

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHATARA JONES,

Defendant-Appellant.

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UNPUBLISHED

January 28, 2010

No. 289612

Muskegon Circuit Court

LC No. 08-056057-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals from her sentence by delayed leave granted. Defendant pleaded guilty to poisoning food, drink, medicine, or the public water supply, MCL 750.436. The trial court sentenced her to eight to 15 years in prison. Because the trial court did not err in sentencing defendant, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At the plea proceeding, defendant, then 19 years old, admitted that she was at home with her baby, and upset with the baby's father, when she put a mixture of bleach and milk in the baby's bottle. Defendant continued that she never gave the poisoned milk to the baby, and stated that she had not actually contemplated doing so, but admitted that the baby could have ingested the poison if someone had given it to her. Defendant initially stated that she was not thinking as she prepared the mixture, and simply left the bottle on the stove and went back to her room with the baby. The trial court asked if it had in fact been her plan to feed the bleach to the baby, and defendant replied in affirmative, adding, "I was going to really hurt myself and my baby. I wasn't going to just hurt my baby." Defense counsel added that defendant's mother played some role in bringing the episode to a close.

On appeal, defendant argues that the trial court erroneously scored one of the sentencing variables, erroneously failed to take mitigating information into account for purposes of sentencing, and in the end imposed a sentence amounting to unconstitutionally cruel and unusual punishment.

I. Guidelines Scoring

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a

particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

The trial court scored Offense Variable (OV) 1, which concerns aggravated use of a weapon, at 20 points, which is what MCL 777.31(1)(b) prescribes where “[t]he victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device.”

At sentencing, defense counsel objected on the ground that the victim-baby was not actually exposed to a harmful substance in the ordinary sense of the word. The prosecuting attorney disagreed. The trial court recited its understanding that, after defendant mixed milk and bleach, and was thwarted by her mother, “there was a second mixing with Comet in the bottle,” which the prosecuting attorney confirmed and about which defense counsel remained silent. The trial court retained the score of 20 points on the ground that the bleach or Comet mixtures constituted harmful substances for this purpose, and that “exposed to” in fact “connotes something more than, for example, having the spray can with the substance aimed directly at you,” adding that “the proximity of the child to the substance, i.e., real close to having the child ingest the substance, is close enough to consider that the child was exposed to the harmful . . . substance.” The dictionary definition of “expose” is consistent with the trial court’s interpretation of the word. Random House Webster’s College Dictionary (2nd ed, 1997), p 460 defines “expose” as “to lay open to danger, attack, or harm: *exposing soldiers to gunfire; to expose people to disease.*”

Defendant repeats this argument on appeal, and we hereby adopt the trial court’s reasoning in response. Defendant states that nothing in the record indicates that the victim was ever placed in proximity to the poisonous substances, or that defendant tried to bring the hazardous substances to the baby. In the presentence investigation report, the agent’s description of the offense reports that defendant’s mother poured out the mixture of milk and bleach and confronted defendant, who then took the bottle to the bathroom with her and filled it at least in part with Comet cleanser. The agent continues that defendant then tried to take the baby and leave, prompting the mother to call her two sons to help her stop defendant from doing so, one of whom forcibly took the baby from defendant. Moreover, in pleading guilty, defendant herself admitted at least briefly intending to harm both herself and her baby. This evidence well supports the trial court’s determination that defendant “exposed” her victim to harmful substances. Indeed, the baby might well have died from that exposure had it not been for the forcible intervention of others.

Defendant additionally protests that this scoring decision depended in part on evidence not admitted by defendant or proved to the trier of fact beyond a reasonable doubt. However, factfinding for purposes of sentencing is not wholly derivative of the presentation of proofs at trial, but takes place later, governed by substantially different rules. For purposes of sentencing, the court’s consideration is confined neither to facts determined beyond a reasonable doubt, nor to evidence that would be admissible for determination of guilt or innocence. More particularly, factual findings for sentencing purposes require a mere preponderance of the evidence. See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (1990) (Boyle, J., joined by Riley, C.J., and Griffin, J.). Information relied upon may come from several sources, including some that would not be admissible at trial, e.g., a presentence investigator’s report.

*People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1101(b)(3).

Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 203 (2004), where the United States Supreme Court held that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Id.* at 313.. But our Supreme Court has reiterated that “the Michigan system is unaffected by the holding in *Blakely . . .*” *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant’s recourse to *Blakely* and related authority is thus unavailing. II. Sentencing Mitigation

A criminal defendant has a Due Process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, § 1, and Const 1963, art 1, § 17. See also *Townsend v Burke*, 334 US 736, 740-741; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski*, 385 Mich 244, 249; 188 NW2d 559 (1971); MCL 769.34(10).

In this case, defendant presents ample argument that a sentencing court is obliged to consider mitigating evidence, and invokes Due Process and other constitutional doctrines. However, not only did defense counsel at sentencing not ask the court to take into account any particular mitigating evidence, defendant in his brief on appeal specifies no mitigating factors overlooked by the trial court that might properly have influenced the court’s decision. These failures of preservation and presentation are fatal on appeal. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (“A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.”).

Defendant argues that trial counsel was ineffective for failing to offer or argue mitigating evidence below. But the failure on appeal to show that trial counsel had any such mitigation at hand to work with defeats any claim of ineffective assistance in the matter. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) (“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.”). Accordingly, we need not consider this issue further.

### III. Cruel and Unusual Punishment

The federal and state constitutions bar the imposition of cruel and/or unusual punishments. US Const, Am VIII (cruel and unusual); Const 1963, art 1, § 16 (cruel or unusual). Constitutional questions are reviewed de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). However, defendant concedes that defense counsel did not argue at sentencing that the sentence of eight to 15 years constituted cruel and unusual punishment. Review is therefore limited to ascertaining whether there was plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first notes that the minimum sentence imposed, eight years, exceeded the recommended range under the sentencing guidelines, which came to 19 to 38 months. A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a “substantial and compelling reason . . .” MCL 769.34(3).

See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Babcock*, 469 Mich at 257-258, 272. Defendant argues that the trial court failed to satisfy that duty in this case. The trial court explained its departure very simply:

[I]n the 12 years I've been here, I've tried real hard to refrain from just getting up on my soap box and pontificating with people. . . .

But what happened here is probably about one of the worst things I can think of for a parent to do to a child. I'm satisfied that you should serve a long term with the Michigan Department of Corrections. I'm going [to] almost double the guidelines.

\* \* \*

. . . And very simply the reason for the departure is this. According to the information in the report, you tried to kill your child once by putting bleach in the milk bottle.

\* \* \*

After that, you tried to put Comet or Comet near the bottle filled the second time with pop. And, in fact, somebody else reports to the police that you told her that you were going to smother your baby and kill—

\* \* \*

That's what is in the report. And that's three times, by my count, that you were involved in efforts to kill your own child.

\* \* \*

And that's the reason for the departure.

The agent's description of the offense in the presentence investigation report does indeed indicate that, in addition to preparing poisonous mixtures involving chlorine bleach and Comet cleanser, defendant had told a friend that same day that she intended to "smother her baby" in order to "get rid of her stress."

In reviewing a trial court's decision whether to depart from the recommended range under the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion . . . ." *Babcock*, 469 Mich at 265.

We conclude that the trial court did not clearly err in concluding that defendant three times resolved to murder her baby. Defendant's admissions in tendering her guilty plea well established the scheme involving bleach. The documentation concerning Comet and smothering originated with persons close to and concerned about defendant, and defendant nowhere disputes

that she had resorted to such alternative scheming. We are thus satisfied that those constitute objective and verifiable factors. And given that the victim in this case was a defenseless baby, and that the offender was the person who had a special duty of care of the highest order to that infant, we conclude that these accounts of defendant's repeated attempts to murder her baby "keenly" or "irresistibly" grab the attention as circumstances that exist in only "exceptional cases." See *Babcock*, 469 Mich at 257-258. Accordingly, the trial court did not abuse its discretion in departing from the guidelines for that reason. And, a sentence that is proportionate under the sentencing statutes does not violate the federal or state constitutions' punishment prohibitions. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

Defendant next argues that she has strong family support. Although that does seem to be the case, we reject the premise that an otherwise permissible sentence can be transformed into cruel and unusual punishment for that reason. In other words, a would-be child murderer's sentence of eight to 15 years' imprisonment is not cruel and unusual punishment, whether or not the offender has strong family support.

Defendant next points out that she suffers from mental problems, and argues that this renders her sentence excessive. Defendant did not offer an insanity defense, and thus has never denied responsibility for her actions for that reason. We are not unsympathetic to defendant's special challenges in this regard, even as we declare that she was nonetheless responsible for her actions, and thus is not entitled to lesser criminal punishment because of her mental problems.

Defendant asserts that the trial court should have, apparently *sua sponte*, ordered an assessment of defendant's rehabilitative potential through intensive treatments, but cites no authority for the proposition that the lack of such special investigation itself can render a sentence unconstitutionally excessive.

Defendant argues that the trial court failed to fashion a sentence individualized to her. The court's statements from the bench made abundantly clear that the court was acting in direct response to the facts peculiar to this case.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Patrick M. Meter  
/s/ Christopher M. Murray