STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2003
v	No. 239706 Muskegon Circuit Court
ROGER WAYNE FIELSTRA, Defendant-Appellant.	LC No. 00-045349-FH

Before: Donofrio, P.J., Fort Hood and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of operating a motor vehicle while under the influence of intoxicating liquor ("OUIL") causing death, MCL 257.625(4), and one count of OUIL causing serious injury, MCL 257.625(5). Defendant was sentenced to concurrent terms of ten to fifteen years' imprisonment for both convictions for OUIL causing death, and to three to five years' imprisonment for the OUIL causing serious injury conviction. We affirm defendant's convictions because the trial court properly excluded evidence of an insurance settlement. But we vacate defendant's sentences because we do not find substantial and compelling reasons for an upward guideline departure, and accordingly remand for resentencing.

This case arises from an accident that occurred at 4:22 p.m. on October 7, 2000 on Airline Road in the Township of Fruitport that resulted in the deaths of James Glover and Todd Anderson, as well as the serious injury of Lissette Cepero. Vermaine Mogck was driving a tractor with a farm trailer attached to it approximately sixteen miles an hour on Airline Road. Mogck positioned the tractor so the two right wheels were on the shoulder of the road, and the width of the shoulder of the road allowed him to travel mostly on the shoulder. But, he would periodically swing out onto the main roadway due to the presence of a mailbox. Mogck had no mechanical signals, lights, or "slow moving vehicle" signs on his tractor or the trailer. He also did not use any hand signals when maneuvering. Mogck testified that he was off the roadway when the accident occurred.

Nancy Vallier-Flannery and her husband Larry Flannery were in their vehicle right behind Mogck's tractor. Vallier-Flannery drove up behind the tractor and was traveling at about twenty miles per hour. When she tapped on her brakes to slow down, she noticed that the vehicle traveling immediately behind her, a Jeep Cherokee driven by decedent Todd Anderson and injured passenger Lissette Cepero, slowed down behind her vehicle. Behind the Jeep

Cherokee was defendant's vehicle, a gray Chevrolet pickup truck. Following defendant's pickup was Charles LeMarie's vehicle. Vallier-Flannery had been waiting for an opportunity to pass Mogck's tractor, and when she felt it was safe to pass without crossing the double yellow line she started to move past the tractor when she heard a loud bang and crunch of metal.

LeMarie testified that the Jeep Cherokee attempted to pass the tractor, but the tractor moved to the left making it difficult to pass without crossing the centerline. The Jeep Cherokee braked. Defendant was traveling at about forty-five miles per hour in his Chevrolet truck and did not slow down. Defendant's Chevrolet truck closed in on the Jeep Cherokee. Defendant's vehicle then got close to the Jeep Cherokee. The Jeep Cherokee braked and defendant's Chevrolet truck kept approaching and appeared to be traveling faster than the Jeep Cherokee. Defendant's Chevrolet truck went to the right and struck the right side of the rear of the Jeep Cherokee. LeMarie did not see the brake lights activate on defendant's truck before or at the time of impact. The impact of the collision launched the Jeep Cherokee into the other lane. The Jeep Cherokee then shot across the roadway and collided with an oncoming vehicle, a blue Ford pickup truck driven by decedent Jim Glover.

At the time of the first collision, when defendant's Chevrolet truck hit the Jeep Cherokee, LeMarie saw what appeared to be "a blue cloud" of Pabst Blue Ribbon beer cans. After the second collision, Roy Scarborough, who was traveling in a vehicle behind Glover, testified that he saw defendant get out of his vehicle and saw what looked like a canned beverage in defendant's lap. Several people who lived near the accident site heard the accident and walked over to help. Dan Bolthouse and Rusty Kolka checked on defendant. They spoke with defendant who had a beer between his legs and had been drinking. Defendant asked them to dispose of the beer he had and both Bolthouse and Kolka declined. There were empty beer cans in the back of defendant's truck. Pamela Carr and Daniel Norris also encountered defendant. Carr stated that he smelled like beer and had a beer in his hand. Carr saw him put the beer in the back of his truck, and defendant asked her for gum or breath mints. Norris stated defendant reeked of beer.

After being read his *Miranda*[1] rights defendant explained that he had done nothing wrong while Deputy Jerry Young transported him to the station for a Breathalyzer test. Defendant stated that as he was traveling down Airline Road several cars suddenly stopped in front of him. He stated that he had tried to avoid the vehicle immediately in front of him but he was not able to stop in time. Defendant stated that he believed that he had done nothing wrong because the farm tractor pulling the trailer caused the accident and was at fault. At 6:19 p.m. defendant's bodily alcohol content level registered .24 on a Breathalyzer machine. Several hours later, at 9:35 p.m., defendant's blood was tested, and the alcohol content registered at .20.

Defendant first argues that he was denied his constitutional right to due process and to present a defense when the trial court did not admit evidence pertaining to an insurance settlement. We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Werner*, 254

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Mich App 528, 538; 659 NW2d 688 (2002). "'An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias.'" *Werner, supra*, quoting *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The insurance settlement at issue concerns a settlement between the estate of the deceased James Glover and Vermaine Mogck, the driver of the farm tractor. The prosecutor moved to exclude the settlement from evidence. After significant argument and deliberation, the trial court granted the prosecutor's motion to exclude the evidence under both MRE 401, MRE 402, and MRE 403 (relevance) and MRE 408 (evidence of offers to compromise.) We have reviewed the record and the applicable law and agree with the result of the trial court's decision to exclude evidence of the civil settlement in this criminal proceeding.

Clearly, defendant's theory of the case was that Mocgk's slow moving farm tractor and trailer caused the accident and the resulting injuries and deaths. Defense counsel pointed out in argument outside of the presence of the jury that the personal representative of the estate James Glover settled with Mocgk's insurance company for $75,000 out of a $100,000 policy limit. Defendant asserted that evidence surrounding the civil settlement was relevant and pertinent because the personal representative of James Glover's estate pursued a claim alleging that Mocgk was the cause of the accident.

Our review of the record reveals a multitude of testimony describing every aspect of the accident from many perspectives. This testimony included a significant amount of testimony about Mocgk's farm tractor and trailer's involvement in the accident including the speed it was traveling, the course it took on and off of the roadway, and its lack of warning lights or signs, and signals. The jury also heard testimony from the witnesses regarding their opinions about Mogck's tractor and trailer. LeMarie testified that following the accident he forced Mogck off the road by pulling his car in front of the farm tractor. LeMarie confronted Mogck and told him that "he probably could have caused somebody to be killed back there." Mogck acknowledged at trial that LeMarie stopped him on the road and screamed at him that he caused an accident that killed someone. LeMarie testified at trial before the jury that he thought Mocgk was part of the cause of the accident. Vallier-Flannery testified that she was annoyed with Mogck as he was driving and believed that the farm tractor's presence on the road was ridiculous. Flannery testified that Mogck could have made a better effort to stay on the shoulder of the roadway. Cepero testified that she thought it was "stupid" for the tractor to be on the road traveling so slowly.

The crux of the reason defendant wanted this evidence introduced was to bolster his theory of the case, that Mogck was actually the cause of the accident, rather than defendant. In light of the weighty amount of the eye-witness testimony presented to the jury implicating Mogck as a cause of the accident, we find that the evidence of the civil settlement with Mogck's insurance company, although marginally relevant under MRE 401, should have been excluded as "needless presentation of cumulative evidence." MRE 403. And, this marginally relevant evidence should also have been excluded because its probative value was outweighed by its prejudicial impact. MRE 403. Since the issue is resolved by the application of MRE 401 and MRE 403, we need not reach the issue of whether MRE 408 applies under these facts.

Defendant next argues that he is entitled to resentencing because the trial court exceeded the sentencing guidelines for reasons that were not "substantial and compelling" and that were already taken into account in calculating the guidelines. This Court reviews for clear error the trial court's determination of the existence of a sentencing factor. *People v Babcock (Babcock III)*, ____ Mich. ___; ___ NW2d ___ (Docket No. 121310, filed 7/31/03), slip op p 28, quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that the sentencing factor is objective and verifiable. *Babcock III*, *supra*. The phrase "objective and verifiable" has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, the prosecution, and others involved in the case, and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

We review for an abuse of discretion the determination that the objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence. *Babcock III*, *supra*, at slip op pp 28-29. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id*. at slip op p 29.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock III*, *supra*, at slip op p 26, see also 11 n 13. To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock III*, *supra*, at slip op pp 8-9, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). A substantial and compelling reason "exists only in exceptional cases." *Babcock III*, *supra*, at slip op p 9, quoting *Fields*, *supra*, at 62.

Defendant's Sentencing Information Report (SIR) indicates that his sentencing guidelines range was from forty-three months' to eighty-six months' for the OUIL causing death, MCL 257.625(4); and seven months' to twenty-eight months' for the OUIL causing serious injury, MCL 257.625(5). The trial court departed upwards and sentenced defendant to 120 months' to 180 months' for the OUIL causing death, MCL 257.625(4), and thirty-six months' to sixty months' for the OUIL causing serious injury, MCL 257.625(5).

The trial court identified three factors upon which it grounded its decision to deviate from the sentencing guidelines for defendant's convictions and recorded them on defendant's Sentencing Evaluation Report Departure Evaluation form:

> (1) two people were killed because of defendant's drunk driving, (2) a third victim was seriously injured and may have residual effects from her injuries for the rest of her life, and (3) defendant had a prior conviction for OUIL and open receptacle in a vehicle, which should have alerted him that he had a problem with alcohol and driving. Also, his blood alcohol content was .24, and he was driving with an open beer in his car.

We are satisfied that the factors articulated by the trial court are objective and verifiable. *People v Daniel*, 462 Mich 1, 6-7, 18; 609 NW2d 557 (2000); *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). Plainly, two people were killed in the accident, and a third was severely injured while defendant operated his vehicle with a bodily alcohol content exceeding .20. But

the deaths of Anderson and Glover, Cepero's severe injuries, and defendant's bodily alcohol content were already accounted for in the scoring of the offense variables for these crimes. Regarding defendant's prior conviction, defendant acknowledges in his brief on appeal that his prior conviction was properly not included in the scoring of his SIR but argues that it was improper for the trial court to rely on the conviction as a basis for the upward departure. Defendant's discharge date for his prior OUIL conviction was more than ten years prior to the instant offense and therefore cannot properly be used as a basis in determining defendant's sentence. The final basis the trial court relies on is that defendant was driving his vehicle with an open beer in his truck. We do not find that fact alone, although stunning, constitutes a substantial and compelling reason for departing from a guideline sentence. Therefore, based on the record before us, we do not find that the factors present, singularly or collectively, substantial and compelling reasons for the upward departure. We do not suggest that a sufficient record cannot be made because the record does evidence other behaviors on the part of the defendant that may be considered objective and verifiable for inclusion in an upward departure analysis.

We affirm defendant's convictions, vacate defendant's sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ William D. Schuette