

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL TOLAND,

Defendant-Appellant.

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UNPUBLISHED  
December 23, 2003

No. 227354  
Wayne Circuit Court  
LC No. 99-008697

ON REMAND

Before: Smolenski, P.J., and Whitbeck, C.J.<sup>1</sup>, and Owens, JJ.

PER CURIAM.

On October 3, 2003, the Michigan Supreme Court issued an order vacating this Court's opinion dated February 26, 2002, and remanding for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Defendant's main issue on appeal is whether the trial court articulated substantial and compelling reasons sufficient to justify its upward sentencing departure. In regards to this sentencing issue, we vacate defendant's sentence and remand for resentencing.<sup>2</sup>

Defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c, and sentenced to 20 to 40 years' imprisonment as a fourth-habitual offender, MCL 769.12. This sentence represented a significant upward departure given defendant's statutory guidelines range as a habitual offender was 19 to 76 months' imprisonment. A trial court may depart from the sentencing guidelines range if it finds a substantial and compelling reason to do so. *Babcock, supra* at 272. In finding that substantial and compelling reasons existed to warrant an upward departure from the sentencing guidelines, the trial court stated:

I find that the fact that . . . the victim was the niece of the defendant, that she was a guileless innocent or retarded child who was by her behavior and her

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<sup>1</sup> Chief Judge Whitbeck was substituted on remand due to the death of Judge Martin Doctoroff who was on the original panel of judges.

<sup>2</sup> The only other issue we addressed in our prior opinion was whether defendant's trial counsel was ineffective for failing to object to defendant's sentence. This issue is rendered moot by our decision in this opinion.

testimony here on the stand I think truly feeling hurt and wounded by what had happened to her.

The fact that she was exploited because of her mental limitations makes this a truly despicable crime, and I think those are facts and circumstances in this case that the sentencing guidelines simply do not adequately address.

We must determine whether these reasons were substantial and compelling, sufficient to justify an upward departure. A substantial and compelling reason must (1) be objective and verifiable; (2) keenly or irresistibly grab our attention; and (3) be of considerable worth in deciding the length of a sentence. *Id.* at 272. The existence of a particular factor is a factual determination to be made by the sentencing court, one that we review for clear error, while the determination that a factor is objective and verifiable is reviewed de novo. *Id.* at 265, 273.

The reasons the trial court gave to justify its departure, the victim's mental limitations, young age, and her relationship to defendant, were all supported by the factual record,<sup>3</sup> and are objective and verifiable. But a court may not base its departure on an offense characteristic already taken into account in the sentencing guidelines unless the court finds that the characteristic is given inadequate or disproportionate weight. *Id.* at 272; MCL 769.34(3)(b). Offense variable 10 (OV 10) considers exploitation of a vulnerable victim, for which defendant was scored ten points. Ten points should be scored when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority." MCL 777.40(1)(b). Thus, in determining defendant's sentencing range, the guidelines consider the victim's mental disability, age, and her relationship to defendant. However, OV 10 provides that ten points should be scored if the offender exploited the victim with regard to any *one* of the factors listed. In this case, the evidence established that defendant exploited the victim based on her mental disability, her youth, *and* his authority status as the victim's uncle. Therefore, we find that the trial court did not clearly err in determining that these factors were given inadequate weight given the particular circumstances of this case.<sup>4</sup>

Next, we must determine whether these substantial and compelling reasons are sufficient to justify the court's upward departure. Whether an objective and verifiable factor constitutes a substantial and compelling reason to justify the particular departure at issue is reviewed for an abuse of discretion. *Babcock, supra* at 274. This abuse of discretion standard

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<sup>3</sup> The trial court also noted that defendant assaulted the victim in her own home, a supposed safe-haven, and that he threatened the victim to gain her silence. However, it does not appear from the court's comments that either of these reasons were a basis for its sentencing departure. Therefore, we will not consider them in our review.

<sup>4</sup> We reject defendant's contention that the statute under which he was convicted accounted for his relationship to the victim. The specific subpart of MCL 750.520c that applied to defendant only defined the parameters of the offense, not the sentencing factors. The offense variables taken into consideration when scoring the guidelines depend on the category of the offense, MCL 777.21, which in this case is crimes against a person. MCL 777.16y.

acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*Id.* at 269; citations omitted.]

Based on the facts and circumstances of this case, we find that the trial court's substantial and compelling reasons for departing from the sentencing guidelines do not justify the degree of the departure. While the sexual assault of a mentally disabled minor, particularly of one to whom defendant was closely related, is always an egregious offense, the court's enhanced minimum sentence represented over a three-fold increase from the maximum-minimum of defendant's enhanced sentencing guidelines range. In addition to the seriousness of the offense, defendant's criminal history must also be considered. And it appears that defendant had no prior convictions for assaultive behavior. Compare to, e.g., *People v Perez*, 255 Mich App 703; 662 NW2d 446 (2003), vacated in part on other grds 469 Mich 415 (2003); *People v Armstrong*, 247 Mich App 423; 636 NW2d 785 (2001). Therefore, we hold that the trial court abused its discretion in fashioning a sentence that was "not proportionate to the seriousness of the defendant's conduct and his criminal history." *Babcock*, *supra* at 273.

Accordingly, we vacate defendant's sentence and remand this case for resentencing. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ William C. Whitbeck  
/s/ Donald S. Owens