

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

UNPUBLISHED  
September 9, 2014

v

DEWAYNE RUFFIN,

No. 316078  
Wayne Circuit Court  
LC No. 11-002374-FC

Defendant-Appellee.

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Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals as of right the judgment of sentence in which defendant was sentenced to concurrent terms of 574 days to 15 years' imprisonment for kidnapping-child enticement, MCL 750.350, and second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years old). We vacate defendant's sentence and remand for resentencing.

I. FACTUAL BACKGROUND

The underlying facts of this case were set forth in the first appeal, *People v Ruffin*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2013 (Docket No. 310039), as follows:

On February 22, 2011, at about 2:00 p.m., the ten-year-old victim was walking to her father's house when defendant, who lived across the street, told her that she should be wearing a hat. The victim further testified that, as she continued to walk toward her father's house, defendant approached her, grabbed her right arm, and forcefully pulled her across the street to his house. Once they got to his house, defendant opened the screen door. But before the inner door was opened, the victim had "a feeling he was about to do something" so she "strength[ed] up and yanked away." She then ran toward her father's house. When she reached the driveway, believing she was safe, she started walking. While in the driveway of her father's house, defendant approached her from behind, grabbed her by both of her arms, turned her around to face him, and then "felt on my butt" with both of his hands.

The victim then ran to her father's house and, once inside, she told her sister about the incident. The victim's sister testified that the victim was shaking

and crying when she described the incident, and seemed scared. The victim's sister then told her older sister, who testified that the victim appeared scared and was crying. An adult in the house was told about the incident and she called the victim's mother and the police. The victim's mother testified that, when she arrived at the house, the victim appeared scared and was crying. The next day, the victim complained about her right shoulder hurting. The following day, she was taken to the hospital because her mother thought the victim's shoulder was dislocated. The treating physician testified that his examination revealed "reproducible tenderness over the trapezius musculature on the right side." This injury was consistent with the history that he had received—a "male attempted to pull her into a home by pulling on her right arm." When asked if it appeared that the victim was "making it up," the physician testified: "No. I believe that the history and the physical examination were compatible with having been assaulted."

At trial, defendant testified that, on the date at issue, he was alone in front of his house shoveling snow. At about 1:00 p.m., he saw the victim walking across the street. He told her she needed a hat. He had no other contact with her and did not see where she went. At about 2:30 p.m., after he finished shoveling the snow, defendant went into his house and fixed his disabled mother lunch. About 40 minutes later, he went back out to shovel snow at a corner store. Defendant testified that he finished shoveling at about 3:30, and returned home. He stayed home until about 6:00 p.m., and then "stepped back outside." When he returned home, he learned from his cousin that the police were looking for him. He did not ask any questions and did not know why the police were looking for him until the victim's stepmother or aunt came over at about 7:30 p.m. Defendant did not call the police or do anything "[b]ecause I know I hadn't did anything." Defendant also testified that he had never had any problems with the victim or her family.

The responding police officer, Matthew Fulgenzi, testified that he was the initial officer who responded to the police run at approximately 4:00 p.m. After his investigation, he went to defendant's house, but defendant was not home. He returned to the home at approximately 9:30 p.m. and arrested defendant. Defendant was charged with kidnapping-child enticement and second-degree criminal sexual conduct. The first trial on this matter resulted in a mistrial after the jury was unable to reach a unanimous verdict. The second jury trial resulted in convictions as charged.

However, after the jury's verdict, defendant moved for a new trial. The trial court granted the motion. The prosecution appealed, and a panel of this Court held that "the trial court abused its discretion when it granted defendant's motion for a new trial because the jury verdict did not result in a miscarriage of justice and was not against the great weight of the evidence." *Ruffin*, unpub at 8.

On remand, the trial court calculated the recommended minimum guidelines range at 51 to 85 months. Instead of imposing a minimum sentence within that guideline range, the trial court stated:

The Court's struggled with this case for some time. I don't think that's any secret to everybody standing, standing here, both by way of the verdict, as well as now the sentencing.

Some cases grab you. This is just one of them that has. No matter what I do isn't going to make anybody necessarily happy.

But that's not my job.

But I have to do what I believe to be right, and what I believe is justice.

And in this case, sending Mr. Ruffin to prison is not justice.

The Court does agree that there are some objective and verifiable factors, not the cooperation part of it. Certainly to his credit, but not as we analyze this.

Certainly his age, his lack of significant prior history, he's been a model prisoner, model tether while on bond, all to his credit.

And for those reasons, the Court doesn't do this often, I don't take it lightly. The Court is going to sentence him to five hundred seventy-four days in the County Jail, with credit for five hundred and seventy-four days.

Although the court attempted to impose a flat sentence of 574 days, the prosecutor objected, contending it was an illegal sentence. The trial court then sentenced defendant to concurrent terms of 574 days to 15 years for both convictions. The prosecution now appeals, arguing that the trial court erred in downward departing from the sentencing guidelines.

## II. SENTENCING

### A. STANDARD OF REVIEW

As we have previously explained:

If the trial court departs from the sentencing guidelines, this Court reviews for clear error whether a particular factor articulated by the trial court exists. A trial court's determination that a factor is objective and verifiable presents a question of law that this Court reviews de novo. This Court reviews for an abuse of discretion the trial court's conclusion that the factors provide substantial and compelling reasons to depart from the guidelines. The trial court abuses its discretion when its result lies outside the range of principled outcomes. [*People v*

*Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012) (quotation marks and citation omitted)<sup>1</sup>.]

## B. DOWNWARD DEPARTURE

The legislative sentencing guidelines provide a range for a defendant's minimum sentence. *Anderson*, 298 Mich App at 183. A trial court may depart from that range if substantial and compelling reasons exist, and the trial court divulges those reasons on the record. *Id.* In order to be substantial and compelling, the reasons relied on must be objective and verifiable, meaning "based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *Id.* (quotation marks and citation omitted). The reasons for departure also must "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Id.* (quotation marks and citation omitted). Furthermore, a court imposing a departure must justify why the particular departure imposed is warranted. *Id.* at 183-184. In other words, "[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." *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008).

If a trial court fails to articulate the substantial and compelling reasons justifying the departure, this Court "must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure." *People v Babcock*, 469 Mich 247, 260-261; 666 NW2d 231 (2003). Moreover, "if 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." *Smith*, 482 Mich at 304.

In the instant case, the trial court identified three reasons for the downward departure: defendant's age, his lack of "significant prior history," and his good behavior while in prison and released on bond. Although the trial court labeled these reasons "objective and verifiable," it provided no explanation for why these reasons were substantial or compelling. The trial court likewise provided no explanation for the extent of the particular departure. Instead, the trial court merely imposed a minimum sentence equal to defendant's credit for time served, as the court felt that "sending Mr. Ruffin to prison is not justice."

The court imposed what it wanted defendant's sentence to be, with an apparent disregard for the guidelines. On this basis alone, a remand is warranted because the "trial judge gave no explanation for the *extent* of the departure independent of the reasons given to impose a departure sentence." *Smith*, 482 Mich at 305-306 (emphasis in original); see also *People v Laidlaw*, 489 Mich 901, 901; 796 NW2d 256 (2011).

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<sup>1</sup> Contrary to defendant's argument on appeal, we do not find this issue abandoned because the prosecution failed to provide us with a copy of the transcripts, as we have before us all of the relevant transcripts.

Furthermore, none of the reasons the trial court listed “keenly or irresistibly grab” the court’s attention. *Anderson*, 298 Mich App at 183. As the Michigan Supreme Court has cautioned: “Substantial and compelling reasons for departure exist only in *exceptional* cases.” *Smith*, 482 Mich at 316 (emphasis added). Here, the trial court did not explain why defendant’s age at the time of the offense, 54, was exceptional rather than unremarkable. In fact, under the particular circumstances of this case, that the jury found that a 54-year old defendant sexually assaulted a 10-year old only seems to highlight the depravity of defendant’s behavior.

As for defendant’s prior criminal record, that was accounted for in defendant’s Prior Record Variable (PRV) score, which totaled 12 points for his prior conviction for domestic violence.<sup>2</sup> “Because the sentencing guidelines make elaborate provision for a defendant’s criminal record and base the recommended minimum sentence in part on those provisions, a trial court may not depart from the recommended minimum on the basis of a defendant’s prior record unless the trial court first finds that the sentencing guidelines gave inadequate or disproportionate weight to the defendant’s criminal history.” *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007). While a downward departure may be warranted based on a defendant’s prior record when considered in conjunction with his age, *id.* at 456 n 1, the trial court in the instant case did not make the threshold finding that the guidelines inadequately or disproportionately accounted for these factors. Furthermore, although defendant’s behavior as a prisoner is commendable, it is not a substantial and compelling reason for a downward departure when considered alone or in light of the severity of the offense.

Therefore, a remand for resentencing is warranted. If the trial court finds that a departure is warranted, the court must identify substantial and compelling reasons for departure. The court also must justify the extent of the particular departure imposed. We also caution the trial court that a substantial and compelling reason must be one that “keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Babcock*, 469 Mich at 258 (quotation marks and citation omitted).

### C. DIFFERENT JUDGE ON REMAND

The prosecution also argues that this case should be remanded to a different judge for resentencing. We agree.

In considering whether to remand to a different judge for resentencing, we consider the following factors:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and

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<sup>2</sup> This conviction is listed in the presentence investigation report, and defendant agreed at sentencing that 12 points for the PRV score was accurate.

duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citation omitted).]

Based on the record before us, there is a reasonable expectation that the trial judge would have substantial difficulty in putting aside his previously expressed views. As this Court observed in the previous appeal, when the trial judge ordered a new trial for defendant, he characterized the prosecution's evidence as "patently incredible," "implausible," and "seriously impeached." *Ruffin*, unpub at 3. At the sentencing hearing following the first remand, the judge acknowledged that it was "no secret" that he had "struggled with this case for some time."

Despite our previous holding that detailed that the evidence was sufficient to sustain defendant's convictions, the trial judge persisted in his belief that sending defendant to prison was "not justice." Rather, the trial judge stated he would do what he believed was "right." The judge not only imposed a sentence that equaled defendant's time served—a sentence that was far below the lowest minimum range recommended—the judge did so without any meaningful analysis of the steps required to impose such a dramatically reduced sentence.

Under these circumstances, reassignment is necessary to preserve the appearance of justice and impartiality. These outweigh considerations of duplication or waste.

### III. CONCLUSION

The trial court failed to articulate sufficient substantial and compelling reasons for a downward departure or justify the extent of the particular departure imposed. We vacate defendant's sentence and remand for resentencing. On remand, the case is to be reassigned to a different trial judge. We do not retain jurisdiction.

/s/ Michael J. Riordan  
/s/ Pat M. Donofrio  
/s/ Mark T. Boonstra