

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 18, 2014

v

LAURA JOAN ZUGARO,
Defendant-Appellant.

No. 319335
Oakland Circuit Court
LC Nos. 2013-246343-FH
2013-247274-FH

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right her bench trial convictions of two counts of aggravated stalking, MCL 750.411i, arising out of her repeated unwanted contacts with Reid Adomat and Christine Cooper, husband and wife, in violation of several personal protection orders (“PPOs”). Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to concurrent prison terms of 34 months to 10 years. Because there was sufficient evidence to support her conviction¹ and because the trial court articulated substantial and compelling reasons to depart from the sentencing guidelines, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support her conviction with respect to victim Christine Cooper. “This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial.” *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006), citing *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In our evaluation, we view the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Lanzo Constr Co*, 272 Mich App at 474, citing *Wilkens*, 267 Mich App at 738.

¹ As discussed, *infra*, defendant only challenges the sufficiency of the evidence with respect to one of her convictions.

“Aggravated stalking consists of the crime of ‘stalking,’ MCL 750 411h(1)(d), and the presence of an aggravating circumstance specified in MCL 750.411i(2).” *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002).

MCL 750.411h(1)(d) provides that “stalking” is the “willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.”

MCL 750.411i(2) provides the following circumstances that elevate stalking to aggravated stalking:

(a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.

(b) A least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim’s family, or another individual living in the same household as the victim.

(d) The individual has been previously convicted of a violation of this section or [MCL 750.411h].

Here, Cooper testified that defendant called her at work over a hundred times, including 50 in a single day. The evidence also established that defendant made these phone calls willfully; indeed, defendant herself, while not admitting the number of phone calls or the reason for the phone calls, admitted that she had intentionally called Cooper on at least one occasion. Cooper also testified that the phone calls were harassing and threatening and that, as a result of the phone calls, she felt scared and stressed. The above conduct satisfies the elements of stalking under MCL 750.411h(1)(d). Finally, evidence was presented that the phone calls were made during the timeframe in which defendant was prohibiting from contacting Cooper pursuant to several PPOs entered by a court. This circumstance satisfied the “aggravated” requirement under MCL 750.411i(2)(a).

Therefore, there was sufficient evidence to provide beyond a reasonable doubt that defendant had committed all of the necessary elements of aggravated stalking with regard to her actions toward Cooper.

II. DEPARTURE FROM SENTENCING GUIDELINES

Defendant next argues that the trial court failed to articulate a sufficient reason to make an upward departure from the sentencing guidelines. In reviewing a departure from the sentencing guidelines range, whether a factor that may justify an upward departure exists is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 265; 666

NW2d 231 (2003). “Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.” *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d (2012) (quotation marks omitted). Whether a factor is objective and verifiable is reviewed de novo, while whether a factor is a substantial and compelling reason to depart from the guidelines range is reviewed for an abuse of discretion. *Babcock*, 469 Mich at 265, 273. This Court also reviews the amount of the departure for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The trial court abuses its discretion when “the minimum sentence imposed falls outside the range of principled outcomes.” *Id.*

A trial court ordinarily must impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3); *People v Lopez*, 305 Mich App 686, 689; 854 NW2d 205 (2014). “A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The phrase “substantial and compelling” constitutes strong language intended to apply only in “exceptional cases.” *Babcock*, 469 Mich at 257-258. A reason for departure is substantial and compelling where it is “objective and verifiable” and “of considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab[s] the court’s attention.” *Smith*, 482 Mich at 299. A reason is “objective and verifiable” where “the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Defendant’s minimum sentencing guidelines range was calculated to be 0 to 16 months. The trial court, however, made an upward departure and sentenced defendant to a 34-month minimum sentence. The trial court justified its departure by noting that the following reasons “grabbed the court’s attention” and were not “appropriately accounted for in the guideline range”:

Number one, she has violated, uh, PPO violations against the same victims, uh, in a serial manner, therefore, failing to adhere to the court orders.

Number two, there has been a tremendous amount of volume of calls, the severity of the calls, repeated calls and an extended time frame of the calls. It is by . . . the normal language and understanding of our civilization predatory. It is not scorable pursuant to the plain language of the court rules [sic]. It’s also embedded within the charge and it’s also embedded in OV 19 and OV 10, none of those of which allow for the, uh, or appropriate, uh, consideration of the severity, serial nature, the time frame and the volume of all those calls, so, uh, they’re clearly not appropriately accounted for. . . .

[N]umber three is she has directly changed the victim’s lives. We heard, we heard the statement here but also under oath we heard a great deal of testimony with regard to how the lives of the victims were changed in very

material ways. . . . [T]hat's objective, it's verifiable, it happened, uh, but is not clearly accounted for in the guideline range. It is well beyond the normal intimidation or fear or harassment.

I also agree with the People that OV 9 is not appropriately scorable but in the totality of the circumstances it ought to have been, uh, and therefore that also independently justifies the upward deviation.

Defendant on appeal claims that the trial court's determination, that the above factors were given inadequate weight in the guidelines calculations, was incorrect because they, indeed, were scorable under Offense Variable ("OV") 9, 10, and 19. However, defendant failed to explain how these OVs could have been scored at anything other than 0 points each, and her failure to fully brief the merits of her argument results in it being abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Regardless, our review of the three offense variables reveals that they could not be scored anything other than 0 points.

First, OV 9 applies to the number of victims and provides that 0 points are to be scored when there are fewer than two victims who were placed in danger of physical injury or death. MCL 777.39. It is important to note that "[o]ffense variables must be scored giving consideration to the sentencing offense alone." *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). Here, defendant never stalked Cooper and Adomat in person while they were together. She also never contacted them simultaneously over the phone. Accordingly, while defendant stalked two victims, because the stalking was independent of each other, OV 9 could only be scored at 0 points.

Second, OV 10 relates to the "exploitation of a vulnerable victim." MCL 777.40(1). OV 10 is properly scored at 15 points if "predatory conduct was involved"; 10 points if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status"; 5 points if the defendant "exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious"; or 0 points if the defendant did not exploit a victim's vulnerability. MCL 777.40(1). With respect to scoring 15 points, "predatory conduct" is defined as "preoffense conduct directed at a victim." MCL 777.40(3)(a); *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). In the instant case, there was nothing to suggest that Cooper was a "vulnerable victim." Thus, the only relevant possibility was that defendant engaged in preoffense conduct that was directed at Cooper, but there was no evidence to suggest that this occurred. Accordingly, OV 10 could only be appropriately scored at 0 points.

Third, OV 19 addresses a defendant's interference with the administration of justice. MCL 777.49. It is properly scored at 10 points if the defendant "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Apparently, defendant believes that her violating the various PPOs is a ground to find that she interfered with the administration of justice. However, the mere violating of court orders is insufficient to score any points under this OV. See *People v Hershey*, 303 Mich App 330, 343-344; 844 NW2d 127 (2013). Rather, OV 19 is generally scored when a defendant interferes with being apprehended

or perjures herself in a court proceeding. See *id.* As such, defendant serially violating the PPOs is not a ground to score points under OV 19.

Therefore, to the extent that defendant's argument is based on the trial court's alleged failure in determining that OV 9, OV 10, and OV 19 were not scorable, defendant is not entitled to any relief.

Additionally, we conclude that the trial court's proffered reasons were "substantial and compelling" for departing from the sentencing guidelines. In this case, the trial court specifically noted that it did not believe that the facts and circumstances surrounding defendant's aggravated stalking of both Adomat and Cooper could be appropriately accounted for in the guidelines. As previously noted, facts and circumstances that have been given inadequate weight under the scoring guidelines are appropriate to consider for departing from the guidelines range. MCL 769.34(3)(b); *Abramski*, 257 Mich App at 74.

Here, the trial court found that defendant violated the PPOs against the same victims in a "serial manner" and noted that the sheer volume of calls over an extended period of time to both victims constituted substantial and compelling reasons for departing from the guidelines. We note that the stalking statute merely requires "repeated or continuing harassment." MCL 750.411h(1)(d). Thus, the statute and, as already discussed, the guidelines calculations do not take into account the extent of the repeated or continuing harassment, which the court described as "hundreds upon hundreds of phone calls." Thus, we conclude that the trial court did not err in relying on the sheer amount of calls and violations, as the number of transgressions constituted a substantial and compelling reason.

Next, the trial court noted the significant life-altering changes both victims suffered as a result of defendant's actions, which included Adomat changing his work location multiple times, the victims changing their lifestyle by altering the routes they drove and always having to look around for defendant wherever they went, the victims purchasing firearms for protection, and the victims adding a home security system because they were living in fear. The victims noted that the only time they had any peace was when defendant was incarcerated. Again, because the immense impact to the victims was given inadequate weight under the guidelines calculations, we conclude that the trial court did not err in finding this as a substantial and compelling reason to deviate from the guidelines.

In addition to these three reasons that the trial court grouped together for justifying the departure, the trial court also agreed with the prosecution that OV 9 did not appropriately take into account defendant's actions, as she was simultaneously stalking a husband and wife, but was doing it in an independent manner. This resulted in OV 9 being scored at 0 points because, technically, there was only one victim to each of defendant's crimes. However, it is without question that each victim was impacted by defendant's stalking of the other, as well as the stalking they individually were subjected to by defendant's actions. Thus, the trial court did not err in considering this fact as a substantial and compelling reason for departing from the guidelines range.

We note that in the course of her argument, defendant also avers that her sentence is disproportional. To the extent that defendant is attempting to mount a separate challenge to her

sentences, the argument is abandoned because it is not listed in defendant's statement of the questions presented, as required by MCR 7.215(C)(5). See *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007). Regardless, defendant's sole position on this issue is without merit. Defendant claims that the sentence was not proportional by virtue of her "mental condition." However, sentences are to be "proportionate to the seriousness of the defendant's conduct and to the defendant in light of h[er] criminal record." *Babcock*, 469 Mich at 262. Defendant offers no authority supporting her position that a defendant's "mental condition" forecloses a trial court from exceeding the sentencing guidelines. Here, the trial court fulfilled its duty to "justify the particular departure it made by explaining 'why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been,'" by comparing the imposed sentence to where it falls on the sentencing grid. *People v Portellos*, 298 Mich App 431, 453; 827 NW2d 725 (2012), quoting *Smith*, 482 Mich at 304. The court noted that, because of the substantial and compelling reasons it cited, defendant's sentence was consistent to a sentence from an adjacent guidelines cell. Thus, the trial court adequately described why the sentence it proposed was more proportionate, and it did not abuse its discretion. See *Smith*, 482 Mich at 306.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro