

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ANDREW CENSKE,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2005

No. 254237

Marquette Circuit Court

LC No. 03-040967-FH

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of aggravated stalking, MCL 750.411i, and malicious use of a telephone to threaten, MCL 750.540e(1)(a). He was sentenced to concurrent terms of forty to sixty months in prison for stalking, and six months for malicious use of a telephone. We affirm defendant's convictions and sentences, but remand for completion of a sentencing information report departure evaluation. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's stalking conviction stems from various threats defendant made to attorney Joseph Lavey in 2001 and in 2003. His conviction for malicious telephone use arises from threats to Marquette Police Detective-Sergeant Steven Snowaert in 2003. Lavey testified that he represented Pathfinders, a local mental health organization, in litigation instituted by defendant. In January 2001, Lavey received a phone call from defendant. In the call, recorded by Lavey's answering machine, defendant repeatedly used profanity and threatened to harm him. Lavey testified that he thought that defendant was repeatedly "racking" a shotgun during the message. Defendant called Lavey later that day asked him if he had understood the earlier message, and again threatened him. On January 15, 2001, defendant appeared at Lavey's office. He was disruptive, and threw paperwork at one of Lavey's office workers. Lavey testified that he felt threatened as a result of defendant's actions.<sup>1</sup>

In 2003, defendant was detained in the Marquette County jail on unrelated federal charges. On April 25, 2003, defendant made a series of threatening phone calls to Lavey and to

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<sup>1</sup> Defendant later pled no contest to attempted malicious use of a telephone, MCL 750.540e(1), as the result of these actions.

Snowaert, a police officer involved with his prior criminal charges. He threatened to kill Lavey and repeatedly stated that he was making a real threat. He further stated that Lavey should “hide for the rest of his life” because he would someday return to “put him in his f\*\*\*in’ grave.” Lavey testified that he felt highly threatened by defendant’s actions. He did not know that defendant was incarcerated at the time of the call. Lavey subsequently purchased a pistol and additional security locks for his home and office.

Defendant’s other threatening calls on April 25, 2003 were made to the Marquette City Police department. He repeatedly stated that “Detective Snowaert is a dead fag.” Snowaert felt threatened at first, partly, because he did not know the identity of the caller. Once he learned of defendant’s identity, he did not feel that defendant was an immediate threat, but also knew that defendant would not remain incarcerated indefinitely.

Defendant argues that the trial court erred when it departed from the sentencing guidelines. We disagree.

Defendant’s sentencing guideline range for his stalking conviction was five to twenty-three months’ imprisonment. He received a minimum sentence of forty months in prison for this offense. 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 factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, we must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not base a departure 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); *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218, aff’d in part, rev’d in part 472 Mich 555; 697 NW2d 511 (2005). 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. *Abramski, supra*. We must 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 the instant case, the trial court found that various factors justified a sentence outside the guidelines. The trial court found that the guidelines did not adequately reflect: (1) the disruption of Lavey’s life and the grief to Lavey and his family; (2) the real danger that defendant presents to Lavey and his family; (3) the danger defendant presented to Detective Snowaert; (4) the fact that defendant showed no understanding of the impact of his threats nor any sign of remorse; (5) defendant’s misconduct while incarcerated as a jail inmate; and (6) the

vicious, malicious tone of the threats which appeared to be designed to terrorize. The trial court indicated that its intent was to impose the same sentence should a reviewing court find any of the grounds a valid reason for departure.

Of the reasons given by the trial court, the first is already considered by the guidelines. The psychological effect of the defendant's conduct on the victim and his family are scored under Offense Variables 4 and 5. See MCL 777.34; MCL 777.35. These variables were scored at zero points because there was no serious psychological injury requiring professional treatment of either Lavey or a family member. This ground for departure is arguably invalid.

The second and third grounds for departure, the likelihood future danger to Lavey and Snowaert, would seem to be subjective in nature, because the likelihood of future harm is not easily measurable. The fourth ground for departure, defendant's remorse, or lack thereof, is not generally considered objective and verifiable. *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000). Here, however, defendant's lack of remorse or understanding about the wrongful nature of his conduct, and the likelihood that he would continue to pose a risk to Lavey and Snowaert, were objectively manifested during closing arguments when defendant stated that he wished that Lavey had died. Defendant objectively stated his intent to continue to pursue his vengeance against Lavey for the rest of his life. We conclude that this factor stated by the trial court was objective and verifiable.

The malicious tone of defendant's threats is self-evident from the threats themselves. Defendant's misconduct while incarcerated is supported by a memorandum included in the presentence investigation report. Misbehavior after arrest is a legitimate factor to consider at sentencing, as an aggravating circumstance indicating a disposition to violence or impulsiveness. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

If a trial court articulates multiple reasons for a departure, and we determine that some of the reasons are invalid, we must determine whether the trial court would have departed, and if so to the same degree, on the basis of the valid reasons alone. *Babcock*, *supra* at 260, 273. Some reasons for departure given by the trial court were arguably improper. However, based on the trial court's comments that it intended to depart to the same extent even if this Court found only one reason valid, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone. We further hold that the sentence as a whole was proportionate to the offense and the offender, and the valid reasons stated by the trial court were substantial and compelling. We affirm the trial court's sentencing decision.<sup>2</sup>

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<sup>2</sup> We note that, although the trial court articulated its reasons for departure on the record, it failed to complete the required sentencing information report departure evaluation. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). We therefore remand the case to the trial court in order for it to perform the ministerial task of completing a departure evaluation. *Id.* at 426.

Next, defendant argues that his convictions violate his first amendment rights. He maintains that his actions fell within a protected class of speech, and that the statute did not provide fair notice of what was prohibited. We disagree.

This Court addressed the constitutionality of the stalking statute based upon overbreadth and vagueness claims in *People v White*, 212 Mich App 298; 536 NW2d 876 (1995), and found the statute constitutional. *Id.* at 309-314. By its terms, the statute does not prohibit “constitutionally protected activity or conduct that serves a legitimate purpose,” and cannot be applied to entirely innocent conduct. *Id.* at 311-312, citing MCL 750.411i(1)(d). In addition, the statute is not vague, and contains definitions of crucial words and phrases that are clear and would be understandable to a reasonable person. *Id.* at 312. This Court reached a similar result in *People v Taravella*, 133 Mich App 515, 520-521; 350 NW2d 780 (1984), when it reviewed the constitutionality of the misdemeanor of malicious use of a telephone to threaten.

Defendant also argues that the prosecution presented insufficient evidence to support the convictions. This claim is based on the argument that defendant’s 2001 nolo contendere plea for attempted malicious use of a telephone, MCL 750.540e(1), could not be used to form the basis of the instant convictions, because he was allegedly told that statements made during the plea could not be used against him in any other civil or court action. During the plea proceeding concerning defendant’s 2001 misdemeanor conviction, the trial court noted that one of the purposes of the no contest plea “is so that any statements Mr. Censke has made cannot be used against him in any civil or other court proceeding, and I find that a sufficient basis to allow a no contest plea versus a guilty plea.” At trial, the order of probation from this case and the probation officer’s recommendation were used as impeachment evidence to rebut defendant’s claim that he had never been prohibited by court order from contacting Lavey. The prosecutor also played a recording of defendant’s earlier threat and Lavey testified about the incident.

Defendant maintains that the trial court’s comments during the preceding plea hearing support his assertion that such a plea prevented all of his statements; i.e., the 2001 threat, from being used in a second proceeding. However, he does not provide case law to support his argument that this comment rendered his earlier threats inadmissible. Defendant may not merely state a position and then leave it to this Court to rationalize and discover the basis for the claim, nor may he leave it to this Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Defendant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Moreover, defendant’s argument is meritless. Defendant misreads the import of the trial court’s comments. We read the above comment as a discussion of the fact that defendant did not want to make any in-court admissions during a guilty plea hearing that could be used in subsequent civil proceedings. The evidence of the prior threats and defendant’s failure to avoid contact with Lavey was relevant and probative. MRE 401; MRE 403. Defendant has failed to show that the trial court erred when it allowed the prosecutor to present evidence of defendant’s earlier threats against the victim. Thus, his insufficient evidence claim is without merit.

Defendant raises additional claims that consist of general allegations of misconduct and harassment by the prosecutor and the sheriff’s department, but presents nothing to support these

allegations. His failure to properly address the merits of these assertions of error constitutes abandonment of these issues. *Harris, supra* at 50; *Mackle, supra* at 604 n 4.

Affirmed, but remanded for completion of a sentencing information report departure evaluation. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Jane E. Markey