STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAROL ANN BOAK,

Defendant-Appellant.

UNPUBLISHED
June 3, 2021

No. 340201
Clinton Circuit Court
LC No. 16-009711-FH

Before: SHAPIRO, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant originally applied for delayed leave to appeal, but this Court denied her application.[1] Defendant then appealed to our Supreme Court, which held the matter in abeyance until it issued an opinion in *People v Dixon-Bey*, 504 Mich 939; 931 NW2d 302 (2019).[2] Ultimately, our Supreme Court remanded defendant's appeal for consideration as on leave granted.[3] Thus, defendant appeals by leave granted the trial court's May 1, 2017 plea-based sentence after defendant pleaded guilty to producing child sexually abusive activity or material, MCL 750.145c(2); possession of child sexually abusive material, MCL 750.145c(4); and the distribution or promotion of child sexually abusive material, MCL 750.145c(3). The trial court sentenced defendant to 12 to 20 years' imprisonment for the child sexually abusive activity conviction, 16 months to 4 years' imprisonment for the possession of child sexually abusive material conviction, and 48 months to 7 years' imprisonment for the distribution or promotion of child sexually abusive material conviction. We affirm.

[1] *People v Boak*, unpublished order of the Court of Appeals, entered November 9, 2017 (Docket No. 340201).

[2] *People v Boak*, 915 NW2d 363 (Mich, 2018).

[3] *People v Boak*, 505 Mich 867; 935 NW2d 319 (2019).

I. BACKGROUND

This case arises out of defendant sexually abusing a two-year-old girl, CB, possessing and distributing photos of CB's vagina, and possessing and distributing photos of an erect adult penis next to a nine-year-old girl, TB. CB was sleeping at defendant's home when defendant removed her diaper and took a picture of CB in a sexual position with her vagina held open. Defendant sent that picture to codefendant Kenneth Thelen.

Defendant then met codefendant Terry Plowman, and they discussed getting nude photos of TB. Plowman babysat TB and took three photos: one photo of his erect penis against her back, one photo of his penis tucked under her bottom, and one photo of his erect penis next to her head. Plowman texted those photos to defendant. Defendant then texted those photos to Thelen.

Defendant pleaded guilty to producing child sexually abusive activity or material, possessing child sexually abusive material, and distributing or promoting child sexually abusive material. Defendant's minimum sentencing guidelines range was 57 to 95 months' imprisonment for producing child sexually abusive activity or material. However, the trial court sentenced defendant to an upward departure sentence of 12 to 20 years' imprisonment, as noted *supra*. This appeal followed.

II. STANDARD OF REVIEW

On appeal, defendant challenges the departure sentence imposed for the producing child sexually abusive activity of material conviction, arguing that it is disproportionate and therefore unreasonable. We cannot agree.

We review 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 by failing to adhere to the principle of proportionality when fashioning a sentence. *Id*. (citations omitted.) We review a trial court's factual finings at sentencing for clear error. *Id*. at 125-126. "Clear error exists when we are left with a definite and firm conviction that a mistake was made." *People v Abbott*, 330 Mich App 648, 654; 950 NW2d 478 (2018). When a sentence is disproportionate and therefore unreasonable, remand for resentencing is required. *Steanhouse*, 500 Mich at 476.

III. ANALYSIS

The Michigan sentencing guidelines are advisory in nature, and therefore, when departing from them, the trial court's reasoning needs only to be reasonable. *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015). "[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). A sentence adheres to the principle of proportionality if it reflects the seriousness of the circumstances surrounding the offense and the offender. *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 473.

While it may be that 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) (citation omitted), a sentence that upwardly departs from the applicable minimum sentencing guidelines range may be more proportionate to the circumstances surrounding the offense and the offender. "[R]elevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range . . . include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight." *Id*. at 525 (citations omitted). When imposing a departure sentence, the trial court must justify the sentence imposed by explaining why it is more proportionate to the offense and the offender than a sentence within the guidelines would have been. *Id*.

Defendant argues on appeal that when imposing sentences in this case, the trial court did not sufficiently justify why the circumstances surrounding the offense and the offender warranted an upwards departure from the applicable minimum sentencing guidelines range. When imposing a departure sentence, the trial court articulated the following reasoning:

> The Department of Corrections has determined through their—their COMPAS scoring, which frankly it you as anyone—I have no idea what goes in that COMPAS score, that's something internal to the D-O-C, and without having benefit of—looking at the factors and seeing how the risk level is—is calculated, I don't—I acknowledge the D-O-C says you're low risk, I don't have confidence that you're low risk. Why don't I have confidence that you're low risk? Well, I—I looked at the letters that your loved ones sent on your behalf, who painted you in a very positive light—as one would expect of your mother and—and coworker, and you know, the others, but the conduct that you engaged in with—involving these two children, nine and two is heinous conduct, it—it turns my stomach. And I think anyone who were to read or to listen to your plea would conclude the same thing.
>
> I'm also concerned when contemplating one aspect of—of your sentencing, which is rehabilitation, whether that is something truly achievable. It does not surprise me you have trustee status at the jail, you're a good worker. That—that is not inconsistent with what other individuals who have been committed (sic) of sex offenses, you know, do. It's very possible to lead what I would call a double life, or to project an image that on the surface seems beyond reproach, when yet there is a very disturbing and—and ugly side that nonetheless exists. I am concerned when I think about public safety. Again, recognizing the D-O-C says you're low risk, but I hear blaming the codefendant, I've heard you say you're sorry, but you have never apologized to either of your two victims—
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> * * *
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> I certainly am mindful that today, [the victim's mother], who has bravely attended your sentencing and your codefendants sentencings once again has stood up and given a very heartfelt plea on behalf of her nine year old, whom you violated. And that to the Court suggests that, you know, there is a long road. Having heard from the nine year old in one of your codefendant's sentencings, I can tell you she is strong, she is bright, and I have said she's the bravest nine year old I have ever come to know.

* * *

> So, you know, I—I also contemplate the—the other function of sentencing, which is deterrence and the need to make an example so that others who may be teetering for whatever reason—and frankly, I don't buy into the fact that it was your divorce and your relationship with one of your codefendants that caused you to engage in this activity. Without a willingness, it wouldn't have happened.
>
> I am mindful that I did give [a codefendant] eight years for his offense on the minimum, and that was because of very similar considerations, that in comparing what the Department of Corrections and the guidelines looked like that they were inadequate. I similarly find that they are inadequate in your situation for all of the—the reasons that I have indicated. It would not be reasonable nor just under the circumstances to impose a sentence within the guidelines range of fifty-seven to ninety-five months on the minimum, and therefore as to count one, sexual—child sexually abusive activity involving the two children, the Court's sentence is that you be sentenced to the Department of Corrections for a period of twelve years on the minimum to twenty years, with credit for two hundred seven days served, and you will serve that concurrently with counts two and three.

On the basis of the foregoing, we conclude that the trial court properly determined that the sentencing guidelines in this case did not adequately account for the circumstances surrounding the offense. The trial court properly considered the seriousness of defendant's conduct, which included the sexual assault and exploitation of two very young minor females. The trial court further considered the effect on the victims, and the fact that defendant failed to take responsibility for her role and apologize to the victim without making excuses for her behavior. Finally, the trial court noted defendant's willingness to participate in this type of activity with her codefendants; that without defendant being a willing participant, it may not have occurred. Thus, we conclude that the trial court did not abuse its discretion by imposing a sentence that upwardly departed from the minimum sentencing guidelines range.

Affirmed.

/s/ Kathleen Jansen

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BECKERING, J. (*concurring*).

After a careful review of the record, including the presentence report and sentencing transcript, I concur with the majority opinion affirming defendant's sentence. The record fully supports the trial court's finding of no confidence as to whether defendant is at low risk of re-offending. It supports the trial court's finding that defendant's crimes upon the two young victims, aged two and nine at the time of the offenses, were "heinous." It supports the trial court's concern that defendant, who was living a "double-life" during the predatory sexual crimes on children for which she was convicted, would do so again, requiring deterrence of her conduct and would serve to deter similar conduct by others. The record also fully supports the trial court's interpretation of defendant's statements in the presentence report and at trial as not truly accepting personal responsibility for her own conduct and her own decisions, such that it called into serious doubt defendant's ability to be rehabilitated and the public's ability to be safe around her. Moreover, the trial court referenced the nine-year-old victim's impact statement made at the codefendant's sentencing and her guardian's statement at defendant's sentencing, both of which highlighted the victim's trauma and the impact the offense has had on her life. As a result, the record supports the trial court's conclusion that a sentence within the guidelines would not be reasonable or just under the presenting circumstances. See *People v Dixon-Bey*, 321 Mich App 490, 525 n 9; 909 NW2d 458 (2017) (stating that other factors a court can consider to determine whether the sentencing guidelines are proportionate to the offense include the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation) (quotation marks and citations omitted).

While the trial court did not detail how it selected a sentence of 12 years out of a maximum of 20 years for Count I, it did state that it did so for all of the reasons the court concluded that a sentence within the minimum guidelines range was neither reasonable nor just. See *People v Babcock*, 469 Mich 247, 260 n 14; 666 NW2d 231 (2003) (explaining that while determining a sentence, a court is not required to "explain why it chose a twelve-month departure as opposed to an eleven-month departure," rather, the court is required is explain why the departure is justified). Considering the circumstances present in this case, I find no abuse of discretion on the part of the trial court. The trial court correctly considered the calculated guidelines, and then applied the principle of proportionality, by thoroughly analyzing "the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 460; 902 NW2d 327 (2017) (quotation marks and citation omitted). See also *People v Walden*, 319 Mich App 344, 355; 901 NW2d 142 (2017) (stating that "[g]reater trial court discretion constricts an appellate court's wherewithal to find an abuse of discretion"). Consequently, I agree with the majority opinion to affirm the trial court's sentences in this case.

/s/ Jane M. Beckering

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SHAPIRO, P.J. (*dissenting*).

I respectfully dissent and would remand for resentencing. Defendant, a 51-year-old woman with no prior criminal history, was sentenced to a minimum term of 144 months. The relevant guideline range was 57 to 95 months and the presentence investigation report recommended a minimum term of 72 months. The highest sentence that could have been imposed under *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), would have been 160 months. Thus, the sentence imposed was a substantial departure from the presumptively-proportionate sentencing guidelines and only 16 months short of the maximum-minimum that could have been imposed. In my view, the trial court's reasons for exceeding the guidelines were insufficient to establish a proportionate sentence.

In *People v Dixon-Bey*, 321 Mich App 490, 523-25; 909 NW2d 458 (2017), this Court set forth the relevant standards for reviewing a sentence that exceeds the guidelines:

> When our Supreme Court adopted the principle of proportionality in *Milbourn*,[1] it noted that it did so, in part, to "effectively combat unjustified disparity" in sentencing. Therefore, "[o]ne of the purposes of the proportionality requirement is to minimize idiosyncrasies." The *Milbourn* Court pointed to the sentencing

[1] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

guidelines as an aid to accomplish the purposes of proportionality, noting that they were "a useful tool in carrying out the legislative scheme of properly grading the seriousness and harmfulness of a given crime and given offender within the legislatively authorized range of punishments." In *Smith*,[2] our Supreme Court reiterated that the sentencing guidelines "provide[ ] objective factual guideposts that can assist sentencing courts in ensuring that the offenders with similar offense and offender characteristics receive substantially similar sentences."

More recently in *Steanhouse*,[3] our Supreme Court noted that the Legislature had incorporated the principle of proportionality into the legislative sentencing guidelines. In the same opinion, our Supreme Court repeated its "directive from *Lockridge* that the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts " 'must consult' and 'take . . . into account when sentencing . . . .' " " Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a "useful tool" or "guideposts" for effectively combating disparity in sentencing. Therefore, *relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight*. When making this determination and sentencing a defendant, a trial court must " 'justify the sentence imposed in order to facilitate appellate review,' " which "includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." [Emphasis added; citations omitted.]

In imposing a sentence well above the guidelines range, the trial court in the instant case did not indicate that there were sentencing factors not taken into consideration by the guidelines nor did it conclude that there were factors the guidelines did not weigh sufficiently. The trial court indicated that it was exceeding the guidelines because: the conduct was "heinous" and "turns my stomach"; concern about public safety; the need to establish deterrence for others who might commit such a crime; defendant did not offer an apology until sentencing and in the court's view the apology was insufficient because it did not address the victims directly.

As the Supreme Court stated in *Milbourn*, 435 Mich at 653-654, "[A] trial court appropriately exercises the discretion left to it by the Legislature *not* by applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination."

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[2] *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

[3] *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017).

It is difficult to imagine a circumstance in which the production of child sexually abusive material is not heinous or stomach turning. But there was nothing in this crime that made it more heinous than many others. Arguably, it was less heinous as the child was two years old, asleep, has no memory of the single incident and there was no penetration involved.[4] The trial court's concern for public safety and deterrence was certainly proper, but the court offered no reason why those interests would not have been satisfied by a prison sentence within the guidelines. The Department of Correction's COMPAS evaluation indicated that defendant was a "low risk" for recidivism. The trial court stated that it did not agree with that finding but offered no explanation for its conclusion other than its observation that child sex offenders can live a double life, appearing beyond reproach which masks their ugly side. While this is typically so, it does not speak to the question whether defendant's conduct and history sets her apart from those sex offenders sentenced within the guidelines.

The trial court also noted that a second child was victimized for which defendant pleaded guilty to one count of possession and one count of distribution of child sexually abusive material and received prison sentences for each. The photos of that nine-year-old child[5] were taken by a codefendant and defendant was not present when they were taken, although she clearly participated in discussions about obtaining them and after receiving copies sent them to the other codefendant, Kenneth Thelen, who was her boyfriend and introduced her to child pornography. In light of these two concurrent convictions, defendant was scored 20 points for PRV 7 (her only PRV points) as well as 25 points for OV 13, thereby raising the relevant guideline grid from 24 to 40 months to 57 to 95 months. The trial court did not comment as to why this increase in the guideline range inadequately accounted for the two other offenses, each of which carried a lesser sentence than production, and for which defendant was also sentenced.

The court indicated that the defendant's apology was inadequate to show actual remorse. Defendant's statement reads in pertinent part:

> I did so well for so long. When I left my marriage, I got a whole lot of things going in a good direction. My kids—I raised my kids, I was raised with the right boundaries, and I raised my kids with the right boundaries. This was never, never a thought in my mind, never, I can say that. And then I went bad. My kids are living their lives, they're living good lives. And then I met Mr. Thelen, and he

[4] This is not to suggest that characterizing the actions as "heinous" was incorrect. While the two year old was asleep, defendant removed the child's pants and diaper and took a photo of her "in a sexual position with her vagina held open." She then sent the photo to her boyfriend of two years, Kenneth Thelen, who was a codefendant.

[5] The child in these photos was fully clothed but in each photo codefendant Plowman is present, with whom defendant was also intimate. Although this second victim was also not penetrated, Plowman exposed his erect penis and placed it against or near the child who was awake and aware of his conduct. Plowman was sentenced to a minimum term of eight years. The other codefendant, Thelen, who encouraged both Boak and Plowman in these activities, was allowed to plead guilty to attempted production of child sexually abusive material and sentenced to a minimum term of 14 months.

> opened up a world that I never, ever been a part of, and I am beyond sorry. I—I stand here taking responsibility for my actions because they were wrong, I know they were wrong. And it was eating at me, you really must know it was eating at me. I could not handle it anymore, I couldn't —it was things he introduced me to and I stand before you saying that, that is my conscience, that is my heart. I worked hard—I worked so hard to do good for so long, but I know I have to take—I am taking responsibility, I know there's punishment, I know that—that is a part of this system, I understand, more than understand, and I've never been more sorry about anything in my entire life. It—it's not anything that will ever—I —I worked hard. I started counseling, and I still write to my counselor. I spoke with mental health at the—at the facility, I can't have an outside therapist come in, that's fine. Rules were meant to be followed, rules are set for a reason, I understand that, completely understand that, and it will not happen, I want no part of it. And I am very, very sorry for what transpired. I don't want—I didn't want any more part of it—one individual wanted to pursue more and I said no, I said no, so no more.

The trial judge was present when the defendant made this statement and I would defer to her conclusion that the apology was not directed at the victims and so therefore less worthy of belief. Nevertheless, I do not believe that the trial court's reasons justified a departure sentence, at least not one of this degree, and would remand for resentencing.

/s/ Douglas B. Shapiro