

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HOWARD MCDANIEL,

Defendant-Appellant.

UNPUBLISHED

March 29, 2005

No. 252040

Oakland Circuit Court

LC No. 2003-190643-FH

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

A jury convicted defendant of attempted first-degree home invasion. MCL 750.110a(2) and MCL 750.92. He was sentenced as a fourth habitual offender, MCL 769.12, to twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction and remand for resentencing in accordance with this opinion.

I. Sufficiency of the Evidence

Defendant first argues that insufficient evidence supports his conviction. We disagree.

A. Standard of Review

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether sufficient evidence was presented at trial to sustain a criminal conviction, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723-724; 597 NW2d 73 (1999).

B. Analysis

The elements of first-degree home invasion are contained in MCL 750.110a(2), which provides in relevant part that,

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a

person who breaks and enters a dwelling or enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

Defendant may be convicted of attempted first-degree home invasion if he took any act with the intent toward committing the offense. MCL 750.92; *People v Thousand* 465 Mich 149, 164; 631 NW2d 694 (2001).

At approximately 11:23 p.m. on May 27, 2003, Ingmar Korstanje awoke to the sound of his doorbell ringing. From his living room Korstanje asked if he could help the person at the door. A man replied asking Korstanje if he had jumper cables available, and before Korstanje replied, the man turned and began to briskly walk away. At approximately 11:29 p.m., Susan Ciuchna, who lives nearby to Korstanje, was awakened by someone incessantly ringing the doorbell to her condominium. Ciuchna picked up her cell phone and went to a window that overlooked the front door. There, she heard loud noises coming from the front door and called the police. Ciuchna related to the police that the suspect had left her front door and was walking away in a westerly direction wearing a distinctive two-toned jacket. Evidence at trial showed that Ciuchna's front door had been pried open with a tool.

A patrol car from the Royal Oak Police Department arrived at Ciuchna's home minutes after she had placed the call. The officers investigated the crime scene while awaiting the arrival of a tracking dog. Meanwhile, an undercover police officer of Royal Oak Police Department, who had heard Ciuchna's description of the suspect, began to look for the suspect west of Ciuchna's home. The undercover officer stopped at the High Top Bar, which is about two blocks west of Ciuchna's home, and saw defendant walk by the bar entrance carrying a bundle. Defendant entered the bar, and the undercover officer watched him place the bundle under a pay phone. Police later found that the bundle defendant carried was a two-toned jacket, a large screwdriver and a pair of latex gloves. Also, the police tracking dog picked up a scent in the area the suspect was last seen and headed west to the High Top Bar and directly up to defendant, who was then in police custody. Ciuchna could not identify defendant as the suspect, but did identify the jacket carried by defendant as the same worn by the suspect. Korstanje identified defendant as the person at his door.

A verdict can be based on circumstantial evidence and the reasonable inferences drawn from that evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The jury determines what inferences can be drawn from the evidence and what weight to give each inference in its deliberation. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court should not interfere with the jury's role in this process or the jury's determination of witness credibility. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992). From the evidence presented at trial, the jury could reasonably conclude beyond a reasonable doubt that defendant was the individual who rang Korstanje's and Ciuchna's doorbells to ascertain if anyone was present, and when no one answered Ciuchna's

door, pried it open with the screwdriver to gain entry into the home to steal its contents. MCL 750.110a(2); MCL 750.92. Therefore, sufficient evidence was presented to support defendant's conviction for attempted first-degree home invasion.

II. Sentencing Issues

A Departure from Recommended Minimum Sentence Range

The sentencing information report recommended a minimum sentence range of twelve to forty-eight months' imprisonment. The trial court sentenced defendant minimum sentence range of twenty to thirty years' imprisonment, thus exceeding the guidelines. Defendant argues that the trial court abused its discretion in departing upward from the sentencing guidelines. Though we do not conclude that the trial court abused its discretion in sentencing defendant above the recommended minimum sentence range, we conclude that the particular departure in this case, which is at least five times over the longest recommended minimum sentence, is not within the "permissible principled range of outcomes," as defined in *People v Babcock*, 469 Mich 247, 266-270; 666 NW2d 231 (2003). Therefore, the trial court abused its discretion in sentencing defendant, and resentencing is required.

1. Standard of Review

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Babcock, supra* at 264-265. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

2. Analysis

Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A trial court may not base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3).

Here, the trial court noted several reasons supporting the upward departure, including "defendant's criminal history, his propensity for recidivism, the nature of his testimony, his lack of remorse, his inability to sustain himself on the streets," all of which relate back to defendant's inability to rehabilitate himself. Although the guidelines took into account three of defendant's prior high severity felony convictions under prior record variable 1, and one prior low severity

felony conviction under prior record variable 2, the guidelines did not adequately account for defendant's 30-year history of committing similar offenses. See *People v Deline*, 254 Mich App 595, 598-599; 658 NW2d 164 (2002), vacated in part on other grounds, *People v Barbee*, 470 Mich 283, 681 NW2d 348 (2004). Over a thirty-year period, defendant has been convicted of seven felonies and seven misdemeanors, the majority of which relate to burglary and/or breaking and entering. These offenses are documented in defendant's presentence information report; therefore, they are objective and verifiable factors. Further, defendant has repeatedly established his recidivism by consistently committing offenses shortly after being released from jail or prison, including the instant offense which he committed while absconding from parole. Indeed, this Court has indicated that a "defendant's extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court's legitimate concern for the protection of society, justify . . . a prison sentence [exceeding the guidelines]." *People v Solmonson* 261 Mich App 657, 671; 683 NW2d 761 (2004).

However, we conclude that the substantial and compelling reasons articulated by the trial court do not justify the *particular* departure in this case, "i.e., the sentence is not proportionate to the seriousness of . . . defendant's conduct and his criminal history." *Babcock, supra* at 273. The particular departure in this case results in a mandatory minimum sentence that is at least sixteen years above and at least five times over the longest recommended minimum sentence. While defendant's criminal history is extensive, it alone does not justify the particular upward departure in this case. Rather, "the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal range." *Id.* at 264. Here, the trial court did not articulate any reasons indicating that the instant offense was any more serious than other attempted first-degree home invasions. In this regard, the trial court merely stated that "breaking into someone's house with a screwdriver, a single woman in the middle of the night, that's not a minor crime. This woman is terrorized for the rest of her life as a result of your actions." While we agree with the trial court that defendant did not commit a minor crime, no substantial and compelling reason exists to justify the particular departure in this case on the basis of the seriousness of the offense. Therefore, because defendant's sentence is not justified by a substantial and compelling reason, it is not within the "permissible principled range of outcomes," and resentencing is required.

Because our conclusion requires that defendant be resentenced, we need not address defendant's remaining sentencing claim of cruel and unusual punishment. In addition, we reject defendant argument that the United States Supreme Court's decision in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), supports his claims in regard to his sentence. Michigan's sentencing guidelines scheme is unaffected by the *Blakely* decision. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

We affirm defendant's conviction and remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh