

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COURTNEY HALL,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 251179

Genesee Circuit Court

LC No. 02-010183-FC

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals by leave granted his concurrent sentences of ten to fifteen years' imprisonment imposed on his plea-based convictions of second-degree criminal sexual conduct, MCL 750.520c(1). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court departed from the thirty-six to seventy-one month sentencing guidelines range without articulating substantial and compelling reasons for the departure. We disagree. A trial court may depart from the sentencing guidelines range only if a substantial and compelling reason exists for the departure, and the trial court states the reason on the record. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003); *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). A substantial and compelling reason justifying a departure must be objective and verifiable, must keenly or irresistibly grab one's attention, and must be of considerable worth in determining the length of a sentence. *Babcock, supra* at 257-258; *Solmonson, supra* at 668. A substantial and compelling reason exists only in exceptional cases. *Babcock, supra* at 258. This Court reviews for an abuse of discretion whether the trial court articulated a substantial and compelling reason to justify a departure from the sentencing guidelines. *Id.* at 264-265; *People v Thomas*, 263 Mich App 70, 78; 687 NW2d 598 (2004). An abuse of discretion occurs if the outcome that the trial court imposed falls outside the permissible principled range of outcomes. *Babcock, supra* at 269, 274.

The trial court based its departure in part on defendant's sexual conduct with the victims involving penetration, which occurred over a long period of time. Defendant argues that because the parties agreed during plea negotiations that OV 11, MCL 777.41, would be scored at zero, this factor is not verifiable. This Court reviews whether a particular factor is objective and verifiable as a matter of law. *Babcock, supra* at 264, 273. This factor is substantiated in the record. At defendant's preliminary examination, each victim testified that defendant placed his

penis inside her vagina. Thus, this factor is verifiable. The parties' agreement that OV 11 would be scored at zero does not preclude a determination that the factor is verifiable.

Defendant also argues that the fact that the sexual conduct occurred over a long period of time was already taken into account in the scoring of OV 13, MCL 777.43. Although OV 13 was scored at twenty-five points for a pattern of felonious criminal activity, that variable did not take into account that the activity involved sexual penetration specifically. OV 13 was not specific to the type of activity involved in this case, which the trial court properly characterized as "a long period of time of criminal sexual conduct involving penetration." Accordingly, the trial court did not base its departure on an offense characteristic already taken into account in the sentencing guidelines, as prohibited under MCL 769.34(3)(b).

The fact that defendant engaged in sexual penetration with the victims over a lengthy period of time was a substantial and compelling factor justifying the particular departure imposed. This factor is both objective and verifiable, and it keenly and irresistibly grabs one's attention. *Babcock, supra* at 257-258; *Solmonson, supra* at 668. Defendant received a favorable plea bargain that resulted in his convictions of offenses for sexual contact rather than penetration and for only two incidents rather than the numerous incidents that existed. The trial court's departure on this basis acknowledged the full history and pattern of sexual conduct that defendant perpetrated on the victims. In addition, defendant still received the benefit of his plea bargain because a conviction of first-degree criminal sexual conduct subjected him to a sentence of life imprisonment while a conviction of second-degree criminal sexual conduct subjected him to not more than fifteen years' imprisonment. MCL 750.520b(2); MCL 750.520c(2). The departure in this case was a four-year and one-month departure. Because the sentences that the trial court imposed do not fall outside the permissible principled range of outcomes, the trial court did not abuse its discretion. *Babcock, supra* at 269, 274.

The trial court also based its departure, in part, on the fact that the victim's mother, defendant's wife, did not report defendant's activity to the police or otherwise take steps to protect the children. Defendant argues that this factor was not substantial and compelling. The record does not indicate that defendant coerced or threatened his wife in order to prevent her from reporting the sexual conduct to the police or taking other appropriate action. The presentence report merely states that defendant's wife was scared of defendant. MCL 769.34(3)(b), however, allows a trial court to depart from the guidelines based on an "offense characteristic" and does not require that such characteristics be within a defendant's control. MCL 769.31(d) defines "offense characteristics" as "the elements of the crime and the aggravating and mitigating factors relating to the offense that the [L]egislature determines are appropriate." Nothing in that subsection requires that an aggravating or mitigating factor be within the defendant's control.

The fact that defendant's wife was unwilling to report defendant's conduct was an aggravating factor that made it more likely that defendant's conduct would continue and less likely that it would cease. Indeed, the reluctance of defendant's wife to alert the authorities of defendant's conduct likely allowed it to persist. This factor keenly and irresistibly grabs one's attention and justifies the particular departure imposed in this case. *Babcock, supra* at 257-258; *Solmonson, supra* at 668. Because the outcome does not fall outside the permissible principled range of outcomes, the trial court did not abuse its discretion in determining that this factor

constitutes a substantial and compelling reason justifying the departure imposed. *Babcock, supra* at 269, 274.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen