

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

TIA MARIE-MITCHELL SKINNER,
Defendant-Appellant.

No. 306903
St. Clair Circuit Court
LC No. 10-002936-FC

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a. She was sentenced to prison for life without parole for the murder conviction and to life for the two other convictions. Defendant appeals as of right. We remand for resentencing on the first-degree murder conviction but affirm the remainder of defendant's sentences.

The victims, defendant's parents, were viciously attacked in their bed in November 2010. Defendant's father was killed in the attack and defendant's mother suffered roughly 25 stab wounds. An investigation led to Jonathan Kurtz, defendant's boyfriend, and James Preston. The investigation also led to the discovery of a map of the neighborhood and a note containing tips on how to break into defendant's house and commit the murders. Cell phone records revealed text messages between defendant, Kurtz, and Preston that indicated that the crime had been planned by all three. During an interview with police, defendant implicated Preston, then implicated Kurtz and Preston, and then admitted that she had talked to Kurtz about killing her parents. Defendant said that Kurtz was going to seek Preston's help.

First, defendant argues that the trial court erred in sentencing her to life without parole on the first-degree murder conviction in violation of *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and the Eighth Amendment. She did not preserve this issue. Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003). The plain error standard of review also applies to constitutional issues. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture for plain error, the defendant carries the burden of proving the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial

rights. *Id.* at 763. Reversal is warranted only if the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764.

The Eighth Amendment prohibits cruel and unusual punishment, which means that punishments for a crime should be tailored to both the offender and the offense. US Const, Am VIII; *Miller*, 132 S Ct at 2463. The Court held in *Miller* that a mandatory sentence of life without the possibility of parole for a juvenile violates the Eighth Amendment. *Miller*, 132 S Ct at 2464. The Court reasoned:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. [*Id.* at 2468.]

However, the Court did not say that life without parole was always inappropriate but that “we require [the sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469. *Miller* does not completely ban life without parole for juveniles. Instead, it “mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.* at 2471.

This Court recently discussed the implications of *Miller* in *People v Carp*, ___ Mich App ___, ___ NW2d ___ (2012). In *Carp*, this Court recognized that *Miller* announced a new rule in sentencing juvenile offenders to life without parole and that it would be “applicable to all cases ‘pending on direct review or not yet final.’” *Carp*, slip op at 23-24, quoting *Teague v Lane*, 489 US 288, 304-305; 109 S Ct 1060; 103 L Ed 2d 334 (1989). Further, this Court recognized that the authority to determine penalties lies with the Legislature but that the judiciary has the power to administer the laws, and because our Legislature has not rewritten the sentencing scheme for juveniles to comply with *Miller*, our trial courts are “caught between the *Miller* Court’s ruling that a mandatory life sentence without parole for a juvenile convicted of homicide is constitutionally defective while simultaneously required by the current statutory scheme in Michigan to impose such a sentence.” *Carp*, slip op at 31. This Court therefore set out parameters to aid trial courts in sentencing juveniles until the statutes are rewritten in accordance with *Miller*. Noting how *Miller* emphasized the necessity of the sentencing court to consider characteristics of both the offender and the offense before sentencing and that an offender’s age is a relevant consideration, *Carp*, slip op at 32, this Court reaffirmed the idea that *Miller* does not require the abrogation of life without parole sentences; instead “a sentencing court must, considering factors of youth, have the discretion to determine whether a juvenile convicted of homicide will have imposed on him or her the harshest penalty of life in prison without parole or be entitled to life in prison with the possibility of parole.” *Id.* at 33-34.

This Court found in *Carp* that MCL 791.234(6)(a) as written and applied to juveniles convicted of homicide was unconstitutional. *Carp*, slip op at 36. This Court determined that the statute failed to acknowledge the discretion of the sentencing court as mandated by *Miller*. *Id.*

This Court then discussed some factors to be considered at the time of sentencing when sentencing a juvenile convicted of homicide. The factors include:

(a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Id.* at 37 (internal quotation marks and citations omitted).]

In this case, defendant was 17 years old at the time of the crime; she therefore was a juvenile for the purposes of sentencing. *Miller*, 132 S Ct at 2460; see also *Carp*, slip op at 39-40. The trial court did not make the necessary determination under *Miller* before sentencing defendant to life without parole for the first-degree murder conviction. The trial court's failure to sentence defendant appropriately is a plain error. *Carines*, 460 Mich at 763. And because MCL 791.234(6)(a) is unconstitutional as applied to defendant, the trial court committed error affecting defendant's substantial rights. *Id.* at 763.

