

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DAVID LEE STEPHENS,

Defendant-Appellant.

UNPUBLISHED

April 22, 2021

No. 353678

Macomb Circuit Court

LC No. 2018-003428-FC

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. The trial court initially sentenced defendant to 38 months to 10 years’ imprisonment, using as its basis, conduct for which defendant was acquitted. The same day defendant was sentenced, our Supreme Court issued its opinion in *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019). There, our Supreme Court held that “due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” *Id.* at 629. In consideration of *Beck*, the trial court ordered a resentencing of defendant and at resentencing, defendant’s guidelines were calculated to 0 to 17 months’ imprisonment. The trial court departed upward from the guidelines by imposing a minimum sentence of 24 months. Defendant appealed, arguing that the trial court abused its discretion by departing from the guidelines minimum sentence range and that his sentence is disproportional. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This appeal arises out of an altercation defendant had with the victim, his girlfriend, on September 15, 2018. On the date, defendant came home late and after the victim viewed his phone, she confronted defendant about his interactions with other woman. The couple began to argue and the victim ordered defendant to leave the apartment. He refused. The argument then turned physical, with the victim shoving and hitting defendant. When defendant attempted to restrain the victim, she bit his hand. He then punched her in the lip. The victim then went into the bathroom to clean her bloody lip and defendant followed. Shortly thereafter the victim told defendant: “you

might as well call your daughter now, you'll never see her again, you're going to jail." Defendant then punched the victim in the eye, fracturing the orbital bone in her left eye and knocking her into the bathtub.

Medical personnel were dispatched to the apartment where they determined the victim had suffered (1) blunt head trauma with loss of consciousness, (2) a left orbital floor fracture, (3) multiple linear neck abrasions, (4) left lid ecchymosis (bruising and swelling of the left eye), and (5) scapular contusion (bruising of left shoulder). Doctors determined that the victim's left orbital floor fracture was so severe that she required surgery, involving placement of a titanium plate to serve as a new orbital floor. Because of the swelling of her eye, her surgeon waited four days to perform this surgery. The victim's stay in the hospital lasted five days.

After this incident, defendant was charged with five counts: (a) torture, MCL 750.85; (b) AWIGBH (orbital eye injury), MCL 750.84; (c) AWIGBH(strangulation or suffocation), MCL 750.84; (d) unlawful imprisonment, MCL 750.349b; and (e) interfering with a crime report, MCL 750.483a(2)(b). As previously stated, the jury acquitted defendant on every count except the charge of AWIGBH pertaining to the orbital injury. At defendant's initial sentencing, the trial court assigned 50 points to Offense Variable (OV) 7 on the basis of the conduct for which defendant had been acquitted. This increased defendant's minimum guideline sentence range to 19 to 38 months' imprisonment. The trial court sentenced defendant to 38 months to 10 years' imprisonment. However, at defendant's resentencing hearing, with OV 7 now assigned 0 points, defendant's guidelines minimum sentence range was reduced to 0 to 17 months' imprisonment. As previously indicated, the trial court imposed a minimum sentence of two years' imprisonment—seven months above the ceiling of the guidelines minimum range.

The trial court offered two reasons for its departure. First, the trial court noted that the guidelines did not account for the relationship between defendant and the victim. According to the trial court, defendant assaulted his girlfriend—a person whom he knew loved him, trusted him, and looked to him for comfort and security. This factor, reasoned the trial court, increased the seriousness of defendant's offense. Second, the court considered the severity of the injury to the victim's eye and determined that the guidelines did not fully account for the extent of the injury suffered by the victim, observing: "[t]his [wa]s a punch to a part of the body in which the pain is excruciating [sic] when the orbital bone is fractured."

II. ANALYSIS

On appeal, defendant argues that the trial court abused its discretion by imposing an upward departure sentence because it failed to explain why a departure sentence here was more proportionate than a sentence within the guidelines. Defendant argues that the trial court's reliance on the severity of the victim's eye injury is error because the severity of the injury is already accounted for in OV 3. Also, the trial court could have assigned 50 points to OV 7 if it believed that defendant's crime embodied excessive brutality. According to defendant, a departure sentence cannot be justified by factors that a trial court could have used to score otherwise unscored OVs. Additionally, defendant argues, the trial court's reliance on defendant and the victim being in a dating relationship is "so subjective that it cannot be viewed as a basis for departure."

This Court reviews a trial court's sentence for an abuse of discretion. *People v Lampe*, 327 Mich App 104, 125; 933 NW2d 314 (2019), quoting *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its discretion if it fails to adhere to the principle of proportionality when fashioning a sentence. *Id.* (citations omitted). This Court reviews a trial court's findings of fact at sentencing for clear error. *Id.* at 125-126. Generally, a trial court's findings of fact are clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

The Michigan sentencing guidelines are advisory in nature, and so a trial court's reason for departing from them need only be reasonable. See *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015) (striking down MCL 769.34(3), which required a trial court to articulate a "substantial and compelling reason" for departure from guidelines). "[A] sentence is reasonable under *Lockridge* if it adheres to the principle of proportionality . . ." *People v Walden*, 319 Mich App 344, 351; 901 NW2d 142 (2017). And a sentence adheres to the principle of proportionality if it reflects the seriousness of the circumstances regarding the offense and the offender's criminal history. *Steanhouse*, 500 Mich at 474, citing *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), abrogated by MCL 777.1 *et seq.*, readopted by *Steanhouse*, 500 Mich at 473.

Although the sentencing guidelines provide the "best 'barometer' of where on the continuum from the least to the most threatening circumstances a given case falls[.]" *People v Dixon-Bey*, 321 Mich App 490, 530; 909 NW2d 458 (2017), quoting *Milbourn*, 435 Mich at 656, a sentence outside the applicable guidelines range may be more proportional to a given offense and offender than a sentence within the guidelines range would be. This may be the case if any of the following are true: (1) the guidelines do not accurately reflect the seriousness of the offense; (2) there are factors not considered by the guidelines; and (3) the factors considered by the guidelines are not assigned adequate weight. *Dixon-Bey*, 321 Mich App at 525. In considering the forgoing, if a trial court decides to impose an out-of-guidelines sentence, the trial court must explain on the record why it believes that sentence to be more proportionate to the offense and offender. *Id.*

Addressing defendant's arguments as to the sentence imposed, we note our concurrence with defendant that OV 3 already accounts for the fact that the victim suffered a bodily injury requiring medical treatment. However, such a conclusion does not address the rationale provided by the trial court for its sentence. Here, the trial court concluded that OV 3 did not account for the *extent* of the victim's injury. In its holding, the trial court found that not all bodily injuries requiring medical treatment are the same. The term "'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). And the term "'requiring medical treatment,' . . . 'refers to the necessity for treatment and not the victim's success in obtaining treatment.'" *People v Maben*, 313 Mich App 545, 551; 884 NW2d 314 (2015), quoting MCL 777.33(3). Hence, it becomes apparent that the phrase "bodily injury requiring medical treatment" applies to any number of injuries—from a sprained toe to the loss of a limb. However, as the trial court correctly found, under OV 3, all bodily injuries requiring medical treatment are equal to 10 points regardless of the extent of the victim's pain or the degree of damage to the victim's body. Accordingly, it was not error for the trial court to conclude that OV 3 did not weigh this factor adequately.

Defendant next argues that the trial court could have assigned 50 points to OV 7 if it found that the defendant's crime embodied excessive brutality. However, defendant's assertions that the trial court's findings relative to the extent of the victim's injuries necessarily implicated a scoring of OV 7 are incorrect. A trial court should assign 50 points to OV 7 if "[a] victim was treated with sadism, torture, *excessive brutality*, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a) (emphasis added). A victim is treated with excessive brutality when a defendant treats the victim with "savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018) (citation omitted). Accordingly, for the trial court to assign 50 points to OV 7, it would have to find that defendant treated the victim with savagery or cruelty beyond the usual brutality of AWIGBH. Here, the trial court found that the severity of the victim's injury warranted more than the 10 points added defendant's OV 3 score. At the resentencing, the trial court was careful not to even suggest that defendant's assault went beyond the usual brutality of AWIGBH, lest it run afoul of *Beck*.

Finally, defendant argues that the trial court's reliance on defendant and the victim's dating relationship was so subjective that the trial court could not cite it as a reason for departure. Such an argument runs contrary to holdings of this Court. In *Walden*, 319 Mich App at 352-353, we held that one of the factors a trial court may consider under the proportionality standard is the relationship "between the victim and the aggressor." See also, *Lampe*, 327 Mich App at 126. Relying on that precedent, the trial court reasonably concluded that defendant's relationship with the victim increased the severity of defendant's offense. As we have previously held, the trial court was correct that the guidelines do not account for this aspect of defendant's offense, and it was reasonable for the trial court to conclude that this warranted an upward departure.

Defendant also argues that his sentence is not proportionate and runs afoul of our Supreme Court's holding in *Milbourn*, 435 Mich at 636. Here the trial court exceeded the guidelines by seven months based on the severity of the injury suffered by the victim and the relationship between the victim and defendant. The injury suffered by the victim required a surgical procedure and five days of hospitalization, and defendant does not dispute that at the time of the incident he was living with the victim and in a romantic relationship with her. Hence, the reasons provided by the trial court for its departure were reasonable, and the departure from the guidelines is moderate, especially given the severity of the victim's injury. See *Steanhouse*, 500 Mich at 474 (noting that appellate courts may consider the extent to which a sentence deviates from the guidelines). Accordingly, we conclude that defendant's minimum sentence of two years' imprisonment is proportional to the severity of his offense. Because defendant's sentence is proportional, the trial court did not abuse its discretion, and defendant's sentence is not cruel or unusual punishment in violation of the Michigan Constitution or the United States Constitution. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008); US Const, Am VIII; Const 1963, art 1, § 16.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle