

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 18, 2013

v

KEITH LOREN SIVERTSEN,  
  
Defendant-Appellant.

No. 309565  
Kent Circuit Court  
LC No. 11-009766-FH

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Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of receiving and concealing stolen property valued at \$1,000 or more but less than \$20,000, MCL 750.535(3)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 7 to 15 years. We affirm.

**I. FACTUAL BACKGROUND**

Grand Rapids Police Detective William Recor received a tip regarding suspicious roofing shingles that led him to defendant's residence in Grand Rapids. Detective Recor and two other officers arrived at defendant's residence and observed a pallet of roofing shingles next to the house, which were wrapped in "Mr. Roof" branded plastic, and were completely covered by a tarp. Defendant had fled into the residence and his nephew ran to the back of the garage. Eventually, the officers made contact with defendant, who informed them that his nephew brought the shingles to the residence a couple of days ago and defendant did not know from where they originated. Defendant's nephew also spoke with the officers and indicated that he brought the shingles to the house, but claimed that he and his brother got them from an unnamed individual in Newaygo County.

The next day, the general manager of Mr. Roof in Grand Rapids received an anonymous telephone call reporting that Mr. Roof shingles were at defendant's address. The general manager subsequently discovered that the fence surrounding his inventory had been cut, and he confirmed that he was missing shingles. He testified that Mr. Roof uses proprietary, patented shingles that cannot be purchased on the open market. He estimated the total value of the stolen shingles (128 bundles) was between \$3,600 and \$4,000.

At trial, defendant claimed that the shingles had simply been deposited at his home by his nephews without his knowledge. He claimed that his nephew denied that they were stolen. The

jury found defendant guilty of receiving and concealing stolen property valued at \$1,000 or more but less than \$20,000, MCL 750.535(3)(a). Defendant was sentenced to 7 to 15 years. Defendant now appeals.

## II. SENTENCING

### A. Standard of Review

On appeal, defendant argues that the trial court erred in imposing a sentence that was a departure from the sentencing guidelines. We review the reasons a trial court relies on to depart for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). “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.” *Smith*, 482 Mich at 300. An abuse of discretion occurs when the trial court’s decisions falls outside the range of reasonable and principled outcomes. *Id.* Lastly, whether a reason is objective and verifiable is a matter of law, which we review de novo. *Id.*

### B. Departure

Generally, a trial court is required to impose a minimum sentence that falls within the appropriate sentencing guidelines range. *People v Lucey*, 287 Mich App 267, 269-270; 787 NW2d 133 (2010). However, a trial court may impose a sentence outside of that range if it states on the record substantial and compelling reasons for departing from the sentencing guidelines. *Id.* at 270. These reasons also must be objective and verifiable. *Smith*, 482 Mich at 299. “[T]he trial court may 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 . . . that the characteristic has been given inadequate or disproportionate weight.” *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012) (quotation marks and citation omitted).

In the instant case, the trial court provided numerous reasons for departing from the sentencing guidelines. The trial court observed that defendant had an “absolutely terrible” criminal record, with 10 low severity felonies, 18 (arguably 19) misdemeanors, he had served 11 different jail sentences, 10 different prison sentences, and had been on probation three times, with one escape. The trial court identified numerous reasons that were unaccounted for in the sentencing guidelines, including: the guidelines only account for four of defendant’s low severity felony convictions in PRV 2; the guidelines only account for 7 of defendant’s misdemeanors; the PRV grid level stops at 75 points and defendant’s PRV score is 125; and defendant’s recidivism in committing the same type of theft crimes indicates that he will continue to commit these felonies when released from prison. This Court has recognized that “a defendant’s criminal history that has not been given adequate weight by the guidelines may provide a substantial and compelling reason to depart from the guidelines recommended sentence.” *Lucey*, 287 Mich App at 273-274. Moreover, while defendant argues that the reasons for departure were already taken into account in the sentencing guidelines, a trial court may rely on such characteristics when they have “been given inadequate or disproportionate weight.” *Anderson*, 298 Mich App at 825.

Defendant also challenges the extent of the departure. “The trial court must justify the particular departure it made by explaining why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *People v Portellos*, \_\_Mich App\_\_; \_\_NW2d\_\_ (Docket No. 301190, 301333, issued November 13, 2012) (slip op at 13) (quotation marks and citation omitted). One way in which a trial court may do this is to compare “the facts of the defendant’s case against the sentencing grid to explain why its sentence is more proportionate.” *Id.* “[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Smith*, 482 Mich at 305 (quotation marks and citation omitted). As the Michigan Supreme Court has recognized, “[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.* at 304.

Here, the connection between the reasons given for departure and the extent of the departure is clear. As the Court has explained, “[t]he requirement that the trial court justify the extent of the departure is not overly burdensome. The court need only reasonably comply with the statutory articulation requirement in order to facilitate appellate review.” *Smith*, 482 Mich at 315. In the instant case, the trial court specifically stated that the sentence it imposed was proportionate not only to the crime, but more importantly, to the offender. The court recognized that defendant was 52 years old and that he displayed an unrelenting dedication to breaking the law, which made it clear that defendant will continue to commit theft crimes when released. The court further explained that defendant’s PRV exceeded the grid by 50 points, so that the maximum sentencing range in the sentencing grid did not contemplate a defendant with such an extensive criminal history. Defendant’s recidivism and severe PRV score renders the connection between “the reasons given for departure and the extent of the departure” clear. *Smith*, 482 Mich at 304. Given the totality of the facts and circumstances, we cannot say that the trial court chose an outcome falling outside the principled range of outcomes. *Smith*, 482 Mich at 300.

### C. Factual Basis

Defendant also contends that his sentence cannot stand because it was based on facts that were not found by a jury beyond a reasonable doubt. To support his argument, defendant cites *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), where the United States Supreme Court held that factual findings have to be proved to a jury beyond a reasonable doubt in order to be the basis for sentencing. However, even defendant acknowledges that his claims are precluded by the Michigan Supreme Court’s decision in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Our Supreme Court has repeatedly held that *Blakely* does not implicate Michigan’s indeterminate sentencing system because the maximum sentence is set by statute, not by the trial court. See *People v McCuller*, 479 Mich 672, 682-683; 739 NW2d 563 (2007); *Drohan*, 475 Mich at 145-146, 163-164; *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Thus, defendant’s claim is meritless.<sup>1</sup>

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<sup>1</sup> We also note that defendant has failed to identify what facts he believed the trial court relied on that were “beyond the elements of the crime as found by the jury[,]” especially since even under

### III. CONCLUSION

Defendant has failed to establish error requiring reversal based on the trial court's departure from the sentencing guidelines. Because defendant also failed to establish error requiring reversal regarding the factual basis for his sentencing being proven to a jury, we decline to hold this appeal in abeyance. We affirm.

/s/ Jane M. Beckering  
/s/ Patrick M. Meter  
/s/ Michael J. Riordan

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*Apprendi*, the United States Supreme Court carved out an exception for prior convictions. *Drohan*, 475 Mich at 164.