Defendant is entitled to a resentencing at which time the trial court must consider the "characteristics of youth and the circumstances of the offense" before sentencing defendant for the first-degree murder conviction. *Carp*, slip op at 40. Again, the trial court is still permitted to sentence defendant to life without parole, however the proper determination in accordance with *Carp* and *Miller* must be made first. *Id.* at 33-34.

Defendant also argues that the trial court erred in departing from the guidelines for the attempted murder conviction. If the defendant is serving a life without parole sentence, a departure from the guidelines on a concurrent sentence will be moot because a "mandatory life sentence[] effectively nullifies the significance of any sentences for the companion convictions." *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Should the trial court determine that a life without parole sentence is appropriate for the murder conviction, then that sentence would void the significance of any other sentences and defendant's life sentence for the attempted murder would be valid. *Watkins*, 209 Mich App at 5. However, if defendant is not resentenced to life without parole, we conclude that his life sentence for attempted murder should stand.

The Michigan Sentencing Guidelines require a trial court to impose a minimum sentence that falls within the sentencing guidelines range. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). A trial court may depart from the sentencing range only when the trial court has substantial and compelling reasons to do so. MCL 769.34(3); *Buehler*, 477 Mich at 24. However, MCL 769.34(3)(b) indicates that the 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, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."

The trial court may only use reasons that are objective and verifiable to justify a departure from the sentencing guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Factors are objective and verifiable if they are based on “actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). Furthermore, to be substantial and compelling “the reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Babcock*, 469 Mich at 257 (quotation marks and citation omitted). A trial court should find substantial and compelling reasons only in exceptional cases. *Id.* The trial court’s reasons for departure are reviewed for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The conclusion that the trial court’s reasons are objective and verifiable is reviewed as a matter of law. *Id.* Whether the reasons given by the trial court are “substantial and compelling enough to justify the departure is reviewed for an abuse of discretion.” *Id.* An abuse of discretion occurs when “the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

Here, the trial court stated the following substantial and compelling reasons for departure:

. . . [T]he sentencing guidelines do not adequately account for the betrayal of the relationship between a mother and a daughter. A young girl adopted at birth in order to provide her with a safe and secure environment, with loving care, that could not have been received had she remained with her birth mother. For all intents and purposes [defendant’s mother] not only lost her husband that night, but also a daughter whom she had loved and trusted. The betrayal and the death plot that she orchestrated defies explanation.

. . . [T]here is incomprehensible brutality, savagery of the attack upon [defendant’s mother]. She was stabbed nearly two dozen times while she lie sleeping beside her husband in bed. She survived this attack only by sheer [sic] luck. The attending surgeon testified that he had never known anyone to live who had suffered this many wounds.

Finally, the sentencing guidelines do not adequately account for the total detachment from reality and the callous disregard for human life exhibited by all three of you as evidenced by the text messages that were exchanged before and after this horrible crime. Contract killing for \$1,000.00. Money was never even paid. The money that you could not wait to get your hands on so you could buy some video games.

The indications in the text messages were that Kurtz had agreed to other killings as well and at least one of which Preston agreed to join him in. Indications throughout the text messages were that all three of you were anxious, if not excited to complete this murder spree. This was all a game one of the messages said. A game that you cannot lose. A game one of you asked was it fun. Only fun if I get the money.

The day the preparations for this horrible crime was [sic] discussed in these text messages were punctuated with the letters L-O-L, meaning laughing out loud.

If the conspiracy to murder [defendant's mother] is punishable by life imprisonment the actual assault, the vicious repeated stabbing of her should not be punishable by anything less.

The trial court found that defendant's callousness and total disregard for human life was not adequately accounted for by the sentencing guidelines and that it was conveyed via the text messages between defendant, Kurtz and Preston. The trial court's determination is both objective and verifiable, as evidenced by defendant's attitude in the text messages. Additionally, the trial court determined the brutality of the attack, although scored in one of the offense variables, was not adequately accounted for. This reason is also objective and verifiable as evidenced by the numerous wounds and circumstances of the attack. The text messages and the circumstances of the attack are both factors that are external to the mind and capable of being confirmed and therefore are objective and verifiable factors. *Id.* The trial court sufficiently articulated substantial and compelling reasons for departing from the guidelines and therefore, defendant is not entitled to resentencing for the attempted murder conviction.

Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause