STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 22, 2001
v KENNETH RAY BUHL, JR., Defendant-Appellee.	No. 227115 Oakland Circuit Court LC No. 99-168891-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENNETH RAY BUHL, JR., Defendant-Appellant.	No. 227951 Oakland Circuit Court LC No. 99-168891-FC

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, defendant and the prosecution appeal as of right from a jury trial conviction for kidnapping[1], aggravated stalking[2], and felonious assault[3]. Defendant was sentenced to concurrent sentences of five to twenty years in prison for the kidnapping conviction, one to five years in prison for the aggravated stalking conviction, and one to four years in prison for the felonious assault conviction. We affirm the convictions, but vacate the sentences and remand for resentencing.

[1] MCL 750.349; MSA 28.581.

[2] MCL 750.411i; MSA 28.643(9).

[3] MCL 750.82(1); MSA 28.277(1).

Basic Facts and Procedural History

Defendant and the victim were involved in a relationship that lasted approximately 4 ½ months. Shortly before the relationship terminated, defendant was charged with domestic violence against the victim. A "no-contact order" was issued prohibiting defendant from any contact with the victim. Despite this "no-contact order", defendant made multiple contacts, both in person and by phone.[4]

On July 26, 1999, while on bond for the domestic violence charge, defendant appeared at the victim's employment. He confronted the victim with a large kitchen knife and although the victim attempted to avoid the knife, she was cut on the stomach. Defendant thereafter attempted to shove a washcloth in her mouth, took the victim's car keys and pushed her into her van. He drove away and kept her for approximately one hour. After she agreed not to call the police, defendant drove back and released the victim one block from her employment. The police were notified and the victim was taken to the hospital for treatment. While at the hospital, defendant paged the victim and authorities arrested defendant when he appeared at the hospital.

Still another "no-contact order" was issued. Despite this second order, defendant telephoned the victim from jail approximately thirty times, ultimately, resulting in the revocation of defendant's phone privileges. Thereafter, in lieu of phoning, defendant wrote letters to the victim. At least four "no-contact orders" were issued.

A jury found defendant guilty of kidnapping, felonious assault and aggravated stalking. The presentence report recommended a minimum sentence of 126 to 210 months, but the parties agreed at sentencing that the guidelines had been improperly scored, and stipulated that the proper minimum sentence range was 108 to 180 months. In imposing sentence, the trial court deviated from the guidelines stating:

> "Well, no means no and you certainly did put her in fear, however I think there's reason to deviate somewhat because I think you are truly remorseful and because you did in fact bring the victim back …."

The trial court did not complete or attach a departure evaluation to the presentence report.

On appeal, the prosecution contends that the trial court erred by departing from the statutory sentence guidelines when imposing defendant's sentence. Defendant argues that he was denied a fair trial by the prosecutor's misconduct and his own counsel's ineffectiveness.

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[4] Over the three weeks between defendant's arrest for domestic violence and the instant offense, defendant phoned the victim eight times, paged her at least four times, showed up at her house and place of employment, and made personal contact with her on numerous other occasions.

Deviation from the Guidelines

The prosecution argues the defendant's "remorse" and "bring[ing] the victim back" to the scene of the kidnapping and assault are not substantial and compelling reasons to depart from the statutory sentence guidelines. We agree.

The sentencing guidelines[5] apply to crimes committed on or after January 1, 1999. *People v Babcock*, 244 Mich App 64, 71-72; ___ NW2d ___ (2000). The statute mandates that this Court remand a matter for resentencing if "the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range."[6] The existence of such a reason must be objective and verifiable. *Id.* at 75. Whether a factor giving reason to depart from the guidelines does or does not exist, is reviewed by this Court for clear error. A trial court's determination that a particular factor is objective and verifiable is to be reviewed de novo as a matter of law, and the conclusion "that the objective and variable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion." *Id.* at 76, quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). An abuse of discretion is found where an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the trial court's ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000); see also *Babcock, supra*, 244 Mich App 76.

In the instant case, the trial court merely stated that it was departing from the sentencing guidelines because defendant was "truly remorseful" and defendant "did in fact bring the victim back." The trial court did not articulate any additional reasons for the departure, and failed to attach a departure evaluation to the presentence report.[7]

We find that these justifications are not substantial and compelling reasons to depart from the guidelines. A defendant's remorse, being a subjective and unverifiable factor, is not a proper basis for a downward departure from the sentencing guidelines, set forth by statute. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000); *Fields, supra*, 448 Mich 69, 80.[8] Similarly, the fact that defendant returned the victim to a place within one block of her employment after

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[5] MCL 769.34(1) and (2); MSA 28.1097(3.4)(1) and (2). The guidelines themselves are found in Chapter XVII of the Code of Criminal Procedure, MCL 777.1 *et seq.*; MSA 28.1274(11) *et seq.*

[6] MCL 769.34(11); MSA 28.1097(3.4)(11).

[7] A sentencing court may deviate from the range delineated by the applicable guidelines. To minimize the risks of relying on misinformation, evaluate the effectiveness of the guidelines, and facilitate appellate review, the sentencing court must articulate its reasons for departure both on the record at sentencing and on the sentencing information report. *People v Bennett*, 214 Mich App 511 (2000), *citing People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987).

[8] In *Babcock, supra*, 244 Mich App 74, this Court noted that because the Legislature chose to use the "substantial and compelling reason" standard in the new sentencing guidelines without defining the standard within the context of the new statute, the Legislature was presumed to agree with the Supreme Court's construction in *Fields, supra*, 448 Mich 69, of the identical standard found in the controlled substances act.

cutting her with a knife and keeping her in a van for an hour, cannot be considered a substantial and compelling reason to deviate from the guidelines.

On this record, we conclude that the trial court had no justification or excuse for its conclusion that objective and variable factors were present in the instant case which would constitute substantial and compelling reasons to depart from the statutory minimum sentence. Accordingly, we vacate the sentence and remand for resentencing.

Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct in her closing arguments. We disagree.

Because defendant failed to object to the remarks at trial, this issue is not properly preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Thus, our review of the prosecutor's remarks is limited to plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We review issues of prosecutorial misconduct on a case by case basis, examining the prosecutor's conduct in the context of the record. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The question we must answer on appeal is whether the alleged misconduct denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant first claims that the prosecutor appealed to the jury's civic duty to convict defendant by comparing his actions to an armed robbery in an unsafe neighborhood. It is prosecutorial misconduct to make "civic duty arguments that appeal to the fears and prejudices of jury members." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). However, the prosecutor's statements in the case at bar, directly addressed defendant's more-than-implied argument that his victim was to blame for what happened. Although defendant cites authority for the proposition that prosecutors may not appeal to a juror's civic duty to convict a defendant, he fails to provide any support that the prosecutor's statements in the instant case were such an appeal.[9] Defendant "may not leave it to this Court to search for authority to sustain or reject [his] position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987); see also *People v Jensen*, 231 Mich App 439, 457; 586 NW2d 748 (1998). Therefore, we do not believe that the prosecutor's comments rises to the level of an impermissible civic duty argument.

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[9] In contrast to the two limited examples cited by defendant, the prosecutor did not urge the jury to rid the community of criminals or suggest the consequences of a not guilty verdict. See *People v Sterling*, 154 Mich App 223, 233; 397 NW2d 187 (1986) (prosecutor made an "improper appeal to the civic duty of the jury to rid the community of rapists."); *People v Biondo*, 76 Mich App 155, 157-158; 256 NW2d 60 (1977) (prosecutor discussed the City of Detroit's crime problem and told the jury that business would leave the city if it was allowed to continue); *People v Meir*, 67 Mich App 534, 536-538; 241 NW2d 280 (1976) (prosecutor warned the jury that defendant might sell drugs to their children and that a not guilty verdict would cause defendant to tell his friends they could sell drugs.)

Next, defendant complains that the prosecutor directly addressed a member of the jury by referring to a question the juror asked in voir dire. However, defendant provides no legal authority for his bare assertion that, "[p]ersonally addressing a juror during summation, blatantly violates every standard and ethic governing an attorney's conduct during trial and breaches the confines of impartiality that guarantees a fair trial." Again, defendant cannot rely on this Court to find authority to support his argument. *Jensen, supra* at 457; *Keifer, supra,* at 294.

Finally, the defendant contends that "[t]he prosecutor denied defendant a fair and impartial trial by directly informing the jury that defendant, not the prosecutor, requested lesser included offenses." Although this Court has held that it is improper for a trial court to inform the jury as to the source of requested instructions, such an error is not grounds for reversal absent a miscarriage of justice. *People v Gray*, 57 Mich App 289, 298; 225 NW2d 733 (1975); *People v Fry*, 55 Mich App 18, 24; 222 NW2d 14 (1974). Such is not the case here.

In the instant case, the trial court repeatedly instructed the jury that the attorneys' arguments were not evidence, and further explaining that the jury must base its verdict only on the evidence presented. Therefore, even if the prosecutor's statements were objectionable, which we do not find, those statements nevertheless would have been cured by the trial court's instructions. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Thus, we conclude that defendant was not denied a fair and impartial trial by the prosecutor's alleged misconduct.

Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance was objectively unreasonable and that he was prejudiced by such deficient performance. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must also overcome a presumption that the challenged actions of trial counsel were trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). A defendant must create a record in the trial court by moving for a new trial or evidentiary hearing. *People v Ginther*, 390 Mich 436; 443; 212 NW2d 922 (1973). Failure to do so limits this Court's review to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Because we conclude that the prosecutor's comments did not prejudice defendant, there is no merit to his argument that trial counsel's failure to object to the statements denied defendant the effective assistance of counsel. Furthermore, defendant fails to rebut the presumption that defendant's trial counsel failed to object to the prosecutor's statements as a matter of trial strategy. *Stanaway, supra* at 687; *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Accordingly, we affirm the defendant's convictions, but vacate the sentences and remand for re-sentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper