

Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

Elizabeth T. Clement,
Chief Justice

163815

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163815
COA: 354623
Saginaw CC: 18-045702-FC

JOSE TELLO, JR.,
Defendant-Appellant.

_____/

By order of April 5, 2022, the application for leave to appeal the September 30, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Posey* (Docket No. 162373) and *People v Stewart* (Docket No. 162497). On order of the Court, *Posey* having been decided on July 31, 2023, 512 Mich ____ (2023), and *Stewart* having been decided on July 31, 2023, 512 Mich ____ (2023), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration in light of *Posey*.

We do not retain jurisdiction.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE TELLO, JR.,

Defendant-Appellant.

UNPUBLISHED

September 30, 2021

No. 354623

Saginaw Circuit Court

LC No. 18-045702-FC

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

PER CURIAM.

Defendant sexually assaulted a young boy in October 2018. Defendant lured the victim into his vehicle by claiming he needed help driving and asking the victim if he would like to learn how to drive. The victim said that he would like to learn and entered defendant’s vehicle. Defendant drove to a secluded road, allowed the victim to drive the vehicle for a short period, and then drew a knife and sexually assaulted the victim. The victim escaped and ran to a nearby house for help.

Defendant pleaded *nolo contendere* to kidnapping, MCL 750.349(1)(f); MCL 750.349(3), felonious assault, MCL 750.82(1), and three counts of first-degree criminal sexual conduct (CSC-I) (personal injury), MCL 750.520b(1)(f). The trial court sentenced defendant to serve 450 to 900 months of imprisonment for his kidnapping and CSC-I convictions, and 24 to 48 months of imprisonment for his felonious-assault conviction. Defendant appeals by delayed leave granted,¹ arguing that his within-guidelines sentences for kidnapping and CSC-I are unreasonable and disproportionate.

“This Court reviews the proportionality of a trial court’s sentence for an abuse of discretion.” *People v Foster*, 319 Mich App 365, 375; 901 NW2d 127 (2017). “A given sentence

¹ *People v Tello*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354623).

constitutes an abuse of discretion if that sentence violates the principle of proportionality” *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003).

We note that defendant argues in his reply brief that MCL 769.34(10) is no longer valid in light of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), which rendered the sentencing guidelines advisory. Defendant, however, failed to raise this argument in his delayed application for leave to appeal, and this Court granted defendant’s application “limited to the issues raised in the application and supporting brief.” *People v Tello*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354623). Accordingly, this issue is not properly before us and, therefore, we decline to address it further. *People v White*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 352999); slip op at 4 n 3; MCR 7.205(E)(4).

We now consider the only question properly before us: whether defendant’s within-guidelines sentences were reasonable and proportionate to the offense and the offender. “When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.” *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), citing MCL 769.34(10). “[T]his Court is required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines.” *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). In contrast, a sentence that falls within the appropriate sentencing guidelines range “is presumptively proportionate and must be affirmed.”² *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017), reversed on other grounds 504 Mich 929 (2019).

² There is case law supporting the proposition that a within-guidelines sentence can be disproportionate when particularly unusual circumstances are present. See, e.g., *People v Lee*, 243 Mich App 163, 187; 662 NW2d 71 (2000). Defendant, however, has not identified any unusual circumstances that are sufficient to render his sentences disproportionate. He argues that his sentence was excessive on the basis of his background because he showed remorse, did not have a recent criminal history, served in the National Guard, was employed, graduated high school, is close with his family, and suffers from health issues. These factors are not unusual circumstances sufficient to overcome the presumption of proportionality. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994) (stating that “the factors cited by defendant, i.e. his employment, lack of criminal history, and minimum culpability, are not unusual circumstances that would overcome that presumption”). See also *People v Bowling*, 299 Mich App 552, 558-559; 830 NW2d 800 (2013) (explaining that the “defendant’s age is insufficient to overcome the presumptive proportionality of his sentences”).

Defendant's sentences fall within the applicable guidelines range, and he does not challenge his sentencing guidelines scores on appeal or argue that he was sentenced based on inaccurate information. Thus, we must affirm defendant's sentences. See *Schrauben*, 314 Mich App at 196.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle