

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 12, 2013

v

ELLEN CLARA WATSON,

Defendant-Appellant.

No. 305809
Leelanau Circuit Court
LC No. 10-001686-FH

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ her March 2, 2011 sentence of 46 months to 120 months imprisonment for her plea-based conviction of embezzlement from a vulnerable adult of money or property with a value of \$20,000 or more but less than \$50,000, MCL 750.174a(5)(a). For the reasons set forth in this opinion, we vacate defendant's sentence and remand for resentencing.

Defendant's conviction arises from conduct that she perpetrated against her elderly mother Cora Cole who was in defendant's care while suffering from dementia. Specifically, according to the Presentence Investigation Report (PSIR), in 2008 Cole's niece Lori Kroupa was appointed legal guardian after a Department of Social Services (DSS) investigation revealed that Cole's body was bruised from head to toe. Kroupa transferred Cole to a nursing home and asked the Michigan State Police to conduct an investigation into fraudulent financial transactions that defendant perpetrated against Cole. The investigation revealed that Cole's checking accounts had negative balances and had been closed, credit cards had been maxed out and closed, and investments such as savings bonds and pension payments from Cole's deceased husband were unaccounted for. In addition, defendant presented a fraudulent power of attorney document to financial institutions and represented herself as Cole's power of attorney. Defendant abused

¹ This Court originally denied leave to appeal. *People v Watson*, unpublished order of the Court of Appeals, entered October 12, 2011 (Docket No. 305809). Defendant thereafter sought leave to appeal in our Supreme Court. In lieu of granting leave, our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Watson*, 491 Mich 940; 815 NW2d 482 (2012).

Cole's checking and savings accounts and investment accounts all using the fraudulent power of attorney. Defendant forged a deed and transferred Cole's real property valued at \$350,000 to herself and her son Michael Williams. Defendant and Williams then drew a \$70,000 line of credit on the property using the forged power of attorney. Defendant also forged a revised draft of Cole's will. When defendant's fraud began to surface, she and her daughter, Melissa Schneider, attempted to cover their tracks "by reporting to the financial institutions that Cole's checking account had been stolen." In addition, after Cole passed away in April 2010 at a nursing home, defendant stole Cole's wedding ring off of her mother's dead body. Later, while incarcerated, defendant gave the ring to Cole's son in exchange for the son posting bond.

Defendant was charged as follows: Count 1: uttering and publishing, Count 2: embezzlement of \$20,000 to \$50,000 from a vulnerable adult, and Count 3: fourth-degree vulnerable adult abuse. Defendant pleaded guilty to the embezzlement charge in exchange for the prosecution's agreement to drop the other two charges. Defendant's recommended sentencing range under the sentencing guidelines was 10 to 23 months incarceration. The trial court departed from the guidelines and sentenced defendant to 46 to 120 months imprisonment.

On appeal, defendant challenges the trial court's scoring of several Offense Variables (OVs). The interpretation and application of the sentencing guidelines involves a question of law that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We review the trial court's scoring of the guidelines' offense variables for clear error. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). A scoring decision is not clearly erroneous if there is any evidence on the record to support the decision. *Id.*

Defendant argues that the trial court erred in scoring OV 19 at 10 points. OV 19 addresses "threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." MCL 777.49. A trial court must score 10 points for OV 19 where a defendant "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). "Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts." *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). For example, "[I]ying to law enforcement officers or private persons that are authorized to investigate a crime may constitute interference with their investigatory function, which is interference with the administration of justice under MCL 777.49(c)." *People v Portellos*, ___ Mich App ___; ___ NW2d ___ (2012) (Slip op. at 10); see also *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007). In addition, conduct that amounts to "self-serving attempts at deception obviously aimed at leading police investigators astray or even diverting suspicion onto others and away from [defendant]" can constitute an attempt to interfere with the administration of justice for purposes of scoring OV 19. *Ericksen*, 288 Mich App at 204.

