

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 31, 2013

v

MAYOMI JOSEPH OTAGBA,
Defendant-Appellant.

No. 307928
Wayne Circuit Court
LC No. 11-007687-FC

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced him to 5 to 10 years' imprisonment. In sentencing defendant, the trial court upwardly departed, by 22 months, from the minimum sentencing guidelines range of 19 to 38 months. We remand this case for resentencing or rearticulation of the substantial and compelling reasons for departure.

As an initial matter, defendant suggests in his argument regarding the court's departure from the sentencing guidelines that the trial court "inflated" the scoring of offense variable (OV) 12 (see MCL 777.42); defendant is referring to the trial court's rejection of defendant's argument that the crimes of which defendant was acquitted could not be considered in scoring OV 12. Defendant did not include an issue concerning the scoring of OV 12 in his statement of questions presented for appeal and thus has waived the issue for appellate review. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011). However, even if this argument had been properly presented, the argument would fail. The sentencing-variable points assessed by the trial court are determined "by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008); see also *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991) (explaining that conduct for which the defendant was acquitted could be taken into consideration at sentencing and citing the maxim that "an acquittal does not necessarily mean that the defendant did not engage in criminal conduct, but only demonstrates a lack of proof beyond a reasonable doubt"). Because the "preponderance of the evidence" standard is a lesser standard than the "proof beyond a reasonable doubt" standard required for conviction, the trial court did not err in considering conduct for which defendant was acquitted during its evaluation of OV 12.

Defendant's central argument on appeal is that the trial court did not provide substantial and compelling reasons to justify its upward departure from the sentencing guidelines range. We agree that some of the reasons the trial court relied on were improper.

This Court reviews for clear error whether a trial court's reason for departing from the guidelines exists, reviews de novo whether the factor is objective and verifiable, and reviews for an abuse of discretion whether the factor constitutes a substantial and compelling reason for departure. *People v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301701, issued October 23, 2012), slip op at 3. An abuse of discretion occurs when the trial court's result is "outside the range of principled outcomes." *Id.* "[I]t is well established that '[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.'" *Id.*, slip op at 2-3, quoting MCL 769.34(3). The trial court must justify, on the record, both the departure and the extent of the departure. *Anderson*, slip op at 3. "The sentencing court must explain why its chosen sentence 'is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason.'" *People v Akhmedov*, ___ Mich App ___; ___ NW2d ___ (Docket No. 303129, issued September 11, 2012), slip op at 2, quoting *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

The court must rely only on factors that are objective and verifiable; the factors must be based on occurrences external to the minds of those making the sentencing decision and must be capable of being confirmed. *Id.* "The requirement that the trial court base its decision on objective and verifiable facts" does "not preclude the court from drawing inferences about defendant's behavior from objective evidence." *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008).

The factors "must also 'be of considerable worth in determining the length of the sentence and should keenly and irresistibly grab the [trial] court's attention.'" *Anderson*, slip op at 3, quoting *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Substantial and compelling reasons are only to be found in exceptional cases. *Babcock*, 469 Mich at 257. Generally, only factors not considered by the sentencing guidelines should be relied on as reasons for departure; however, if the court finds, based on the facts in the record, that a particular offense or offender characteristic was not given adequate weight under the sentencing guidelines, the trial court may rely on such a factor to justify a departure from the guidelines. *Anderson*, slip op at 3; MCL 769.34(3)(b).

If this Court concludes that some reasons for departure provided by the trial court were substantial and compelling and other reasons were not, this Court must determine, based on the *proper* factors alone, whether the trial court would have departed from the guidelines to the same extent. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). "This Court must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure only if this Court cannot make such a determination or if the Court determines that the trial court would not have departed to the same degree." *Id.*

The trial court identified the following factors as substantial and compelling reasons for departure: (1) defendant exploited the victim to put her in a position of danger—defendant

expressed concern about the victim's lost gun, offered to help her find it, and invited her back¹ to the house where the assault occurred, and defendant's sister had a close relationship with the victim, (2) defendant's conduct showed he is a danger to the community—defendant lost his temper based on circumstances beyond the victim's control and essentially vented his anger on the victim, and (3) the victim's injuries were severe.²

Defendant argues that the factor concerning placing the victim in danger does not exist on the record and was not objective and verifiable. As noted, the trial court looked to three pieces of information from which it drew inferences that led it to conclude that defendant invited the victim into a position of danger: (1) defendant was the brother of the victim's close friend, (2) defendant offered to help the victim find her gun, and (3) defendant invited the victim to come back to his mother's house to look for the gun. From this information, the trial court inferred that the victim felt as though she was in a position of safety in returning to the house to look for her gun, and, the court seems to indicate, defendant took advantage of this to put the victim in a position of danger.

Based on the victim's testimony that defendant pulled the victim's gun "from . . . his hip" and based on Latrease Brown's testimony that defendant did not own his own gun, it can reasonably be inferred that defendant knew he had the gun the victim was looking for when the victim telephoned Brown.³ However, because the victim presented uncontested evidence that defendant did not assault her until after a fight broke out and someone began shooting at his mother's home, it is simply not reasonable to infer that defendant exploited the victim and invited her into a position of danger; indeed, the evidence does not support an inference that defendant invited the victim to the home with the intent to harm her. The victim's testimony indicated that defendant had initially been "helpful." If defendant did not intend to harm the victim when he invited her to the house, it is difficult to see how defendant intentionally exploited the victim and put her in a position of danger. Because the facts on the record do not support the trial court's inference, the trial court clearly erred in relying on this factor as a substantial and compelling reason for departing from the guidelines range.

Defendant additionally argues that the factor concerning his being a public danger because he vented his anger on the victim was not objective and verifiable because it was merely a theory without any grounding.⁴ The evidence reveals that defendant initially had a helpful

¹ The victim had attended a social gathering at the house at an earlier time.

² The trial court explained its reasons for departure both on the record at the sentencing hearing and in a written departure form. Our summary of the court's departure reasons derives from both sources.

³ Defendant answered the telephone and the victim spoke with him about the missing gun.

⁴ Although defendant does not specifically discuss "public danger" in his appellate brief, we conclude that his appellate argument adequately accounts for this aspect of the trial court's departure justification because the trial court intertwined the "lost temper" factor and the "public danger" factor.

demeanor towards the victim but that this changed after shots were fired at the home. A reasonable inference from the evidence, see *Petri*, 279 Mich App at 422, is that defendant lost his temper and brutally assaulted the victim as a result. It was not unreasonable for the trial court to conclude that defendant essentially attacked an innocent person in a fit of anger. The fact that defendant took his anger out on the victim for an incident she did not cause was an objective, verifiable, substantial, and compelling reason for departure from the sentencing guidelines.

The trial court went too far, however, in concluding that defendant was a danger to the public. In *Solmonson*, 261 Mich App at 670, this Court held that a trial court's conclusion that a defendant "was a danger to himself and the public was not itself an objective and verifiable factor." The Court in *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008), further explained the *Solmonson* holding, stating, "Although a trial court's 'belief' that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, . . . objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure." The Court explained that "a history of recidivism[] and obsessive or uncontrollable urges to commit certain offenses" are factors that could be used to support a departure. *Id.* at 45.

Unlike in *Horn* and cases discussed therein, the trial court here did not rely on "concrete factors that established a firm probability of future offenses," *id.*, because the trial court relied only on this one incident to draw the conclusion that defendant would be a danger to society. Therefore, the trial court clearly erred in relying on its conclusion that defendant was a danger to society to justify an upward departure from the sentencing guidelines range.

The trial court also relied on the extent of the victim's injuries as a factor justifying an upward departure. In *Anderson*, slip op at 5, this Court held that the severity of the victims' burn injuries, which caused prolonged pain, constituted an objective and verifiable reason for departure from the sentencing guidelines because OV 3 (see MCL 777.33) did not adequately take into account the circumstances. Here, evidence of the extent of the victim's injuries was presented at trial in the form of the victim's testimony and testimony of an officer who described photographs taken of the victim about five hours after the incident occurred. The victim indicated that her teeth were severely damaged,⁵ and the officer noted blood, a chipped tooth, scratching, swelling, and other injuries. The trial court noted that it could not assess 25 points under OV 3 for a "[l]ife threatening or permanent incapacitating injury" (see MCL 777.33[1][c])⁶ because inadequate medical information was presented during trial. Under the circumstances, it was not unreasonable for the trial court to conclude that the guidelines did not adequately

⁵ The victim testified as follows regarding the damage to her teeth:

It's broken. And then it's really when hit, it shattered everything in the back. It's like really paper thin. So like broken and from the back it's all shattered. It's all ridged. It's all ridges.

⁶ Defendant received 10 points under OV 3 for "[b]odily injury requiring medical treatment[.]" See MCL 777.33(1)(d).

account for the severe injuries and extensive tooth damage, and thus the extent of injury was an objective and verifiable factor properly considered by the court.

Because it is not apparent from the record whether the trial court would have departed to the same degree as it did without relying on the factors we reject today, we must remand this case for resentencing or rearticulation of the substantial and compelling reasons for departing from the guidelines. *Solmonson*, 261 Mich App at 670. On remand, the trial court, if it once again departs from the guidelines, must clearly indicate on the record its justification for the *extent* of the departure. *Anderson*, slip op at 3.

Remanded for resentencing or rearticulation. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Patrick M. Meter