

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD KEVIN LINDSAY,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2011

No. 296201

Grand Traverse Circuit Court

LC No. 09-010771-FH

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Defendant pleaded guilty to third-degree home invasion, MCL 750.110a(4), malicious destruction of property, MCL 750.377a(1)(b)(i), and felonious assault, MCL 750.82. Defendant was sentenced to concurrent prison terms of 40 to 60 months for the home invasion conviction, 18 to 60 months for the malicious destruction conviction, and 24 to 48 months for the assault conviction. The minimum sentence for the home invasion conviction was an upward departure from the guidelines range of 22 to 38 months. Defendant appeals by leave granted. We affirm.

On appeal, defendant argues that resentencing is required because the sentencing court departed from the sentencing guidelines without providing substantial and compelling reasons for doing so. We disagree.

This Court reviews reasons given for a departure from the sentencing guidelines for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The determination that a reason is objective and verifiable is reviewed de novo as a matter of law. See *id.* Determinations whether the reasons given are sufficiently substantial and compelling to justify the departure are reviewed for an abuse of discretion, as is the amount of the departure. *Id.* “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

“A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing.” *People v Conley*, 270 Mich App 301, 312-13; 715 NW2d 377 (2006). A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). In fashioning a sentence, the court may consider conduct of the defendant during the criminal transaction that was not part of the sentencing offense. *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009). Factors underlying a departure must justify the particular departure

made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Smith*, 482 Mich 292, 299, 303; 754 NW2d 284 (2008). The court may draw inferences about the defendant's behavior from the objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Additionally, "the guideline range presupposes the commission of the offense to which the defendant pled." *People v Butts*, 144 Mich App 637, 640; 376 NW2d 176 (1985). However, "when the undisputed facts show a higher offense, departure is justified on that basis." *Id.*

Here, the sentencing court stated that it departed from the sentencing guidelines because "the threat with a pistol, in [the court's] opinion [was] not adequately considered into the guidelines." Additionally, "the crime [defendant] actually committed [was] home invasion first degree and the 40 month minimum certainly would be permitted . . . under the guidelines for the crime actually committed." Defendant admitted to the elements of first-degree home invasion by stating that he entered an apartment without permission, assaulted one of the occupants by charging at him with a club, and smashed a television set, worth at least \$1,000, with a club. See MCL 750.110a(2). There was also evidence that defendant pointed a pistol at a victim during the course of the events. The above reasons for departure were objectively verifiable, and substantial and compelling.

Using the same offense-variable (OV) and prior-record-variable totals that were assigned for the third-degree home invasion conviction, if defendant had been convicted of first-degree home invasion, he would have been subject to a minimum sentence of 99 to 160 months under the guidelines. The trial court made a minimal departure from the guidelines range for third-degree home invasion in order to somewhat take into account this disparity. With regard to the trial court's statement concerning the pistol, it is true that defendant received 15 points under OV 1 of the sentencing guidelines because "[a] firearm was pointed at or toward a victim," MCL 777.31(1)(e), and he also received five points under OV 2 for possessing or using a pistol, MCL 777.32(1)(d). However, these scores did not change the resulting guidelines range of 22 to 38 months, and the court was within its right to find that defendant should serve a small amount of extra time based on the evidence of a pistol. See, e.g., *People v Young*, 276 Mich App 446, 450-453; 740 NW2d 347 (2007) (explaining that a court may take into account how a particular OV score affects the ultimate guidelines range in determining whether a factor has been given disproportionate weight).

The sentencing court did not abuse its discretion when it departed from the guidelines upper range by two months and imposed a 40- to 60-month sentence for third-degree home invasion.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder