

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 24, 2012

v

QUINN ANTHONY-JAMES MCCLAIN,
Defendant-Appellant.

No. 301359
Jackson Circuit Court
LC No. 08-004968

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his plea-based conviction for unarmed robbery, MCL 750.530. The trial court departed from the guidelines and sentenced defendant to 5 to 15 years' imprisonment. We affirm defendant's conviction, but vacate his sentence and remand for resentencing before a different judge.

On the morning of December 15, 2008, defendant noticed an elderly woman walking to her vehicle in a mall parking lot. Defendant approached the woman from behind and grabbed her purse as she was trying to get into the vehicle. Defendant grabbed the purse with such force that it spun the victim around and caused her to lose her balance and fall to the ground. The victim, who was in her eighties, stated that she suffered a broken pelvis as a result of the fall. Defendant fled on foot, but was quickly apprehended by police.

Defendant entered a plea of guilty but mentally ill. Defendant's minimum sentence was calculated under the sentencing guidelines at 19 to 38 months. However, the trial court departed from the guidelines and sentenced defendant to 5 to 15 years' imprisonment. The trial court noted that the victim was in her eighties and that defendant used enough force to break her hip. The trial court stated that it believed the guidelines did not "adequately reflect in this matter the extent of the injuries to the victim." Defendant argues that the court's concerns were already addressed in the scoring of offense variables (OVs) 3 and 10. We agree.

Defendant argues that the trial court erred when it departed from the sentencing guidelines. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). The determination that the factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* The determination that the objective and

verifiable factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, as is the amount of the departure. *Id.* at 264-265.

Under the sentencing guidelines, a court is directed to impose a minimum sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). However, “[a] 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); see also *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Departure should occur only in exceptional cases. *People v Brooks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298299, issued August 16, 2011), slip op at 12. And a court may “not base a departure on an offense characteristic . . . already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3); see also *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007).

OV 3 “is physical injury to a victim.” MCL 777.33 Section 33(1)(d) requires that OV 3 be scored at 10 points if “[b]odily injury requiring medical treatment occurred to a victim.” Here, defendant was scored 10 points under OV 3 because the victim suffered an injury requiring medical treatment. Thus, the guidelines accounted for the victim’s injury. The trial court, however, determined that the guidelines did not adequately take into account the extent of the injury sustained by the victim.

To ascertain whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a court must first determine the effect of the factor on the recommended minimum sentence range. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). Thus, in determining whether OV 3 was given adequate weight, we must look at the effect that the factor had on defendant’s minimum sentence range. Unarmed robbery is a class C offense. MCL 777.16y. Defendant’s PRV score was 5, which placed him in PRV level B. MCL 77.64. If the victim had not suffered a physical injury, defendant’s total OV score would have been 25, which would have placed him at OV level III and set his minimum sentence at 12 to 14 months. MCL 777.33(1)(f); MCL 77.64. If the victim had suffered a physical injury not requiring medical treatment, then defendant’s total OV score would have been 30,¹ and his minimum sentence range would remain at 12- to 14 months. MCL 777.33(1)(e); MCL 77.64. Because the victim suffered physical injury requiring medical treatment, OV 3 was scored at 10 points; increasing defendant’s total OV score to 35. MCL 777.33(1)(d). This moved defendant to OV level IV and increased his minimum sentence to 19 to 38 months. MCL 77.64. Thus, scoring OV 3 at 10 points accounted for the victim’s injury and increased defendant’s minimum guidelines range by at least 7 months and as many as 14 months.

This may seem insignificant in light of fact that the victim broke her pelvis. However, there was almost no evidence submitted regarding the nature and extent of the victim’s injury.

¹ Five points are scored if a “[b]odily injury not requiring medical treatment occurred to a victim.” MCL 777.33(1)(d).

The only evidence submitted regarding the victim's injury was the testimony of her son at sentencing. The victim's son testified that the victim "had bruises on her head, her pelvis was broke" and she "spent many hours in recuperation, therapy." There was no evidence relating to the type of treatment, the extent of impairment, the length of recovery, or any residual impairment. Rather, the trial court and the prosecutor merely opined that this is the type of injury that elderly women may not recover from. Even if true, that does not necessarily mean this particular victim did not recover.

