

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SENETA MARLICE STAFFNEY,

Defendant-Appellant.

UNPUBLISHED
February 16, 2006

No. 258797
Muskegon Circuit Court
LC No. 04-050280 – FH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of assaulting, resisting or obstructing a police officer, MCL 750.81d(1), and was sentenced to a prison term of one to two years. Defendant’s conviction stems from her actions when, after police responded to a loud noise complaint at defendant’s birthday party, they tried to arrest her on two outstanding warrants. Defendant appeals as of right, and we affirm.

Defendant first argues that the prosecutor engaged in prosecutorial misconduct when he objected to defendant’s request for an adjournment to locate witnesses and then questioned defendant in regard to her not calling any witnesses and argued in closing arguments that this was not the kind of case where the police felt compelled to secure witnesses. We disagree. This Court reviews preserved claims of prosecutorial misconduct de novo, *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004), and unpreserved claims for plain error affecting defendant’s substantial rights, *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

The prosecutor asked defendant during cross-examination, “And you understand that you have the same right to bring witnesses if you want to?” Defendant argues this question was improper because it shifted the burden of proof. Our Supreme Court has stated the following:

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

“The nature and type of comment allowed is dictated by the defense asserted.” *Fields, supra* at 116. “When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory of evidence.” *Id.*

The theory advanced by defendant in her cross-examination of the arresting officer and the back-up officer made the observations of her guests a legally relevant issue. Defendant questioned the two officers in regard to why they had not taken the names of the guests at her party. Defendant’s theory was that the officers had not taken the names of the guests because then the guests would be called as witnesses and would testify to what they had seen. The prosecutor did not shift the burden of proof in questioning defendant regarding her failure to call corroborating witnesses who defendant implied would not have corroborated the officers’ testimony. Rather, the prosecutor’s question highlighted the improbability of defendant’s theory by pointing out that defendant failed to call witnesses who she knew and whose testimony she implied would have contradicted the officers’ testimony. The prosecutor’s question was proper.

The prosecutor’s question was not made improper by his objection to defendant’s request to adjourn trial so that she could subpoena witnesses. Defendant knew the names of her guests and she had two months to locate them. In addition, defendant presented no evidence that the prosecutor impaired her ability to subpoena her guests in the two months defendant was awaiting trial.

In his rebuttal closing argument, the prosecutor argued that this was “not the type of case” where police feel compelled to get the names of the witnesses. Defendant argues this comment was improper. This Court, in reviewing claims of alleged prosecutorial misconduct, examines the pertinent portion of the record and evaluates the prosecutor’s comments in context. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998). In particular, a prosecutor’s comments must be considered in light of defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003).

When read in context of defense arguments, this comment was not improper. In her closing argument, defendant argued that the two officers did not get the names of the guests at her party because the officers did not want the guests to be called as witnesses. The prosecutor’s comment was a response to this argument. The prosecutor provided the jury with an alternate reason for why the two officers did not take the names of the guests. Because the prosecutor’s comment was made in response to a defense argument, the comment was proper.

Defendant next challenges the sentence imposed by the trial court because it was an upward departure from the recommended sentence under the statutory sentencing guidelines. Generally, a trial court is required to impose a minimum sentence that falls within the statutory sentencing guidelines range. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). A trial court may depart from the range established by the sentencing guidelines only if there is a “substantial and compelling reason” for doing so. MCL 469.34(3); *Babcock, supra* at 255-266. A substantial and compelling reason is one that is “objective and verifiable.” *Babcock, supra* at 270. In addition, a substantial and compelling reason is one that “‘keenly’ or ‘irresistibly’ grabs [the Court’s] attention” and is “of ‘considerable worth’ in deciding the length of a sentence.” *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Further, a 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 from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

Defendant was convicted of assaulting, resisting or obstructing a police officer, MCL 750.81d(1). The recommended guidelines range was 0 to 11 months. MCL 777.68. However, the trial court sentenced defendant to one to two years, an upward departure from the recommended minimum sentence.

The trial court departed from the minimum sentence recommended by the sentencing guidelines because defendant had sixteen prior misdemeanor convictions, defendant was convicted of another misdemeanor after she was convicted in the present case, and defendant had a pending felony charge. The trial court noted that not all of defendant’s misdemeanor convictions were scored under the sentencing guidelines and neither was her pending felony charge. The trial court also noted that many of defendant’s convictions involved assaultive or disruptive behavior similar to her behavior in the present case.

Defendant argues that her misdemeanor convictions and pending felony charge were not a substantial and compelling reason for an upward departure. Specifically, defendant argues that the trial court assigned misplaced weight on her prior misdemeanor convictions because many of the convictions were far removed in time and in similarity from the present case. Defendant further argues that the trial court should have followed the Presentence Investigation Report recommendation of probation with restrictions on use and possession of alcohol, substance abuse testing, and participation in an anger management program. We disagree. This Court reviews the trial court’s determination that objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion. *Babcock, supra* at 264-265.

In reviewing whether a trial court had a substantial and compelling reason to depart from the guidelines, this Court recognizes that the trial court had extensive knowledge of the facts and that the trial court was directly familiar with the circumstances of defendant. *Babcock, supra* at 270. This Court acknowledges that the trial court was in a better position to determine whether a substantial and compelling reason existed to depart from the recommended sentence of the guidelines. *Id.* Given that defendant had sixteen prior misdemeanor convictions, more than double the amount needed to score the maximum points under PRV 5, MCL 777.55(1)(a), that many of the convictions were for either assaultive or disruptive behavior, that defendant has continued her assaultive and disruptive behavior up until her trial, we cannot say the trial court abused its discretion in finding that a substantial and compelling reason existed to depart upward from the sentence recommended by the sentencing guidelines. Because the trial court had a substantial and compelling reason to depart from the guidelines, the trial court did not abuse its discretion by foregoing the recommendation of the PSIR.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood