

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIGH EDWARD CROFF,

Defendant-Appellee.

UNPUBLISHED
September 20, 2012

No. 303003
Wayne Circuit Court
LC No. 10-001232-FC

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, the trial court convicted defendant Tigh Croff of voluntary manslaughter¹ and possession of a firearm during the commission of a felony (felony-firearm).² The trial court sentenced Croff to serve concurrent terms of two years' imprisonment for his felony-firearm conviction, and three years' probation for his voluntary manslaughter conviction. The prosecution appeals as of right the trial court's downward departure from the sentencing guidelines. We reverse and remand for resentencing.

I. BASIC FACTS

A. TRIAL

Croff's convictions arise from the death of Herbert Silas. Darlene Whitby testified that on December 27, 2009, she was driving Croff home from work. Whitby testified that she noticed two men behind Croff's house as she pulled into Croff's driveway. The men scattered when she switched the headlights of her car back on. Whitby testified that neither man was holding a weapon, but that one man was holding the globe from an electric meter. Whitby testified that she was aware that Croff's home had been broken into twice before.

Whitby testified that she knew that Croff had a concealed weapons permit and was carrying two guns in his waistband. She remained in the car and Croff jumped out of the car and

¹ MCL 750.321.

² MCL 750.227b.

chased the men. After Whitby lost sight of Croff, she heard gunfire. Whitby testified that Croff returned minutes later, was sweating, and said “[a]ll I do is work, work, work. I can’t have nothing.” Croff told Whitby to call the police, and he and Whitby waited for the police to arrive.

One of the responding officers, Officer Steven Schram, testified that he found a body lying between the sidewalk and street, one block behind and eight houses down from Croff’s house. The body was identified as Silas. Officer Schram testified that Silas did not have a pulse and appeared to have died from a single gunshot wound to the chest. Officer Schram testified that he did not see evidence of close-range firing.

A second responding officer, Lieutenant Eric Decker, testified that he approached Croff and Whitby in the back yard of Croff’s house. Lieutenant Decker testified that Croff informed him that he had a concealed weapons permit, and told him that he “just caught two guys breaking into my house” and “chased them and emptied a full clip at them. The older one stopped and turned saying stop, you’re going to hit me like I was playing or something. I was right up on him and said I know. And then I shot him and he went down.” Lieutenant Decker and another officer took Croff’s guns.

Croff gave a videotaped statement to Sergeant Gary Diaz a few hours later. The prosecution entered the statement into evidence, and the trial court played the statement for the jury at trial. Both the prosecution and Croff agree on appeal that the videotape largely included the same statements that Croff gave to Lieutenant Decker, but the parties have not provided a transcript or copy of the statement to this Court.

The prosecution charged Croff with second-degree murder and felony-firearm, and Croff’s first trial took place in August 2010. During the first trial, the trial court granted Croff’s motion for a directed verdict on the second-degree murder charge, and reduced the charge to voluntary manslaughter. The jury could not reach a verdict, and the trial court declared a mistrial. Croff’s second trial, on charges of voluntary manslaughter and felony-firearm, took place in January 2011. The second jury found Croff guilty of voluntary manslaughter and felony-firearm.

B. SENTENCING

At sentencing, the trial court calculated Croff’s sentencing guidelines range at 29 to 57 months’ imprisonment. The trial court sentenced Croff to two years’ imprisonment for the felony-firearm conviction, and three years’ probation for voluntary manslaughter conviction. The trial court gave two reasons for its downward departure from the guidelines.

The trial court’s first reason was that the guidelines did not take into account that Croff had recently and repeatedly been victimized by burglaries, or that Croff caught Silas breaking into his house. The prosecution argued that offense variable (OV) 6³ took this factor into account. The trial court explained that “even OV 3 fails to take into account at all the fact that

³ MCL 777.36.

[Silas] was killed after being caught burglarizing Mr. Croff’s house.” The trial court stated that it found the reason substantial and compelling, and that it was not adequately taken into account by the sentencing guidelines because the guidelines did not give Croff “negative points” in that situation.

The trial court’s second reason was that the guidelines scored Croff under prior record variable (PRV) 5⁴ for “two fairly old Farmington Hills misdemeanor convictions.” The trial court indicated that the misdemeanor convictions were for assault and possession of marijuana, and that the assault conviction was “almost ten years old and very close to being off the chart.” The trial court concluded that the old convictions had a disproportionate impact on the scoring guidelines because if the trial court scored Croff zero points for PRV 5, the guidelines would recommend a sentence of 19 to 38 months’ imprisonment, instead of 29 to 57 months’ imprisonment.

The trial court sentenced Croff to concurrently serve two years’ imprisonment for the felony firearm conviction, and three years’ probation for the voluntary manslaughter conviction. The prosecution now appeals, arguing that the trial court abused its discretion because it relied on factors that the guidelines already take into account.

II. DEPARTURE FROM THE SENTENCING GUIDELINES

A. STANDARD OF REVIEW

We review for an abuse of discretion the trial court’s determination that the factors in a particular case are substantial and compelling reasons to depart from the guidelines.⁵ We also review for an abuse of discretion and the amount of its departure.⁶ An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible range of principled outcomes,⁷ or when the trial court makes an error of law.⁸

B. LEGAL STANDARDS

Our Legislature has enacted sentencing guidelines.⁹ We closely scrutinize a trial court’s departure from the guidelines on appeal.¹⁰ A trial court may depart from the appropriate

⁴ MCL 777.55.

⁵ *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

⁶ *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

⁷ *Babcock*, 469 Mich at 269.

⁸ *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006); *Koon v US*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

⁹ MCL 769.34.

¹⁰ *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

guidelines range only if it states on the record substantial and compelling reasons for its departure.¹¹ The trial court “shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.”¹²

Further, the trial court’s departure must be proportionate to the defendant’s conduct and criminal history.¹³ The trial court must justify the particular departure it made by explaining “why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.”¹⁴ The trial court may justify its departure by comparing the facts of the defendant’s case against the sentencing grid to explain why its sentence is more proportionate.¹⁵

When the trial court articulates several substantial and compelling reasons, if some of the reasons are valid and others are not, we must determine whether the trial court would have departed to the same extent on the basis of the valid reasons alone.¹⁶ If the trial court would have imposed the same sentence regardless of a misunderstanding of the law, we may affirm the sentence.¹⁷

C. APPLYING THE STANDARDS

The prosecution primarily argues that the guidelines take the degree of provocation into account because provocation is an element of voluntary manslaughter and not second degree murder. We disagree, because the guidelines do not require the trial court to compare the crime on which it is sentencing the defendant to a crime of which the defendant was not convicted. A crime of which a defendant may have been convicted, but was not, is therefore not “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range[.]”¹⁸ Further, the trial court *may* consider facts concerning pending charges, uncharged offenses, and previous acquittals, to justify its departure from the guidelines.¹⁹ That the prosecution initially charged Croff with second degree murder, but Croff was convicted of voluntary manslaughter, is thus not a characteristic that *the guidelines* already take into account.

¹¹ MCL 769.34(3); *Babcock*, 469 Mich at 256-257, 272.

¹² MCL 769.34(3)(b); *Babcock*, 469 Mich at 258 n 12.

¹³ *Smith*, 482 Mich at 300.

¹⁴ *Id.* at 303-304.

¹⁵ *Id.* at 306, 309-310.

¹⁶ MCL 769.34(11); *Babcock*, 469 Mich at 260-261, 273.

¹⁷ *Id.*; *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

¹⁸ MCL 769.34(3)(b).

¹⁹ *Coulter (After Remand)*, 205 Mich App at 456.

However, the prosecution also argues that OV 6 accounts for whether Croff was provoked. OV 6 applies if the defendant intended to kill or injure another individual.²⁰ The trial court must score 10 points for OV 6 if “a killing is intentional within the definition of . . . voluntary manslaughter, but the death occurred . . . in response to victimization of the offender by the decedent.”²¹ Here, the trial court concluded that the sentencing guidelines did not take into account that Croff caught Silas breaking into his home, or that Silas had victimized Croff. The trial court’s conclusion was erroneous because OV 6 does take into account that the decedent provoked or victimized the defendant.

The trial court’s second reason for its departure was that guidelines gave disproportionate weight to Croff’s old misdemeanor convictions. The guidelines specifically provide that the trial court may not consider a conviction that is more than 10 years old for scoring purposes.²² Thus, the guidelines do take into account the age of Croff’s prior convictions. However, the trial court recognized that the guidelines took the age of Croff’s convictions into account, but indicated that it was departing from the guidelines because the guidelines gave Croff’s old misdemeanors disproportionate weight.

The trial court did not abuse its discretion when it concluded that the guidelines gave Croff’s misdemeanors disproportionate weight. The “abuse of discretion 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.”²³ The trial court may consider a characteristic already taken into account by the guidelines if it “finds . . . that the characteristic has been given inadequate or disproportionate weight.”²⁴

Here, the trial court recognized that the guidelines took into account the ages of the convictions, but reasoned that the guidelines gave Croff’s old convictions disproportionate weight. The trial court found that the guidelines gave Croff’s misdemeanors a disproportionate weight because they were “very close to being off the chart” and because Croff “has been for, at least for the last eight years or so apparently a good hard working citizen[.]” The trial court also indicated that the old convictions had a disproportionate affect on the guidelines because if it scored Croff zero points for PRV 5, the guidelines would recommend a sentence of 19 to 38 months’ imprisonment, instead of 29 to 57 months’ imprisonment. We conclude that the trial court did not abuse its discretion when it concluded that the guidelines gave Croff’s old convictions disproportionate weight, and thus justified its downward departure from the guidelines.

²⁰ MCL 777.36(1).

²¹ MCL 777.36(2)(b).

²² MCL 777.50(1).

²³ *Babcock*, 469 Mich at 269.

²⁴ MCL 769.34(3)(b); *Babcock*, 469 Mich at 258 n 12.

Thus, the trial court gave one valid reason and one invalid reason for its departure from the guidelines. The trial court stated that its primary reason for departing downward from the guidelines was that the guidelines did not account for the facts that Silas had both victimized and provoked Croff. That was an invalid reason. We are not convinced that the trial court would have departed to the same extent had it based its departure on the valid reason—that the guidelines gave Croff’s old convictions disproportionate weight—alone because the trial court stated that the invalid reason was the primary reason for its departure. Thus, we cannot affirm Croff’s sentence.²⁵

We conclude that the trial court erroneously concluded that OV 6 did not take into account that Silas had provoked and victimized Croff. Because this was the primary reason the trial court gave for departing downward from the sentencing guidelines, we cannot conclude that the trial court would have departed to the same extent had it not made this error. Thus, we must remand for resentencing or rearticulation of the trial court’s substantial and compelling reasons for its departure.²⁶

We reverse and remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck

²⁵ *Id.* at 260-261, 273; *Schaafsma*, 267 Mich App at 186.

²⁶ *Babcock*, 469 Mich at 260-261.