In this case, there was evidence in the record that supported the trial court's scoring of OV 19 at 10 points. The PSIR indicated that as defendant's fraud began to surface, defendant and her daughter attempted to "cover their tracks" by making false reports to the financial institutions that Cole's checking account had been stolen. In so doing, defendant engaged in a self-serving attempt at deception meant to deflect suspicion away from herself and onto someone else. Defendant's conduct amounted to an attempt to interfere with the administration of justice in that she willfully attempted to avoid criminal charges by trying to deflect the responsibility for

the fraud onto another individual. This evidence supported the trial court's scoring 10 points for OV 19. Therefore, even though the trial court erroneously based its scoring of OV 19 on the fact that defendant's behavior was "predicated on fraudulent documents that are legal in nature," defendant is not entitled to reversal and resentencing on this basis. See *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006) ("[s]coring decisions for which there is any evidence in support will be upheld"); *People v McLaughlin*, 258 Mich App 635, 652 n 7; 672 NW2d 860 (2003) ("this Court will not reverse a trial court's order if it reached the right result for the wrong reason").

Next, defendant argues that the trial court erred in scoring OV 13 at 10 points. MCL 777.43 governs the scoring of OV 13 and it directs a trial court to score 10 points where the offense "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property" MCL 777.43(1)(d). For purposes of scoring OV 13, the statute provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The five-year period is determined by when the sentencing offense took place. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant contends that the trial court used the same acts to score OV 12 and OV 13. A trial court may not consider crimes used to score OV 12 when scoring OV 13, unless the conduct was related to "membership in an organized criminal group or that are gang-related" MCL 777.43(2)(c). Further, "the trial court must score OV 12—and must score it using all conduct that qualifies as contemporaneous felonious criminal acts—before it can proceed to properly score OV 13." *People v Bemer*, 286 Mich App 26, 34; 777 NW2d 464 (2009).

In this case, the trial court did not consider the same acts to score OV 12 and OV 13. The trial court considered defendant's conduct of presenting multiple fraudulent checks for purposes of scoring OV 12. The trial court scored OV 13 based on events described in the PSIR, which included presentation of a fraudulent will, presentation of a fraudulent power of attorney, and the theft of Cole's ring. The trial court did not indicate that it used defendant's conduct of presenting multiple checks considered to score OV 12 to also score OV 13 and defendant's argument to the contrary lacks merit.

Defendant also argues there was insufficient evidence to support scoring OV 13 at 10 points. Defendant's argument lacks merit. In this case, defendant plead guilty to embezzlement from a vulnerable adult, MCL 750.174a(5)(a) (the sentencing offense), which is a crime against property. See MCL 777.16i. In addition to the sentencing offense, the record showed that defendant committed additional crimes against property within a five-year time frame. Specifically, defendant used a fraudulent power of attorney to withdraw \$2,400 from a CD belonging to Cole. She also used the power of attorney to withdraw money from Cole's savings and cashed another CD in excess of \$2,700. The PSIR also states that defendant forged a deed to transfer Cole's property worth over \$350,000 to herself and Williams. Further, defendant and her daughter used Cole's information to open a credit card. All four of these acts constituted additional crimes against property and all were perpetrated within a five-year period when defendant was Cole's primary caregiver from sometime in 2007 until sometime before she was charged in 2010. See MCL 750.174a(5)(a); MCL 777.16i. Further, defendant stole Cole's wedding ring in 2010, which amounted to a larceny, another property offense. See *People v*

Sykes, 229 Mich App 254, 278; 582 NW2d 197 (1998) (setting forth elements of larceny in a building); MCL 777.16r (larceny in a building is a property offense). In sum, the record supported the trial court's scoring OV 13 at 10 points where there was evidence that defendant committed three or more fraudulent criminal acts against a person or property within a five-year period. MCL 777.43(1)(d).

Next, defendant contends that the trial court erred in scoring OV 12 at 10 points. MCL 777.42 governs the scoring of OV 12, and it directs a trial court to score points for contemporaneous felonious criminal acts. A felonious criminal act is "contemporaneous" if both of the following circumstances exist:

- (i) The act occurred within 24 hours of the sentencing offense.
- (ii) The act has not and will not result in a separate conviction. [MCL 777.42(2)(a).]

Importantly, the sentencing offense cannot be considered a "contemporaneous felonious criminal act." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010). Instead, "a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *Id.*

In this case, the trial court scored OV 12 at 10 points. MCL 777.42(1)(c) directs a trial court to score 10 points where "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." The trial court found that scoring 10 points was appropriate because "[i]t does appear there were multiple checks that were in fact presented for payment on the same day, that does indicate sufficient contemporaneous criminal acts within a 24-hour period to support the 10 points."

The trial court erred when it found that scoring 10 points was appropriate because defendant cashed three fraudulent checks within a 24 hour window. Rather, the appropriate inquiry was whether defendant committed three additional criminal acts within 24 hours of the sentencing offense. MCL 777.42(2)(a). Here, the amended felony information stated that the sentencing offense occurred on or about March 10, 2008. The record indicates that defendant engaged in numerous fraudulent transactions, but it is unclear as to when exactly these transactions took place. There is no verifiable evidence that defendant committed three contemporaneous criminal acts within 24 hours of March 10, 2008. Accordingly, the trial court erred in scoring OV 12 at 10 points. However, this scoring error was harmless. Defendant's total OV score was 60 and her OV Level was Level V. Rescoring OV 12 at zero would reduce defendant's total OV score to 50, but her OV Level would remain at Level V and her recommended minimum sentencing range would remain at 10 to 23 months. See MCL 777.16i (embezzlement from a vulnerable adult is a Class D offense); MCL 777.65 (Sentencing Grid for Class D offenses; recommended sentencing range for a defendant with a PRV Level B and an OV Level V (50 to 74 points) is 10 to 23 months incarceration). Therefore, because the scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing on this basis. MCL 769.34(10); *Francisco*, 474 Mich at 89 n 8.

Finally, defendant argues that the trial court did not have substantial and compelling reasons to depart from the sentencing guidelines.

“To deviate from the sentencing guidelines, the trial court must articulate substantial and compelling reasons that are: (1) objective and verifiable; (2) keenly attract the court’s attention; and (3) of considerable worth in deciding the terms of the sentence.” *People v Akhmedov*, ___ Mich App __; ___ NW2d ___ (2012) (Slip op. at 2). “Substantial and compelling reasons justifying a departure exist only in exceptional cases.” *Id.* However, “[t]he trial court may 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 from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.’” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), quoting MCL 769.34(3)(b). Moreover, “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *Id.* at 303 (emphasis in original).

We review the reasons provided for a departure for clear error, while, “the conclusion that a reason is objective and verifiable is reviewed as a matter of law.” *Id.* at 300. “Whether the reasons given are substantial and compelling enough to justify the departure is 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.*

In this case, the trial court made an upward departure of 36 months and explained its rationale as follows:

The amount of money stolen, this crime says \$20,000 or more, it does not score a \$300,000 loss, there is no recognition within the guidelines for someone who could do behavior such as this and show no remorse for it whatsoever and continue to want to pretend as though somehow this was all okay and approved. There is nothing within the guidelines that reflects that.

The multitude of uncharged crimes here, we stopped scoring . . . there are multiple crimes committed here.

The restitution will never be repaid. The breach of trust, the fact that you would do this to your own mother, I guess it’s bad enough if you do it to an employer, but to do this to your own mother.

I don’t know how to properly express the sadness I feel for you. You seem to me to be someone whose [sic] hollow and without a [soul], I don’t know how else you can do this to your own parent.

I do not believe the guidelines appropriately reflect your behavior.

The trial court abused its discretion in concluding that the cited reasons supported an upward departure. With respect to the trial court’s assertion that defendant was “hollow” and did not have a “soul,” this reasoning was not objective and verifiable and could not be used to support the upward departure. *Akhmedov*, ___ Mich App at ___ (Slip op. at 2). The trial court

also referenced defendant's lack of remorse; however, our Supreme Court has explained that a defendant's lack of remorse may not be considered to support a departure from the sentencing guidelines. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000).

In addition, the trial court provided several reasons for the upward departure without first considering whether the relevant OVs accounted for the cited rationale. In particular, the trial court referenced that the sentencing offense only took into account that defendant embezzled \$20,000, when she had actually embezzled \$300,000 from her mother. However, the trial court failed to consider whether OV 16 accounted for the stolen property. OV 16 addresses "property obtained, damaged, lost, or destroyed." MCL 777.46. In this case, OV 16 was scored at 10 points, which is appropriate where a defendant obtained, damaged, lost or destroyed property worth over \$20,000 or had "significant historical, social, or sentimental value . . .", or where a defendant committed wanton or malicious damage beyond that necessary to commit the crime charged. MCL 777.46(1)(a) (b). The trial court failed to consider whether scoring OV 16 at 10 points accounted for the extent of the damage defendant caused and it failed to articulate how OV 16 gave inadequate weight to the characteristic. *Smith*, 482 Mich at 300. Thus, the trial court abused its discretion when it found that the extent of defendant's crime constituted a substantial and compelling reason to depart from the guidelines. *Id.*

Similarly, the trial court failed to consider whether OV 13 accounted for defendant's pattern of felonious criminal behavior when it concluded that the "multitude of uncharged crimes" amounted to a substantial and compelling reason to support a departure. As discussed, OV 13 was properly scored at 10 points in this case where defendant's sentencing offense "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . ." MCL 777.43(1)(d). The trial court did not consider whether OV 13 was scored and it failed to articulate how OV 13 gave inadequate weight to defendant's pattern of criminal behavior. *Smith*, 482 Mich at 300. Thus, the trial court abused its discretion when it concluded that defendant's uncharged criminal conduct amounted to a substantial and compelling reason to support an upward departure. *Id.*

The trial court referenced that defendant perpetrated her crime against her own mother and breached her mother's trust. Again however, the trial court failed to articulate how OV 10, exploitation of a vulnerable victim, did not account for defendant's perpetration of a crime against a vulnerable adult. Here, OV 10 was scored at 10 points, which is appropriate where a defendant "exploited a victim's physical disability, mental disability . . . agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The trial court failed to consider whether scoring OV 10 at 10 points took into account the fact that defendant perpetrated a crime against her mother, a vulnerable adult with whom she shared a domestic relationship. As such, the trial court abused its discretion in concluding that defendant's breach of trust and the victim's vulnerability amounted to a substantial and compelling reason to support an upward departure. *Smith*, 482 Mich at 300.

Finally, the trial court considered that restitution would never be paid. However, even assuming that it was objective and verifiable that defendant was incapable of repaying the restitution, the trial court failed to consider whether the scoring of OV 16 accounted for the extent of the property loss caused by defendant's criminal actions. See *id.*

In sum, we conclude that the trial court failed to cite substantial and compelling reasons to support an upward departure. Accordingly, remand for resentencing is appropriate.² MCL 769.34(11). We note that, on remand, the trial court is not precluded from departing from the recommended minimum sentencing range. However, the court must articulate substantial and compelling reasons to support an upward departure. *Smith*, 482 Mich at 300. To the extent the trial court's rationale has already been taken into account by the scoring of the OVs, the court must make findings of fact to show that a particular characteristic "has been given inadequate or disproportionate weight." *Id.*

For the foregoing reasons, we vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Stephen L. Borrello

² Although we need not address whether the trial court cited reasons to justify the particular 36-month departure that it imposed, *Smith*, 482 Mich at 303, we note that "[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.* at 304. In this case, the trial court failed to give any explanation as to why the 46 month sentence departure was more proportionate than the guidelines' recommended minimum sentence of 10 months. On remand, if the trial court again departs from the guidelines, the court must also articulate reasons to support the *extent* of the departure. See *id.* at 304-307.