

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATHEW ALAN BASTIEN,

Defendant-Appellant.

UNPUBLISHED

July 31, 2012

No. 304817

Hillsdale Circuit Court

LC No. 10-342353-FC

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for operating while intoxicated (OWI) causing death, MCL 257.625(4), OWI causing serious injury, MCL 257.625(5), OWI third offense, MCL 257.625(9)(c), failure to stop at the scene of an accident when at fault, resulting in death, MCL 257.617(3), operating on a suspended license causing death, MCL 257.904(4), and operating on a suspended license causing serious injury, MCL 257.904(5). We affirm in part, vacate defendant's conviction for OWI third offense, and remand for amendment of the judgment of sentence.

On August 18, 2010, Jennifer Gollnick and her nine-year-old daughter, Amy Gollnick, went for a bicycle ride on a road near their home in Hillsdale County (Tr I, 97). Shortly after they began their ride, a minivan, driven by a man later identified as defendant, struck them from behind (Tr II, 280). Jennifer and Amy were riding on the gravel shoulder on the side of the road at the time of the crash. (Tr I, 99). Pamela Valentine, who lived across the street from where the accident occurred, testified that she heard a loud "thud" as the minivan hit Jennifer and Amy. She also testified that she did not see brake lights on the minivan after the crash, and that the minivan did not slow down as it drove away. (Tr I, 122.)

Pamela, who, along with her husband, Jeffery Valentine, was the first person to arrive on scene of the crash, observed that Jennifer was alive and conscious after the accident. However, she noticed that Amy was unresponsive. (Tr I, 124-125.) Doctor Diane Scala-Barnett, a forensic pathologist who performed Amy's autopsy, testified that Amy died instantly after the crash. She opined that the cause of Amy's death was an "internal decapitation," where Amy's spinal column separated from the base of her skull. (Tr II, 303-304.)

Jennifer survived the crash, but suffered several injuries. She suffered a broken shoulder, three broken toes, and a severely sprained foot. (Tr I, 104.) She also received stitches on her

face, head, arm, and ear. At trial, Jennifer testified that she had a “chunk” of skin missing from her right hip, and that she had a scar on her right hip and on one of her feet. Jennifer was hospitalized for five days following the crash and was unable to walk when she was released. (Tr I, 104-105, 107.) She testified that she was confined to a wheelchair immediately after the accident and that she had to use crutches for several weeks after she got out of the wheelchair. She further testified that, at the time of trial, she was unable to run and she experienced pain while climbing stairs. (Tr I, 106-108.) She also walked with a limp (Tr I, 108).

Sergeant Scott Hephner of the Hillsdale Police Department was on patrol on August 18, 2010, and he observed defendant driving a minivan in the area where the crash occurred. Hephner saw that the front end of the minivan was damaged, the windshield was smashed, and that it was dragging a bicycle underneath the front end. (Tr I, 168-169.) Hephner recognized that defendant, who had a suspended license,¹ was the driver of the minivan. Hephner arrested defendant and placed him in the back of his car while he took photographs of the minivan. (Tr I, 170.) Hephner testified that he could smell intoxicants on defendant as he arrested defendant (Tr I, 175).

After taking photographs of defendant’s minivan, Hephner returned to his car and discovered that defendant had either passed out or fallen asleep. Hephner took defendant to the hospital, where, pursuant to a search warrant, defendant’s blood was drawn. (Tr I, 183, 195.) Testing at the Michigan State Police Crime Laboratory revealed that defendant’s blood alcohol content was .20 grams per 100 milliliters of blood at the time it was drawn (Tr I, 219). Deputy John Leva of the Hillsdale County Sheriff’s Department assisted Hephner in taking defendant to the hospital. Leva observed that defendant appeared to be intoxicated. (Tr I, 194.)

Deputy Brian O’Heran of the Hillsdale County Sheriff’s Department investigated the scene of the accident and testified that after the crash, defendant drove approximately 5.4 miles while dragging Amy’s bicycle underneath his minivan (Tr I, 262). Michigan State Police Sergeant Allan Avery testified as an expert in accident reconstruction and noted that defendant was traveling approximately 45 to 60 miles per hour at the time of the crash. He also testified that tread marks from defendant’s tires showed that defendant was traveling on the gravel shoulder of the road during the crash. (Tr II, 276, 280-281, 288.)

The jury convicted defendant of OWI causing death, OWI causing serious injury, OWI third offense, failure to stop at the scene of an accident when at fault, resulting in death, operating on a suspended license causing death, and operating on a suspended license causing serious injury. On May 31, 2011, the trial court departed upward from the sentencing guidelines and sentenced defendant as an habitual offender, third offense, to 17 to 30 years’ imprisonment for the OWI causing death conviction, 17 to 30 years’ imprisonment for the failure to stop at the scene of an accident when at fault, resulting in death conviction, 17 to 30 years’ imprisonment for the operating on a suspended license causing death conviction, 72 to 120 months’

¹ The prosecution introduced defendant’s driving record to establish that defendant’s license was suspended; moreover, defendant stipulated to the fact that his license was suspended at the time of the accident (Tr I, 171).

imprisonment for the OWI causing serious injury conviction, 72 to 120 months' imprisonment for the OWI third offense conviction, and 72 to 120 months' imprisonment for the driving on a suspended license causing serious injury conviction. (Judgment of Sentence, May 31, 2011, lower court file.) Defendant now appeals as of right.

Defendant first argues that his convictions for OWI causing death and OWI third offense violated his right to be free from double jeopardy. Defendant did not raise this issue before the trial court; therefore, it is unpreserved. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). "We review an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *Id.*

Both the United States and Michigan Constitutions protect a defendant from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The prohibitions against double jeopardy protect individuals against successive punishments for the same offense after a conviction or acquittal, and from multiple punishments for the same offense. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). Defendant argues that his convictions for OWI causing death and OWI third offense constitute multiple punishments for the same offense. The prosecution concedes error, and we agree. "To determine whether a defendant has been subjected to multiple punishments for the 'same offense,' we must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed." *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). Here, MCL 257.625 does not contain a clear expression of the Legislature's intent to exact multiple punishments for the same offense; thus, we compare the elements of the offenses using the *Blockburger*² test. *Id.* at 5. "Under the *Blockburger* test, if each offense 'requires proof of a fact which the other does not' then there is no violation of double jeopardy." *Id.* at 5, quoting *Blockburger*, 284 US at 311 (internal citation omitted).

The elements of OWI causing death are: (1) the defendant operated a motor vehicle; (2) the defendant was intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death. MCL 257.625(4). Meanwhile, the elements of OWI third offense are: (1) the defendant operated a motor vehicle; and (2) the defendant was intoxicated. MCL 257.625(9)(c). As defendant correctly notes, the "third offense" designation in OWI third offense is not an element of the crime; instead, the "third offense" designation is merely a sentencing enhancement. *People v Reichenbach*, 459 Mich 109, 127 n 19; 587 NW2d 1 (1998); *People v Weatherholt*, 214 Mich App 507, 511-512; 543 NW2d 34 (1995). Therefore, defendant's convictions for OWI causing death and OWI third offense violate double jeopardy because each offense does not require proof of a fact that the other does not. *Garland*, 286 Mich App at 5. The appropriate remedy in this situation is to vacate defendant's conviction for the lesser offense. *People v Herron*, 464 Mich 593, 609-610; 628 NW2d 528 (2001). Accordingly, we remand with instructions to the trial court to vacate defendant's OWI third offense conviction.

² *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

Next, defendant argues that the evidence produced at trial was insufficient to support his convictions for OWI causing serious injury and driving on a suspended license causing serious injury. These convictions pertain to the injuries suffered by Jennifer. “We review de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196.

As to defendant’s conviction for OWI causing serious injury, the prosecution was required to prove three elements beyond a reasonable doubt: (1) defendant operated a motor vehicle; (2) defendant was intoxicated; and (3) defendant caused Jennifer to suffer a serious impairment of a body function. MCL 257.625(5). Defendant does not contest the first two elements. Instead, he argues that the prosecution failed to present sufficient evidence that Jennifer suffered a serious impairment of a body function.

MCL 257.58c provides a non-exhaustive list of injuries that qualify as a serious impairment of a body function. Pursuant to MCL 257.58c,

[s]erious impairment of a body function” includes, but is not limited to, 1 or more of the following:

- (a) Loss of a limb or loss of use of a limb.
- (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
- (c) Loss of an eye or ear or loss of use of an eye or ear.
- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.
- (f) A comatose state that lasts for more than 3 days.
- (g) Measurable brain or mental impairment.
- (h) A skull fracture or other serious bone fracture.
- (i) Subdural hemorrhage or subdural hematoma.
- (j) Loss of an organ.

We find that the evidence produced at trial was sufficient for a rational jury to find, beyond a reasonable doubt, that Jennifer suffered a serious impairment of a body function. The prosecution presented evidence that Jennifer was temporarily confined to a wheelchair and that she spent several weeks on crutches. The fact that a person requires crutches for a number of weeks demonstrates that the person lost the use of a limb under MCL 257.58c(a). *People v*

Thomas, 263 Mich App 70, 77; 687 NW2d 598 (2004) (explaining that an injury need not be permanent and that the victim's use of crutches demonstrated that he lost the use of a limb under MCL 257.58c). Therefore, we find that the evidence was sufficient for a rational jury to find that Jennifer suffered a serious impairment of a body function that would support defendant's conviction for OWI causing serious injury.

Consequently, because we find that Jennifer suffered a serious impairment of a body function, we find that the evidence produced at trial was sufficient to support defendant's conviction for driving on a suspended license causing serious injury. The elements for driving on a suspended license causing serious injury are: (1) the defendant operates a motor vehicle; (2) the defendant does so with a suspended license; and (3) the defendant causes the victim to suffer a serious impairment of a body function. MCL 257.904(5). Defendant does not challenge the first two elements of the offense. As discussed previously, the evidence produced at trial was sufficient to permit a rational jury to find that Jennifer suffered a serious impairment of a body function because she was temporarily confined to a wheelchair and she required the use of crutches to walk after her accident. See *Thomas*, 263 Mich App at 77. Thus, defendant's argument is without merit.

Defendant disagrees, and, citing this Court's decision in *People v Vidergar*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 257867), he argues that Jennifer's injuries were not severe enough to constitute a serious impairment of a body function. In *Vidergar*, this Court found that the prosecution presented sufficient evidence where the victim suffered broken ribs, a spinal column injury, and a pulmonary contusion. *Id.* at 2. Defendant contends that Jennifer's injuries were minor in comparison to the injuries suffered by the victim in *Vidergar*, and therefore, were not sufficient to support the jury's verdict. However, *Vidergar* does not support defendant's position because the case does not change this Court's decision in *Thomas*, 263 Mich App at 77, wherein we held that a victim who requires the use of crutches loses the use of a limb under MCL 257.58c(a). Thus, *Vidergar* does not provide support for defendant's position. Moreover, even if it did support defendant's position, the case is not binding precedent because it is an unpublished decision. *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004); MCR 7.215(C)(1). Accordingly, we reject defendant's argument.

Defendant also contends that the prosecution failed to present sufficient evidence of Jennifer's injuries because it did not establish the injuries through an expert's testimony. However, defendant cites no authority in support of his position that an expert must verify the extent of the victim's injuries. Moreover, the jury found the victim's testimony regarding the extent of her injuries credible; we will not disturb the jury's finding. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Lastly, defendant argues that the trial court erred by departing upward from the sentencing guidelines. Defendant was sentenced to 17 to 30 years' imprisonment for his convictions for OWI causing death, failure to stop at the scene of an accident when at fault, resulting in death, and operating on a suspended license causing death. Based on defendant's third habitual offender status, his prior record variable (PRV) score of 50, and his offense variable (OV) score of 105, the guidelines range for these Class C offenses was 58 to 171 months' imprisonment. See MCL 777.64. Additionally, defendant was sentenced to 72 to 120

months' imprisonment for his OWI causing serious injury and operating on a suspended license causing serious injury convictions. Based on defendant's third habitual offender status, his PRV score of 50, and his OV score of 75, the guidelines range for these Class E offenses was 22-57 months' imprisonment. See MCL 777.66. The trial court noted three reasons for its departure from the guidelines range: defendant's history of probation violations; defendant's history of alcohol abuse and alcohol-related crimes; and the psychological injuries sustained by Jennifer and her family. The trial court found that the guidelines did not adequately account for these factors and explained its decision as follows:

Your guidelines on Counts 1, 4, and 5 – that's the operating while intoxicating [sic] causing death, failure to stop at a personal injury accident resulting in death when at fault, and driving while license suspended causing death – is 58 to 71 months. Essentially, 14 and a quarter years maximum. The guidelines for 2, 3 and 6 – that's the operating while intoxicating [sic] causing serious injury, the operating while intoxicated third or subsequent offense, and driving while license suspended causing serious injury – is 22 to 57 months.

* * *

As I said, this crime constitutes your fourth through ninth felony convictions. However, the guidelines, in my opinion, fail to consider or give adequate weight to a number of factors.

First, the guidelines do not adequately consider your prior probationary status. While the guidelines do consider the current probation violation, it [sic] does not consider that you have been placed on probation on three prior occasions and violated probation each time. You have never successfully completed probation.

Second, the guidelines fail to consider your extensive abuse of alcohol. You have prior – five prior convictions for alcohol related crimes. You have been convicted of resisting, obstructing police in 2007, when you assaulted police at the Hillsdale Community Health Center where you were being evaluated for an overdose on alcohol and prescription medication, and you violated that probation for consuming alcohol. On August 5, 2010, you violated a personal protection order in this court by going to an ex-father-in-law's home and confronting a resident there. You were found to have a blood alcohol level of .22. I distinctly remember that because you told me, sitting right there, that you were going to get out and you were going to dry up, you were going to go get help. And what did you do, August 18th you go out and you kill a little girl.

You have admitted to consuming alcohol since 13 years of age, working up to three to four times weekly. You have completed two outpatient programs, 2003 and 2010, and one residential treatment program in 2006. Yet you continue to abuse alcohol regularly, having a blood alcohol level at the time of this accident at .20, over two times the legal limit.

Third, the guidelines fail to adequately consider the extent of the psychological injury sustained by the victim's family. Jennifer Gollnick was actually present when her daughter, Amy Gollnick, was killed. The two sisters were inseparable, according to the parents. The crimes have had an [sic] traumatic effect on not just the mother but the surviving father and sister as well. There has been a psychological injury to the remaining daughter with her mother's extensive physical injury.

Mr. Bastien, you sir, are in need of long-term discipline, reformation and deterrence. You require extensive treatment. Society merits protection that you will never take a life again by drinking and driving. The Court finds these reasons to be substantial and compelling to warrant departure. [S Tr, 15-18.]

Defendant did not object to his sentence at trial. However, there is no preservation requirement for challenging a sentence that is in excess of the guidelines range. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

“Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record.” *Id.* at 299. The substantial and compelling reason relied on by the trial court “must be objective and verifiable.” *Id.* See also *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003) (“if a reason is not objective and verifiable, it cannot constitute a substantial and compelling reason.”). Moreover, the departure may not be based ““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.”” *Smith*, 482 Mich at 300, quoting MCL 769.34(3)(b). Additionally, the trial court must consider whether the departure creates a more proportionate sentence. *Babcock*, 469 Mich at 264 (“if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines.”).

The existence of a particular factor relied upon by the trial court is a factual determination that is reviewed for clear error. *Smith*, 482 Mich at 300. Meanwhile, “[t]he conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure.” *Id.* (footnotes omitted). The trial court abuses its discretion if the minimum sentence that it imposes after the departure “falls outside the range of principled outcomes.” *Id.* (footnote omitted).

Defendant challenges each of the reasons upon which the trial court relied in departing from the guidelines. Initially, he avers that the trial court abused its discretion by finding that his history of probation violations was a substantial and compelling reason to depart from the guidelines. We disagree, because a defendant's repeated failure to comply with the terms of his probation can be an objective and verifiable factor that represents a substantial and compelling reason to depart from the sentencing guidelines. *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005); *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005).

Indeed, “any probation violation represents an affront to the court and an indication of an offender’s callous attitude toward correction and toward the trust the court has granted the probationer.” *Schaafsma*, 267 Mich App at 185-186. In this case, defendant was placed on probation three times and he failed to complete his probation each time. Consequently, we find that the trial court did not abuse its discretion when it found that defendant’s history of failing to comply with the terms of his probation was a substantial and compelling reason for departing from the sentencing guidelines.

Moreover, we find that the trial court did not err by finding that the guidelines did not adequately account for defendant’s history of probation violations. Defendant’s current probation violation was accounted for in the Sentencing Information Report (SIR) when the trial court scored five points under PRV 6, MCL 777.56. However, while MCL 777.56 permits the trial court to score five points under PRV 6 if the defendant is on probation at the time of the sentencing offense, the statute does not provide the trial court with the opportunity to score additional points for repeated probationary failures. Furthermore, although defendant’s prior offenses were factored into his PRV score, his history of probationary failures were not factored into the PRV score. Instead, only his current probation violation was factored into the PRV score. Accordingly, the trial court did not err in finding that defendant’s history of probation violations was not given adequate weight by the guidelines. Thus, the trial court did not abuse its discretion in departing from the guidelines based on defendant’s history of probation violations. See MCL 769.34(3)(b) (the trial court may not base a departure on an offense characteristic already taken into account unless the court finds that the characteristic has been given inadequate weight).

Next, defendant argues that the trial court erred in relying on his history of alcohol abuse in departing from the guidelines range. Defendant does not contest whether his alcohol abuse was a substantial and compelling reason to depart from the guidelines range; instead, he argues that his alcohol abuse was adequately addressed within the guidelines. We do not agree with defendant. We note that defendant was scored 20 points under OV 18, MCL 777.48(1)(a), because his blood alcohol content at the time of the offense was .20 grams per 100 milliliters of blood. However, while OV 18 accounts for defendant’s alcohol use during the sentencing offense, it does not take into account defendant’s history of alcohol abuse. Thus, the trial court did not err in finding that defendant’s alcohol abuse was not given adequate weight in the guidelines. Moreover, we also note that although defendant’s previous convictions for alcohol-related offenses were taken into account in the calculation of his PRV score, the PRV score did not account for the underlying cause of defendant’s alcohol-related offenses, i.e., defendant’s repeated alcohol abuse. Consequently, the trial court did not abuse its discretion in finding that defendant’s alcohol abuse was not given adequate weight under the guidelines and that it warranted an upward departure. See *People v Horn*, 279 Mich App 31, 45-46; 755 NW2d 212 (2008) (the trial court did not abuse its discretion when it justified an upward departure on a defendant’s repeated struggles with a particular offense and his uncontrollable urges to commit certain offenses).

Finally, defendant alleges that the trial court abused its discretion by relying on the psychological injuries suffered by Jennifer and her family as a reason for departing from the sentencing guidelines. At the sentencing hearing, Jennifer testified that Andrea Gollnick, her oldest daughter, suffered emotional injuries after the crash because she missed Amy, who was

her best friend. Jennifer also testified that Andrea was afraid to hug or come near her because of her injuries. (S Tr, 11.) The trial court noted Jennifer's testimony at the sentencing hearing and concluded that the extent of the psychological injuries suffered by Jennifer and her family were not given appropriate weight under the guidelines, and that these injuries justified an upward departure from the sentencing guidelines.

Defendant first contends that the trial court erred by finding that the psychological injuries suffered by Jennifer and her family were objective and verifiable. We disagree. "The phrase 'objective and verifiable' has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Here, Jennifer testified concerning the extent of the psychological injuries that she and her family suffered. Accordingly, the record contained facts that were "external to the mind[] of the judge," and the psychological injuries suffered by Jennifer and her family were objective and verifiable. See *id.*

Next, defendant contends that the trial court erred by concluding that the guidelines did not adequately account for the psychological injuries suffered by Jennifer and her family. For the offenses pertaining to Amy's death – OWI causing death, operating on a suspended license causing death, and failure to stop at the scene of an accident when at fault, resulting in death – the trial court scored 15 points under OV 5, MCL 777.35(1)(a), for psychological injury suffered by victim's family. In departing from the guidelines, the trial court noted that the guidelines did not adequately account for the psychological injuries suffered by Jennifer and her family. We find that the trial court did not err in doing so. Although the offense variables account for psychological injury to the victim's family, they did not take into account the change in family dynamics that resulted when Andrea lost Amy, her younger sister, nor did they take into account the fact that Andrea was afraid to hug or go near Jennifer because of Jennifer's physical injuries. See *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001) (the offense variables and guidelines do not adequately consider the ways in which an offense affects familial relationships). Moreover, although the offense variables account for psychological injuries suffered by victims and their families, they do not always account for the unique psychological injuries suffered by individual victims. See *Smith*, 482 Mich at 302 (finding that the trial court did not err by citing the unique circumstances of the victim and her unique psychological injuries as reasons for departing from the guidelines). Thus, in this case, the trial court did not err in finding that Andrea's fear of hugging or going near Jennifer was not given appropriate weight in the offense variables. See *id.* Consequently, the trial court did not err when it justified its departure on the psychological injuries suffered by Jennifer and her family.

We also note that the trial court also scored 10 points under OV 4, MCL 777.34, for defendant's convictions pertaining to Jennifer's injuries – OWI causing serious injury and operating on a suspended license causing serious injury – and departed upward from the guidelines when it imposed the sentences pertaining to those convictions. We decline to find that the trial court abused its discretion when it determined that OV 4 did not adequately account for the psychological injury that Jennifer suffered when she was present at and injured in the same accident that killed Amy. The fact that Jennifer was present when her daughter was killed was a unique circumstance not adequately accounted for by the guidelines and the trial court did not

abuse its discretion in justifying its upward departure on this circumstance. See MCL 769.34(3)(b).

In light of the foregoing, we find that the trial court did not abuse its discretion when it found that there were objective and verifiable reasons for departing from the guidelines, that these reasons were substantial and compelling, and that these reasons were not adequately accounted for in the guidelines. Moreover, we find that the sentences imposed by the trial court are proportionate to both the offenses and the offender.

Affirmed in part, vacated in part and remanded for modification of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Donald S. Owens