

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEX SANTINO ACOSTA,

Defendant-Appellant.

UNPUBLISHED

July 10, 2007

No. 266373

Wayne Circuit Court

LC No. 05-005709-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of five to ten years for the assault conviction and two years for the felony-firearm conviction. He appeals as of right, challenging the trial court's decision to depart from the sentencing guidelines range of ten to twenty-three months for the assault conviction. We affirm.

Following an earlier confrontation, defendant fired shots at a van in front of his home. Defendant claimed that an occupant of the van was shooting at his home. The complainant, a seven-year-old girl, lived in a home approximately one-hundred yards from defendant's home and was an unintended victim of defendant's shooting. She was shot in the head while eating dinner in her home.

Defendant first argues that there was no evidence to support the trial court's reliance on his alleged gang membership as a basis for departure.

Under the sentencing guidelines act, a court may impose a minimum sentence within the appropriate guidelines range, MCL 769.34(2), or it may depart from the guidelines range if it has a substantial and compelling reason to do so. MCL 769.34(3).

We review the trial court's factual determination of gang involvement for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The prosecution maintained that defendant was part of a gang called the Latin Counts and presented a sentencing memorandum with documentation to support its contention. The documentation included an excerpt of testimony from an investigative subpoena hearing, which

indicated that defendant belonged to a gang, the Latin Counts. Thus, the trial court's finding of gang involvement was not clear error.

Defendant next challenges the trial court's consideration of the injuries to the complainant, arguing, in part, that the court mischaracterized the injuries and that the injuries were already taken into account in the scoring of offense variable (OV) 1 and OV 3. MCL 769.34(3)(b) states:

The court shall 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, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Defendant contends that there was no evidence to support the trial court's statements at sentencing that the complainant is "virtually a vegetable" and that she suffered injuries "from which she will probably never recover."

According to the testimony of the emergency room doctor, the child had a gunshot wound to the head. The entrance wound was "just on the top of her left ear in the front" and the exit wound was behind the left ear. The wound on the back was determined to be the exit wound because it "had some stuff coming out of it which looked like brain tissue" During the course of examination, the child had a seizure and had to be placed on life support. According to the doctor, her injuries were "absolutely life-threatening injuries like any other brain injury" The complainant's mother testified that her daughter stayed in the hospital eight days. The presentence information report (PSIR) does not provide any information concerning the complainant's recovery, and the PSIR author indicated that he was unable to contact her family. There is no indication that the complainant or anyone from her family was present at sentencing.

Although evidence that brain tissue was observed coming from the complainant's exit wound supports an inference that the complainant suffered a brain injury, there is no evidence in the record to support the trial court's findings that the injury rendered her "virtually a vegetable" or that her injuries were such that she "will probably never recover." Moreover, the severity of injuries inflicted is addressed by OV 3, MCL 777.33, which is scored at 25 points if "[l]ife threatening or permanent incapacitating injury occurred to a victim."¹ The doctor's testimony supports the life-threatening aspect of the injuries. If the record also established "permanent incapacitating injury," then one may conclude that OV 3 did not adequately account for injuries that were *both* life threatening and permanently incapacitating. However, factual support for the trial court's conclusion regarding the permanence and incapacitating aspect of the complainant's injury is lacking.

However, an appellate court may uphold a sentence that departs from the guidelines if some of the reasons given by trial court are valid, substantial, and compelling while others are not, as long as the appellate court is able to determine that trial court would have departed to the

¹ Contrary to defendant's argument, the injuries that result from the criminal act are not considered in the scoring of OV 1, MCL 777.31, which instead addresses aggravated use of a weapon.

same extent on the basis of the permissible factors alone. *Babcock, supra* at 260; *People v Johnigan*, 265 Mich App 463, 469; 696 NW2d 724 (2005).

We are able to make such a determination here. First, the court did not place a great amount of emphasis on the “vegetable” statement or the statement that the girl “will probably never recover.” Instead, the court stated: “the gang aspects of this, the mutual shooting, the shooting on the street, the harming of an innocent seven-year-old girl, all of those factors are not taken into account by the guidelines and warrant an upward departure” Moreover, on the Sentencing Information Report Departure Evaluation, the court provided the following as the aspects that led it to impose a sentence outside the recommended range:

This was a gang shooting involving the Latin Counts and Cash Flow Posse in which the defendant shot an innocent 7 year old girl who was eating dinner. The 7 year old girl survived but has a traumatic brain injury[.]^[2] Brain tissue oozed out of the bullet wound while she was being treated.

The court placed emphasis on the utter tragedy of a seven-year-old child being shot in the head while trying to eat her dinner, just because defendant had been involved in a gang and had been shooting on her street. These were proper considerations and were not adequately accounted for by the guidelines. Additionally, we note that, after defendant brought a motion for resentencing in which he challenged the court’s reasons for departing from the guidelines and raised similar issues to those raised on appeal, the court declined to resentence defendant and denied the motion. Considering all the circumstances, a remand is not appropriate because we conclude that the trial court would have prescribed the same sentence solely on the basis of permissible factors.

Defendant also argues that his sentence is disproportionate. See *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995), and *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001). We disagree. There were substantial and compelling reasons for the court to exceed the guidelines to the extent that it did, and the sentence is reflective of the seriousness of the matter. See *Houston, supra* at 320. The circumstances in this case were unusual and justified a significant departure from the sentencing guidelines.

Finally, defendant is not entitled to resentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). As our Supreme Court explained in *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006), the defect in the sentencing schemes at issue in *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), is not present in Michigan’s indeterminate sentencing scheme, in which a defendant’s maximum sentence is fixed by statute and the sentencing guidelines affect only the minimum sentence.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

² We conclude that the statement about the existence of a “traumatic brain injury” was a reasonable inference from the evidence.