

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
October 4, 2012

v

GIOVANNI NACCARATO,

Defendant-Appellee.

No. 305222
Wayne Circuit Court
LC No. 11-000851-FH

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant entered a plea of nolo contendere to four counts of burning a dwelling house, MCL 750.72, one count of burning insured property, MCL 750.75, and one count of arson of personal property having a value of \$1,000 or more but less than \$20,000, MCL 750.74(1)(c)(i). Defendant was sentenced to a term of three years' probation for all six counts and was ordered to make full restitution to the tenants of the building he burned down and his insurance company. Plaintiff appeals by leave granted. We vacate defendant's sentences and remand for resentencing consistent with this opinion.

On October 6, 2007, at around 1:00 p.m., firefighters responded to a fire at an apartment building owned by defendant. Defendant had previously evacuated the building under the guise that the building was being fumigated for insects. Once in the apartment building, firefighters noticed two partially filled gasoline containers on a stairway leading to the second floor and later found a third gasoline can in the basement. An investigation was conducted after the fire was extinguished. Investigators determined that the fire was the result of a person's actions and that gasoline was used. Two units on the second floor were destroyed along with all furniture, personal belongings, and clothing in the units. Additionally, two first floor units suffered severe smoke damage as a result of the fire.

Defendant had insured the apartment building for fire loss. Defendant's claim for reimbursement of around \$400,000 was denied by defendant's insurance company. The insurance company did, however, reimburse defendant's mortgage company for the unpaid mortgage balance of \$135,000 on the building. Estimated damage of the tenants' personal property ranged from \$5,000 to \$20,000.

Defendant entered a plea of nolo contendere on March 1, 2011 to four counts of burning of a dwelling, one count of burning insured property, and one count of arson of personal

property. Defendant stipulated to an investigator's report being read into the record to form the factual basis for his plea. At the sentencing hearing on May 24, 2011, plaintiff and defendant disagreed over the scoring of offense variable (OV) 1, MCL 777.31, and prior record variable (PRV) 7, MCL 777.57. The trial court ruled that OV 1 was not scored properly and that PRV 7 was scored properly. In issuing its sentence, the court departed downward from the sentencing guidelines. Defendant's age, ability to be rehabilitated, lack of prior convictions, lack of convictions in the interim between the incident and sentencing, role as a family man, employment at Ford Motor Company, lack of intent to physically harm anyone, and willingness to make restitution were all reasons cited by the trial court as reasons for departing from the sentencing guidelines. Plaintiff filed an application for leave to appeal, which this Court granted. *People v Naccarato*, unpublished order of the Court of Appeals, entered October 14, 2011 (Docket No. 305222).

On appeal, plaintiff first asserts that defendant should be resentenced within the guidelines. Plaintiff argues that the downward departure by the trial court was not warranted because the reasons cited by the trial court were not sufficiently substantial and compelling, because the trial court failed to explain the extent of the particular departure, and because the trial court failed to explain why the sentence imposed was more proportionate to defendant's crime than a sentence within the guidelines. We agree.

A trial court's decision to depart from the guidelines is reviewed for an abuse of discretion. *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). We "review the reasons given for a departure for clear error." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A trial court's "conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Smith*, 484 Mich at 300. Reasons cited by a court as "substantial and compelling enough to justify the departure [are] reviewed for an abuse of discretion, as is the amount of the departure." *Id.* An abuse of discretion occurs "if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

Under the sentencing guidelines, "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." *Buehler*, 477 Mich at 24, quoting MCL 769.34(3). Reasons sufficient to merit departure must be "objective and verifiable" and "should keenly or irresistibly grab the courts attention." *Smith*, 482 Mich at 299. For a reason to be objective and verifiable it must "be based on actions or occurrences external to the minds of those involved." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). Usually, a substantial and compelling reason "exists only in exceptional cases." *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007), quoting *Babcock*, 469 Mich at 258.

Among the reasons cited by the trial court, a number can constitute substantial and compelling reasons for a departure from the sentencing guidelines. A "defendant's age, in conjunction with [a] defendant's lack of a criminal record" may be a reason for a downward departure. *Young*, 276 Mich App at 456 n 1. However, "[i]n order to depart from the sentencing guidelines on the basis of defendant's lack of a prior criminal history, the trial court had to first conclude that the sentencing guidelines gave inadequate or disproportionate weight to the defendant's criminal history." *Id.* at 455. Here, the trial court did not conclude that the

sentencing guidelines gave inadequate or disproportionate weight to defendant's criminal history. Consequently, although consideration of defendant's lack of prior criminal history was appropriate, the trial court failed to explain how that reason was not already adequately addressed in the guidelines.

Another potential substantial and compelling reason for departure is defendant's employment of over 20 years at Ford Motor Company. Compare *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004); *Young*, 276 Mich App at 456-57. Defendant's family support, in conjunction with the other reasons cited can also constitute a substantial and compelling reason for departure from the guidelines. *People v Daniel*, 462 Mich 1, 5-6; 609 NW2d 557 (2000).

Nevertheless, even if substantial and compelling reasons exist for a departure from the guidelines, "[w]hen departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Smith*, 482 Mich at 304. When it is unclear "why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified." *Id.* Moreover "a sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.*

Here, no reason was given for the extent of the particular downward departure by the trial court. The trial court also failed to explain why the sentence imposed was more proportionate than one within the guidelines. Therefore, defendant's sentences must be vacated and the case remanded to the trial court for resentencing. On remand, defendant must be resented within the guidelines unless the trial court provides substantial and compelling reasons for departure and explains why the particular departure is more proportionate to defendant's offense than a sentence within the guidelines. *Id.* at 304-305.

Plaintiff also asserts that OV 1 was improperly scored at 0 points by the trial court because an incendiary device was used and there was a victim; therefore, OV 1 should have been scored 20 points instead of 0 points. We agree.

We review de novo "[t]he proper interpretation and application of the legislative sentencing guidelines." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). In terms of scoring under the sentencing guidelines, "this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). When construing a statute, unambiguous language is given its plain meaning and the statute is applied as written. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). OV 1 should be scored 20 points when, "[t]he victim was subjected or exposed to a harmful . . . incendiary device." MCL 777.31(1)(b). Gasoline is an incendiary device, MCL 777.31(3)(b), and defendant used gasoline to start the fire.

Victim is defined under the statute as any "person who was placed in danger of injury or loss of life." MCL 777.31(2)(a). No tenants were in the building at the time of the fire, but there were witnesses in the area. Furthermore, one firefighter and defendant were injured as a result of the fire. Even if defendant does not count as a victim, the witnesses in the area and the

firefighters are all “person[s] who w[ere] placed in danger of injury or loss of life” as a result of the fire caused by defendant. *Id.* Because defendant used an incendiary device and there were victims as a result of the fire he started, 20 points should have been scored for OV 1.

Accordingly, defendant’s sentences are vacated and we remand this case to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra