

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY SOTO MARTINEZ,

Defendant-Appellant.

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UNPUBLISHED

May 29, 2008

No. 278080

Bay Circuit Court

LC No. 06-010784-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of 5 to 15 years in prison imposed on his jury conviction of domestic violence, third offense, MCL 750.81(4).<sup>1</sup> We affirm.

Defendant first challenges the trial court’s scoring of Offense Variable (OV) 7 (aggravated physical abuse) at 50 points and OV 10 (exploitation of a victim’s vulnerability) at ten points. We review legal questions concerning the application of the statutory sentencing guidelines de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. ‘Scoring decisions for which there is any evidence in support will be upheld.’” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Offense Variable 7 is scored at 50 points where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). “Sadism” is defined as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3). In this case, we find that adequate evidence supported this scoring decision. Defendant’s actions throughout the lengthy assault were excessively brutal, and designed to substantially increase complainant’s fear and anxiety. They also fit the statutory definition of sadism. Defendant’s actions were designed to humiliate complainant as well as physically injure her. His assertions that she was a “whore,” and that the

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<sup>1</sup> Defendant was acquitted of additional charges of criminal sexual conduct in the first degree, MCL 750.520b, and kidnapping, MCL 750.349.

assault was her fault for leaving him and disobeying his orders, show a desire to humiliate her, were for his gratification in order to control her, and constituted revenge for her decision to leave him. The trial court's decision to score this OV at 50 points was not an abuse of discretion.

Defendant also maintains that OV 10 was misscored. Even accepting as true defendant's contention that he is smaller than complainant, this score is supported by the testimony concerning defendant's extensive physical assault on complainant. There was sufficient evidence for the trial court to find that defendant used his greater strength to subdue complainant, both in his car and in his apartment, and to viciously beat her. Thus, the trial court's scoring decision was not an abuse of discretion. MCL 777.40(1)(c).

Defendant also maintains that the trial court's imposition of a 5 to 15 year sentence constituted cruel and unusual punishment, and that the trial court erred when it set his maximum sentence at 15 years without further explanation regarding how the sentence was proportionate to the offense and the offender. Defendant also appears to argue that his minimum sentence, which fell outside the guidelines, was disproportionate, and further maintains that the trial court failed to address various mitigating circumstances when determining the sentence.

A court may depart from the sentencing guidelines range if it has substantial and compelling reasons to do so, and states on the record the reasons for departure. MCL 769.34(3); *Hegwood, supra* at 439. A court may not depart from the guidelines range based on an offense 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)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). 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). In addition, we review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 263 n 20, 264.

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, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *Abramski, supra* at 74. In ascertaining whether the departure was proper, we defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

In the instant case, defendant's prior record variable and offense variable score placed him in the D-III cell of the guideline grid for class G offenses. MCL 777.16d; MCL 777.68. Given defendant's habitual offender status, the guideline range for the D-III cell is 2 to 34 months. *Id.* Defendant's OV score of 90 exceeded the OV points required for placement in the D-III sentencing cell by 74 points. The trial court based its decision to depart from the recommended range based on this excessive OV score, finding that the guideline grid did not adequately reflect the severity of defendant's conduct. This factor is objective and verifiable. A trial court is within its discretion to depart upward from the sentencing guidelines when a

defendant's offense variable score vastly exceeds the points for the highest level of severity. See *People v Stewart*, 442 Mich 937, 937-938; 505 NW2d 576 (1993); *People v Cline*, 276 Mich App 634, 648-649, 652-653; 741 NW2d 563 (2007).

Defendant's sentence was also proportionate to the offense and the offender. While defendant maintains that the trial court dismissed the mitigating factors in his favor, he ignores the seriousness of his offense, which would likely have justified a charge of assault with intent to commit great bodily harm less than murder, MCL 750.84. He further ignores his extensive criminal history, which includes seven misdemeanors and four felonies, two of which involve previous instances of domestic violence. Defendant's criminal history underscores his inability to conform his conduct to the rules of society and supports the trial court's decision. See *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). Defendant's assertion on appeal that the fact that he was suffering from substance abuse should be regarded as a mitigating factor directly contradicts his statement below that "he has never suffered from alcohol or drug abuse addictions." Nor, contrary to defendant's assertion, is his mere statement that he admitted responsibility an objective and verifiable mitigating factor, because it is impossible to judge his subjective intent when he made this admission. See *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000).

Under MCL 769.12(1)(b), the trial court was permitted to sentence defendant to a maximum sentence of 15 years for his conviction for domestic violence, third offense. MCL 750.81(4). Defendant's complaint that the trial court must specifically indicate why it chose that maximum sentence here is without merit where the trial court articulated the reasons for its departure on the record, and the sentence was proportionate. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992). In addition, because defendant's sentence was proportionate, his underlying constitutional claim is without merit. A proportionate sentence does not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

In both issues above, defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that resentencing is necessary because the trial court's scoring decisions, and the sentence itself, were based on facts that he did not admit and were not proven beyond a reasonable doubt at the jury trial. Because defendant did not object to the scoring decisions or the underlying sentence on this ground at sentencing, our review is limited to plain error affecting his substantial rights. See *People v McCuller*, 479 Mich 672, 695; 739 NW2d 563 (2007); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Our Supreme Court recently reaffirmed in *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007), that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Moreover, as discussed in *Harper*, *supra* at 613 n 21, and *People v Drohan*, 475 Mich 140, 162 n 13; 715 NW2d 778 (2006), Michigan's habitual offender statutes are not affected by *Blakely* or its predecessor, *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The trial did not plainly err in its scoring of the guidelines or in fashioning defendant's maximum sentence.

Affirmed.

/s/ Alton T. Davis  
/s/ Christopher M. Murray  
/s/ Jane M. Beckering