

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

STAVRO ADIL HAMAMA,

Defendant-Appellant.

UNPUBLISHED

June 28, 2012

No. 304527

Oakland Circuit Court

LC No. 2010-232794-FH

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of surveilling an unclothed person, MCL 750.539j. He was sentenced to 15 to 24 months' imprisonment. Defendant appeals of right. We affirm.

First, defendant argues that the trial court erred by preventing defendant from presenting medical¹ evidence that he suffered a traumatic brain injury that caused defendant to suffer from memory loss and forgetfulness. We disagree.

As an initial matter, we note that the prosecutor filed a motion to exclude defendant's defense of diminished capacity or special mental traits. There is no indication in the lower court record that defendant filed an answer to the motion. At the hearing regarding the motion, the trial court ruled that defendant was raising an issue of diminished capacity that was barred by case law. However, the trial court also ruled that defendant could admit evidence of a character trait provided that he did not rely on medical evidence. Defense counsel did not place an offer of proof regarding the excluded evidence on the record. When the trial court's ruling excludes evidence, it is incumbent on the party seeking admission to make an offer of proof, and error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected. MRE 103(a)(2); *People v Witherspoon*, 257 Mich App 329, 331; 670 NW2d 434 (2003). "[A]n offer of proof serves the dual purpose of informing the trial court of the nature

¹ Trial counsel attempted to introduce defendant's medical records documenting his traumatic brain injury and subsequent tests. Trial counsel also attempted to introduce evidence that defendant was taking prescription drugs for his memory loss.

and purpose of the evidence sought to be introduced, and of providing a basis for the appellate court to decide whether to sustain the trial court's ruling." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006) (further citation omitted). When a defendant fails to present evidentiary support, the theory is speculative, and the appellate court cannot conclude that plain error affecting substantial rights occurred. *Witherspoon*, 257 Mich App at 331-332; *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). In light of the absence of an offer of proof in the record below and on appeal, defendant failed to establish plain error affecting his substantial rights. *Witherspoon*, 257 Mich App at 331-332; *Hampton*, 237 Mich App at 154. Nonetheless, we will address the legal challenge.

This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Id.* "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). "[W]hether a rule or statute precludes admission of evidence is a matter of law and is reviewed de novo." *Yost*, 278 Mich App at 353, quoting *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Finally, "[t]his Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

"[T]he Sixth Amendment guarantees defendants a meaningful opportunity to present a complete defense." *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011) (citation omitted). However, "[t]he right to present a defense is not absolute or unfettered." *Id.* Evidentiary rules excluding evidence from trial "do[es] not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008) (quotation omitted).

"Relevant evidence is evidence 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Yost*, 278 Mich App at 355, quoting MRE 401. However, even if relevant, the rules of evidence restrict the circumstances under which character evidence is admissible. *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). MRE 404(a)(1) allows a defendant to "offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense." *Id.* at 93. MRE 405(a) states that a defendant may only prove his character trait through reputation or opinion testimony. *Id.* at 97.

Defendant's medical records detailing his traumatic brain injury would have been admissible pursuant to MRE 401 and MRE 404(a)(1), but would have been inadmissible pursuant to MRE 405(a). First, the medical records evidence was relevant to the defense that defendant forgot the victim, Michelle Duda, was in the room. The evidence was also admissible pursuant to MRE 404(a)(1), because defendant's forgetfulness is a pertinent character trait that makes it less likely that he committed the crime. *Roper*, 286 Mich App at 93. However, a defendant may only introduce evidence of a pertinent character trait through reputation or *opinion testimony*. MRE 405(a). Defendant's medical records are not reputation or opinion testimony. Similarly, defendant's statement that he was taking prescription medication for memory loss is not opinion or reputation testimony. MRE 405(a).

In the present case, the trial court allowed defendant to admit, during his testimony, evidence that he was forgetful and how his forgetfulness and surrounding circumstances led to his alleged mistaken entry into the occupied tanning room. Accordingly, the trial court's ruling excluding the medical records was not an abuse of discretion. *Yost*, 278 Mich App at 353.

The diminished capacity defense “allows a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime.” *People v Carpenter*, 464 Mich 223, 232; 627 NW2d 276 (2001). The rationale underlying the diminished capacity defense is that because the “defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of a lower grade of the offense not requiring that particular mental element.” *Id.* (citation omitted). The *Carpenter* Court rejected the diminished capacity defense, holding that a defendant cannot “introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent.” *Id.* at 226.

Defendant submits that the trial court erred in concluding that he offered a diminished capacity defense, but rather, was offering the evidence for a different purpose: to rehabilitate defendant after the prosecutor cross-examined him, and to provide a pertinent character trait of defendant pursuant to MRE 404(a)(1). As discussed above, defendant's argument that the trial court should have allowed him to present medical evidence of his memory loss and forgetfulness is not viable because it is not opinion or reputation testimony. Moreover, defendant failed to make an offer of proof regarding the medical records and any medication taken by defendant. *Witherspoon*, 257 Mich App at 331. Therefore, the trial court did not abuse its discretion in excluding the medical evidence. *Yost*, 278 Mich App at 353.

Next, defendant argues that the trial court did not articulate substantial and compelling reasons for its refusal to sentence defendant to an intermediate sanction. We disagree.

This Court reviews a trial court's reasons for departing from the sentencing guidelines for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). This Court reviews de novo as a matter of law a trial court's determination that a reason for departure qualifies as objective and verifiable. *Id.* Finally, this Court reviews whether the trial court's reasons are substantial and compelling enough to justify the departure, and the amount of the departure, for an abuse of discretion. *Id.* An abuse of discretion standard recognizes that “there will be more than one reasonable and principled outcome.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court does not abuse its discretion if the minimum sentence is within the range of principled and reasonable outcomes. *Smith*, 482 Mich at 300.

“[W]hen the upper limit of the recommended minimum sentence range is 18 months or less . . . the court, unless it articulates substantial and compelling reasons, must impose an intermediate sanction.” *People v McCuller*, 479 Mich 672, 685; 739 NW2d 563 (2007); see also MCL 769.34(4)(a). An intermediate sanction is “probation or any sanction, other than imprisonment.” *People v Stauffer*, 465 Mich 633, 636 n 7; 640 NW2d 869 (2002), citing MCL 769.31(b). “[A] substantial and compelling reason must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *Babcock*, 469 Mich at 257-258 (citations and internal quotes omitted). “[T]he trial court must articulate on the record a

substantial and compelling reason to justify the particular departure imposed.” *Id.* at 260. Additionally, a trial court can base a departure from the sentencing guidelines on an offense or offender characteristic that the sentencing range had already taken into account, if the characteristic was given “inadequate or disproportionate weight.” *Id.* at 267-268; MCL 769.34(3)(b).

Defendant’s recommended minimum guidelines sentencing range was 0 to 17 months. Therefore, defendant qualified for an intermediate sanction. See *McCuller*, 479 Mich at 685.

The first reason the trial court gave for departing from the guidelines is that defendant had a history and pattern of deviant sexual behavior that made him a sexual predator. Defendant argues that this was taken into account by the prior offense variable scores. Defendant’s past criminal sexual deviant behavior was given inadequate and disproportionate weight in the trial court’s calculation of the minimum sentencing guidelines, and therefore, is a substantial and compelling reason to depart from the minimum sentencing guidelines. The trial judge did not just find that defendant had a criminal history; he specifically stated that he had past criminal history of sexually deviant behavior. Defendant’s Presentence Investigation Report (PSIR) objectively and verifiably indicates that defendant committed two previous criminal sexual assaults. Defendant was adjudicated guilty of groping a female classmate and was ordered to comply with the requirements of the Sex Offenders Registry Act, MCL 28.722 *et seq.* Several years later, defendant sexually assaulted a female passenger in his vehicle, and then drove his car into a house. This is a substantial and compelling reason for the trial court to deviate from the minimum sentencing range.

Defendant’s lack of respect for the court system was also a substantial and compelling reason to justify departing from the minimum sentencing guidelines range. It was objective and verifiable. Defendant failed to comply with the sex offender registry provisions on multiple occasions following his 2002 conviction. Therefore, it was not plain error for the trial court to find that defendant’s lack of respect for the court system was a substantial and compelling reason to justify the upwards departure.

The trial court’s articulation that defendant was a danger to the community was not a substantial and compelling reason to depart from the minimum sentencing guidelines because it was not objective and verifiable. The fact that a defendant is a danger to the public is “not itself an objectively and verifiable factor,” but permissibly serves as an explanation of “why [the] defendant’s extensive criminal history justified departure from the recommended sentence range.” *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Therefore, the trial court’s conclusion that defendant was a danger to the community reinforces its previous substantial and compelling reason of defendant’s history of criminally sexual deviant behavior, but is not an independently substantial and compelling reason for the departure.

Next, the record indicates that the degree of departure was proportionate to the offense and offender. *Babcock*, 469 Mich at 264. As the trial court stated, defendant had a history of sexual deviant behavior. In the past two incidents where he had sexually assaulted women, he was a juvenile and was given relatively light sentences. These punishments did not deter defendant from committing another sexually motivated offense. In this case, “defendant’s criminal history supports a conclusion that an intermediate sanction as required under the

guidelines would be less likely to further the traditional goals of sentencing than a prison sentence.” *Solmonson*, 261 Mich App at 671-672. Therefore, the trial court did not abuse its discretion by imposing a 15-month minimum prison sentence.

Affirmed.

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

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Servitto, J. (*concurring in part, dissenting in part*).

While I agree with the majority’s conclusion that the trial court properly precluded defendant from presenting medical evidence to establish a character trait of forgetfulness, I respectfully disagree with their determination that the trial court adequately articulated substantial and compelling reasons to support its upward departure from the sentencing guidelines in imposing sentence.

Before addressing the departure issue, I would note that defendant consistently presented his forgetfulness as a character trait and sought admission of this character trait pursuant to MRE 404(a). As such, he was limited in the methods in which he could prove such character trait by those set forth in MRE 405--specifically testimony as to reputation, testimony in the form of an opinion, or specific instances of his conduct. Defendant’s attempts at introducing medical records and testimony concerning prescriptions were clearly not within the methods allowed under MRE 405. Had defendant produced a witness, perhaps a doctor, to provide an opinion that he was forgetful since and/or as a result of the automobile accident, such testimony would likely have been allowable under MRE 405. Defendant did not, however, attempt to introduce the connection between his accident and his forgetfulness through opinion testimony.

Moving on to the issue of the sentencing departure, “[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.” MCL 769.34(3). The trial court may 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.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

In sentencing defendant, the trial court stated as follows:

But this guy's got a history.

He has a history.

This isn't his first sexually related event . . .

This is a pattern.

He's a sexual predator . . .

And I'm not going to follow the recommendation because I think there's substantial, compelling reasons to go above it.

He's got a history.

He's a danger to the community.

He has no respect for the system.

. . . but he's got prior—you know, he—he's got prior offenses and I don't think he does get it and I'm concerned about him.

The above is the extent of the trial court's articulation of substantial and compelling reasons for a sentencing departure.

As indicated by the majority, the indication that defendant was a danger to the community is not a substantial and compelling reason to depart from the sentencing guidelines. The fact that defendant had a "history" and/or prior sex related offenses was reflected in the guidelines.¹ The majority indicates that defendant's past criminal behavior was given disproportionate and inadequate weight in the trial court's calculation of the guidelines, and that because defendant's prior incidents were committed while he was a juvenile, he was given relatively light sentences for the same. The majority also indicates that defendant failed to comply with the sex offender registry provision on multiple occasions following his 2002 conviction. However, the trial court did not articulate any of these facts on the record, or give any indication that these were considerations it took into account. The majority is rationalizing for the trial court. As indicated in *Smith*, 482 Mich at 318 "[a] reviewing court may not substitute its own reasons for departure." Based on the transcript, I would find that the trial court did not meet its initial burden of articulation of substantial and compelling reasons to justify a departure.

¹ Though the current conviction may have overtones of a sexual nature it is classified as a crime against public order.

Moreover, the trial court gave no explanation whatsoever for the extent of the departure. Defendant's guidelines indicated an appropriate sentence of 0-17 months, and both the probation department and the prosecution recommended a term of 12 months in the county jail. The trial court instead sentenced defendant to 15-24 months in prison, without further elaboration. "[T]he trial judge must explain why the reasons for the departure that he articulated warranted a drastic departure . . ." *Smith*, 482 Mich at 309. Because the trial court did not provide substantial and compelling reasons for the sentencing departure on the record, nor did it explain why its stated reasons justified the extent of the departure, the trial court abused its discretion in sentencing defendant above the sentencing guidelines range. I would therefore remand for resentencing.

/s/ Deborah A. Servitto