

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

UNPUBLISHED  
December 4, 2012

v

SEAN EDWARDS,

No. 306540  
Wayne Circuit Court  
LC No. 10-011030-FC

Defendant-Appellee.

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Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court’s judgment of sentence pertaining to defendant’s convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and armed robbery, MCL 750.529. Defendant was sentenced to 1 day to 15 years in prison for armed robbery and 2 years in prison for felony-firearm. We reverse and remand.

The prosecution argues that the trial court abused its discretion when it departed from the sentencing guidelines range and sentenced defendant to a minimum sentence of one day for defendant’s armed robbery conviction. We agree.

If a sentence is not within the guidelines range, this Court “must determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range.” MCL 769.34(11); *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003). This Court reviews for clear error the trial court’s factual findings that a particular factor in support of the departure exists. *Babcock*, 469 Mich at 264. However, the determination that a particular factor is objective and verifiable is a matter of law and reviewed de novo. *Id.* A trial court’s determination that the objective and verifiable factors constitute a substantial and compelling reason to depart is reviewed for an abuse of discretion. *Id.* at 264-265. A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Under Michigan’s sentencing guidelines act, MCL 769.31 *et seq.*, a court is to impose a minimum sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). However, a court may depart from the guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for the departure. MCL 769.34(3); *Buehler*, 477 Mich at 24. “A substantial and

compelling reason is an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of the sentence; and exists only in exceptional cases.” *Young*, 276 Mich App at 449-450 (internal quotations omitted). Furthermore, in order for a reason to be objective and verifiable it “must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *Id.* at 450 (internal quotations omitted).

Defendant was convicted of armed robbery and felony-firearm. “Armed robbery is punishable by a maximum penalty of imprisonment for life or any term of years.” *Id.* at 448; see also MCL 750.529. After scoring defendant’s offense and prior record variables, defendant’s minimum sentencing guidelines range was calculated to be 51 to 85 months for his armed robbery conviction. In sentencing defendant to serve a minimum of one day on this conviction, the trial court departed from the guidelines.

The trial judge articulated two reasons for his downward departure from the guidelines range. First, the trial judge explained that he was departing from the sentencing guidelines because defendant did not discharge the gun during the course of the robbery, and the gun was only used to “clunk [the robbery victim] in the head, so it was not used in the normal fashion that a handgun was used.” This fact is “objective and verifiable” because it is capable of being confirmed. In fact, no one at trial testified that defendant ever discharged the gun. However, the trial court abused its discretion when it relied on this factor for its departure because this reason is not “substantial and compelling enough to justify departure.” *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Defendant should not have received a more lenient sentence because he did not discharge the firearm. Defendant used the gun to make the victim fearful of death or great bodily harm so he would comply with his demands during the robbery. Defendant placed the gun to the victim’s head and said, “Give it up.” While the gun was pointed at the victim’s head, he pleaded for his life and said that he had a wife and four children. Defendant responded by hitting him in the head with the gun and telling him that he “didn’t want to hear that f... ..t.” Additionally, the victim’s ear began to bleed. Merely pistol-whipping the victim during the armed robbery, rather than shooting the victim, does not make this an exceptional case warranting a downward departure. If anything, these facts are substantial and compelling for sentencing within the guidelines. Because the trial court’s decision is outside the range of reasonable outcomes, the trial court abused its discretion in relying on this fact as a substantial or compelling factor. See *Babcock*, 469 Mich at 269.

Second, the trial judge articulated that he departed from the sentencing guidelines because defendant had no prior criminal history. Pursuant to MCL 769.34(3)(b), “[t]he 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.” Here, the trial court scored defendant two points on prior record variable 4 pursuant to MCL 777.54(1)(e) because defendant had “[one] prior low severity juvenile adjudication.” Thus, because defendant’s criminal history was already taken into account in determining the appropriate sentence range, the trial court erred when it relied on this history without finding that it was somehow given disproportionate weight.

Additionally, “[a] sentence cannot be upheld when the connection between the reasons given for the departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith*, 482 Mich at 303. This evaluation requires this Court to “engage in a proportionality review.” *Id.* at 304. “Such a review considers ‘whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of the criminal record . . . .’” *Id.* at 305.

The trial court gave no explanation for the extent of the departure, going from a minimum sentencing guidelines range of 51 to 85 months to a minimum sentence of one day. In fact, the connection between the reasons for the departure and the sheer magnitude of the departure is completely unclear. Furthermore, the trial court did not articulate substantial and compelling reasons for the departure. Thus, we remand to the trial judge to resentence defendant on the armed robbery conviction.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Elizabeth L. Gleicher  
/s/ Mark T. Boonstra