

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 25, 2002

v

DONTE TARRELLE COLEMAN,

Defendant-Appellant.

No. 231700
Genesee Circuit Court
LC No. 00-006448-FC

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of second-degree murder, MCL 750.317, and possession of a firearm in the commission of a felony, MCL 750.227b. He was sentenced to a term of forty to seventy years' imprisonment on the murder charge and the mandatory two years' imprisonment on the felony-firearm charge. On appeal, defendant challenges the sufficiency of the evidence to support the murder conviction and the adequacy of the reasons for the trial court's upward departure from the sentencing guidelines for the murder conviction. We affirm.

I

The facts are essentially undisputed and reflect a senseless murder of an unarmed victim.

On July 4 and 5, 2000, there was a gathering of friends and family at a home in the City of Flint. By all accounts, the victim, nineteen-year-old Larry Taylor, was intoxicated. Defendant, a sixteen-year-old who had also been drinking, and Taylor got into a verbal confrontation over a remark Taylor made about "dead-beat dads."¹ The confrontation did not come to blows and before defendant drove² away, he told Taylor that he would be back and that he "had something" for Taylor.

¹ Defendant had fathered a child with a young girl the year before, and the child's first birthday was the Fourth of July. Defendant's even younger current girlfriend was pregnant at the time of this incident and both girls were at the gathering.

² Defendant's mother testified at trial that defendant did not have a driver's license.

Defendant returned a short time later with his mother and his pregnant girlfriend. His mother got out of the car and verbally confronted Taylor, who was in the middle of the street and who apparently made no response to her harangue. Meanwhile, defendant retrieved a gun from the trunk of his car³ and proceeded toward Taylor carrying the weapon down by his side. There was testimony that members of the group warned Taylor that defendant was approaching and was armed.

When Taylor turned to face defendant, Taylor put his hands up, palms outward and said words to the effect, “If you are going to shoot me, you better kill me,” whereupon defendant shot Taylor in the head and then fled the scene with his mother and girlfriend. The police and an ambulance were called, and Taylor was taken to the hospital where he died shortly afterwards. The testimony of the medical examiner was that Taylor would have lost consciousness immediately from the gunshot wound to his head.

II

Defendant first argues that there was insufficient evidence to support the murder conviction because there was adequate evidence of provocation on the part of the victim to reduce the homicide to voluntary manslaughter. We disagree. In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find all the elements of the offense proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To prove the elements of second-degree murder, the prosecution must prove beyond a reasonable doubt “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The definition of malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm. *Id.*

In order to reduce homicide to voluntary manslaughter, the killing must be done in the heat of passion caused by adequate provocation and there cannot be a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Voluntary manslaughter is an intentional killing, and it is the element of provocation that distinguishes manslaughter from murder. *Id.*

The trial court carefully reviewed the evidence in reaching its determination that the elements of second-degree murder⁴ had been proven beyond a reasonable doubt. In finding defendant guilty, the trial court expressly rejected defendant’s argument that there was adequate provocation to reduce the killing to manslaughter, finding that “there was no justification for the killing of Mr. Taylor.” The court subsequently ruled that “he [defendant] was not under the type

³ There was testimony that his girlfriend either “popped” the trunk and/or handed defendant the weapon, urging him to “take care of his business.”

⁴ The court first found that the prosecution had not proven the elements of first-degree murder, the original charge in this case.

of emotional excitement that a reasonable person would have acted on impulse in killing someone in the way he did.”

After our own review of the record, we are in full agreement with the trial court. While defendant and the victim exchanged words and defendant was obviously insulted or embarrassed by the victim’s comments, the two never came to blows. Defendant left the scene and later returned and shot the unarmed victim in cold blood in the middle of the street. Our review of the evidence leads us to the firm conclusion that none of the three prongs necessary for a finding of voluntary manslaughter was established.

III

Defendant, who had no prior criminal record, next argues that the sentence imposed for the second-degree murder conviction should be set aside because the trial court did not have substantial and compelling reasons to exceed the guidelines. Because the offenses involved here were committed after January 1, 1999, the legislative guidelines apply. MCL 769.34(1). As calculated for the Sentencing Information Report and modified during the sentencing proceedings, the minimum guidelines range was 144 months to 240⁵ months. Defendant’s minimum sentence—forty years—was twice the upper limit of the guidelines.

Defendant argues on appeal that the trial court’s departure (1) was based on inaccurate information, (2) was impermissibly based on the fact that defendant was unemployed, (3) erroneously considered defendant as more dangerous because he committed the crime in front of his mother who was, in fact, an instigator in the incident, and (4) did not individualize defendant’s sentence. Defendant, to some extent, mischaracterizes the record. The trial judge did misspeak at sentencing in referring to defendant’s age at the time of the crimes as fifteen. He was corrected on the record, and there is no indication that this misstatement was a factor in the length of defendant’s minimum sentence or that defendant was sentenced based on inaccurate information. It is likewise inaccurate to suggest that the trial court did not individualize defendant’s sentence because the court extensively discussed the facts of the crimes and defendant’s actions. In explaining the departure from the guidelines, the court did place emphasis on the fact that defendant committed his crimes in the presence of his mother and the court mentioned that defendant was unemployed.

The prosecutor argues that there were numerous objective and verifiable factors outside the contemplation of the guidelines on which the trial court relied when imposing sentence, including the fact that defendant left the scene, returned with his mother and killed an unarmed man while defendant’s mother stood by and watched. The prosecutor cites the trial court’s description of the offense as “egregious” as a reason for departure. However, the prosecutor goes further than the trial court in this regard, pointing out that defendant committed murder in front of many bystanders who were presumably exposed to potential harm, demonstrating a lack of regard for their safety.

⁵ The SIR, as corrected by the trial court after the modifications, shows the high end of the guidelines as 220 months. However, the sentencing transcript clearly indicates that as modified that number should be 240 months, the number referenced by the parties throughout the sentencing proceeding.

Under the legislative sentencing guidelines, courts in most instances are required to impose a minimum sentence within the appropriate sentence range pursuant to MCL 769.34(2). *People v Babcock* 244 Mich App 64, 72; 624 NW2d 479 (2000) (*Babcock I*). MCL 769.34(3) provides the following exception:

A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in

propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

As pointed out in *People v Babcock*, ___ Mich App ___; ___ NW2d ___ (Docket No. 235518, issued 3/19/02) (*Babcock II*), slip op p 2, MCL 769.34(11) requires this Court to reverse and remand where the trial court does not have substantial and compelling reasons for a guidelines departure. *Supra*. In defining what constituted "substantial and compelling reasons," the *Babcock I* panel, citing *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), stated that substantial and compelling reasons only exist in exceptional cases, and that the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock I, supra* at 75. In further reliance on *Fields*, the *Babcock I* panel stated that the factors relied on by a court in determining whether there are substantial and compelling reasons for departure must be objective and verifiable. *Id.*

As noted in *Babcock II, supra*, our Supreme Court in *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001), partially modified *Babcock I*. The language in *Hegwood, supra* at 437 n 10, indicates that the degrees of substantial and compelling circumstances can vary and that the variance must be considered in reviewing the extent of a departure. In the words of *Babcock II, supra*, slip op p 3, "if there are substantial and compelling reasons to slightly depart from the guidelines, e.g., a six-month departure, those same reasons may not be sufficient to support a more significant departure, e.g., a three-year departure." In addition, the Supreme Court suggested in *Hegwood* that the principle of proportionality is still a viable consideration in determining the extent of a guidelines departure. *Hegwood, supra* at 437.

The trial judge cited numerous factors in explaining his decision to depart from the sentencing guidelines,⁶ beginning by stating his conclusion that the guidelines did not take into account the circumstances of the crimes and “everything” defendant did⁷. He went on to list the following factors as grounds for departure:

1. That defendant was 15 [actually 16] and had been allowed to act as an adult.
2. That defendant was driving without a license and was out late at night.
3. That defendant went home after his confrontation with the victim and returned to the scene with his mother to again confront the victim.
4. That defendant had already fathered one child and had impregnated another young girl.
5. That defendant had no job, was not in school and was “out running around killing people.”
6. That defendant committed murder in front of his mother.
7. That defendant was a danger to the community, and especially so because he committed his crimes in front of his mother.
8. That the victim was intoxicated, unarmed and “not threatening you [defendant] You left the scene and then you came back, and you killed him like a dog in the street. Like some animal.”
9. That defendant clearly intended to kill the victim because he shot the victim in the head, not the leg or arm, noting “You [defendant] pointed the gun right at his head.”
10. That there has to be a message to the community that “just blowing somebody away like that” will result in a long sentence.

We are mindful that the trial judge was the factfinder in this case and his articulation at sentencing demonstrates that he was extremely troubled by the circumstances of these crimes, and justifiably so. The factors cited for the guidelines departure clearly were substantial and compelling reasons which “keenly and irresistibly” grabbed his attention. *Babcock I, supra* at 75.

⁶ In remarks which preceded its guidelines departure explanation, the court also noted that defendant continued to deny shooting the victim, despite overwhelming evidence to the contrary.

⁷ We note that the departure statute requires only “a” substantial and compelling reason for departure and conclude that a single such reason which is also objective and verifiable is sufficient to support departure. MCL 769.34(3). See also *Babcock I, supra* at 78.

For the most part, the departure factors were also objective and verifiable⁸. Once we find that a factor is objective and verifiable as a matter of law, our review is limited to determining whether the trial court abused its discretion in concluding that the factor was substantial and compelling. *Babcock, supra* at 78. We hold that there was no abuse of discretion in the trial court's finding of a substantial and compelling reason to depart from the guidelines on the basis that the defendant was a danger to the community because he shot an unarmed, intoxicated man who was standing in the middle of the street with his hands up in the universal sign of surrender.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

⁸ However, a number of the factors articulated are not in that category: (1) that defendant had been allowed to act as an adult, (2) that defendant was "running around killing people" (he killed one person), (3) that defendant was a more dangerous person because he murdered the victim in front of his (defendant's) mother, and (4) that a sentence in excess of the guidelines would send a message to the community. In addition, the court noted defendant's unemployment in its departure statement, in violation of MCL 769.34(3)(a), although it does not appear from the record that this fact played a significant role in the departure decision.