking treatment potentially exacerbated the severity of the baby’s injuries, and that, by her own admission, defendant’s failure to seek treatment for the baby was due to her selfishness and fear of arrest and removal of her children from her custody. The trial court did not abuse its discretion in determining that those reasons were sufficiently substantial and compelling to justify an upward sentencing departure.

The trial court then determined that taking into account the above-referenced substantial and compelling reasons would contribute to a more proportionate criminal sentence than was available within the guidelines range. *Babcock, supra* at 264, 272. Here, defendant severely scalded her five-month-old baby by submerging him in extremely hot water, causing second- and third-degree burns over 20 percent of his body. Defendant then failed to pursue necessary medical attention for her baby until the following day. The trial court believed that a sentence within the guidelines range of 57 to 95 months’ imprisonment was not proportionate to the seriousness of the offense and the offender. The trial court’s upward departure of just over two years is an outcome falling within the permissible principled range of outcomes; therefore, defendant’s sentence did not constitute an abuse of discretion. *Id.* at 274.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O’Connell
/s/ Christopher M. Murray