Further, the departure in this case was not proportionate to the seriousness of the defendant's conduct and his criminal history. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Id.*, quoting *Babcock*, 496 Mich at 262. "To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense and the offender than a sentence within the guidelines range would have been." *Id.* at 318. In *Smith*, 482 Mich at 318 our Supreme Court explained as follows:

It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence. [Ordinal omitted.]

Here, the trial court departed from the guidelines and set defendant's minimum sentence at 60 months. However, to obtain a minimum sentence of 60 months based solely on the guidelines, defendant would have had to cause a much more severe injury. MCL 777.33(1)(c) provides that OV 3 must be scored at 25 points if "[l]ife threatening or permanent incapacitating injury occurred to a victim." If defendant had caused "[l]ife threatening or permanent incapacitating injury occurred to a victim" his total OV score would have been 50. An OV score of 50 and PRV score of 5 would place defendant in OV level V and set his guidelines range at 29 to 57 months. MCL 777.64. Thus, defendant's minimum sentence of 60 months was higher than that which is deemed appropriate under the guidelines had defendant caused a life threatening or permanent incapacitating injury. In fact, for defendant to receive a minimum sentence of 60 months under the guidelines, he would need an OV score of 75 points or more. To obtain an OV score of 75 points or more based solely on the victim's injury, OV 3 would have to be scored at 50 points or higher. 50 points is appropriate under OV 3 if "[a] victim was killed." MCL 777.33(1)(b). In light of these facts, it cannot be said that defendant's minimum sentence of 60 months was "more appropriate to the offense and the offender than a sentence within the guidelines range would have been." *Smith*, 482 Mich at 318.

Next, defendant argues that the trial court erred when scored OV 10 (exploitation of a vulnerable victim) at 15 points. A trial court's scoring under the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

OV 10 is exploitation of a vulnerable victim. MCL 777.40(1). Section 40(1)(a) provides that OV 10 must be scored at 15 points if “[p]redatory conduct was involved.” “Predatory conduct” is defined under the guidelines as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). In *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008), our Supreme Court explained that “[p]redatory conduct” under the statute is behavior that precedes the offense, directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived.” To help aid lower courts in scoring OV 10, *Cannon*, 481 Mich at 161-162 set forth the following analytical questions:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender’s primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.

At sentencing, the prosecutor argued that defendant “had an opportunity to stalk and approach [the victim] prior to mugging her.” The prosecutor stated that “there is an argument to be made for predatory conduct, because he had to see that this person that he mugged was elderly and he had to see that before he actually mugged her.” This argument is based on pure speculation. There was no evidence presented which showed that defendant actually engaged in conduct before the offense. Rather, the only evidence presented below was that defendant approached the victim from behind and grabbed her purse. Therefore, the OV 10 should have not been scored at 15 points. While we conclude that scoring 15 points for OV 10 was improper based on the lack of factual support on the record, we hold that scoring 10 points under OV 10 would be appropriate. MCL 777.40(1)(b) provides that OV 10 must be scored at 10 points if “[t]he offender exploited a victim’s . . . agedness.” The trial court record clearly indicates that there is a factual basis for the conclusion that defendant exploited the victim’s agedness.

Finally, defendant argues that if this Court remands for resentencing, the case must be reassigned to a different judge. We agree.

In deciding whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendant complains of several comments made by the trial judge; arguing that the trial judge expressed disdain and personal animus against defendant during sentencing. Indeed, the trial judge indicated that it would be his intent to sentence defendant at the top end of guidelines if this case were to be remanded for resentencing. This comment indicates that the trial judge has already made up his mind about defendant's sentence, even before seeing the results of his appeal. Therefore, it is likely that the judge would have difficulty putting aside his previously expressed beliefs and, in order to preserve the appearance of justice, resentencing before a different judge is warranted.

In summary, the trial court abused its discretion when it departed from the sentencing guidelines and imposed a minimum sentence of 60 months. Further, the trial court erred when it scored OV 10 at 15 points.

Defendant's conviction is affirmed, his sentence is vacated, and the matter is remanded to the trial court for resentencing before a different judge. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro