

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 31, 2013

v

ROBERT JENSEN SCHWANDER,
Defendant-Appellant.

No. 307921
Grand Traverse Circuit Court
LC No. 2011-011239-FC

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his 40 to 70 year sentence for his second-degree murder jury conviction, MCL 750.317. We remand and retain jurisdiction.

On June 2, 2011, defendant murdered 16-year-old Carly Lewis in an abandoned building where he had been living. Defendant knew Lewis and had lived in her mother's house until he was told to leave. On the day of the murder, defendant and Lewis planned to meet to smoke marijuana, which they did. When Lewis noticed that several items from her mother's house were in the building where defendant was living, they argued. The argument became physical and concluded with Lewis dead. Defendant then went on a date with his girlfriend. He returned to the building, removed Lewis' clothes and buried her near the building. Seven days later, he removed the body, placed it in garbage bags, and reburied it nearby. When questioned by police about Lewis' disappearance, defendant denied any knowledge.

The police investigated the building where defendant lived and broken scissors were discovered in the drop ceiling. Upon further questioning, on June 14, defendant told police that Lewis was dead and directed them to where she was buried. He denied stabbing Lewis, but admitted that he had choked her to death. Forensic analysis later confirmed that blood on the scissors was Lewis' blood. The victim's body was recovered after using a rod to probe underground in order to find its exact location. An autopsy revealed that Lewis had several slit-like stab wounds, including three on the left side of her face, two on her left breast, one on her right bicep, two on her right wrist, and one on the left side of her neck that extended downward and punctured her lung. A blunt force injury to her forehead was also noted. The forensic pathologist who performed the autopsy testified that evidence of strangulation was not present, that the stab wounds were inflicted while Lewis was alive and that some of the stab wounds were defensive in nature. He also opined that the cause of death was the stab wound that punctured

Lewis' lung and that with prompt medical attention, she could have survived. A forensic pathologist, who testified for the defense, testified that the lung wound would not have resulted in death and that strangulation could not be ruled out.

Defendant was charged with open murder, MCL 750.316. A jury trial was held and defendant was convicted of second-degree murder. The recommended sentence according to the sentencing guidelines was 160 to 270 months. Defendant's objections to the scoring of several offense variables were overruled and, after concluding that substantial and compelling reasons justified a departure from the guidelines, the trial court sentenced defendant to 40 to 70 years' imprisonment. This appeal challenging the sentence followed.

First, defendant challenges the trial court's scoring of offense variables (OV) 1, 2, 6, 10, 13, and 19, arguing that the record evidence does not support the particular scores. He objected to the scoring of each of these variables and so his challenges are preserved. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Its findings of fact are reviewed for clear error. *Id.*

Defendant argues that OV 1, aggravated use of a weapon, was improperly scored at 25 points and OV 2, lethal potential of weapon used, was improperly scored at 5 points because the issue whether a stabbing weapon was used to inflict injuries to Lewis was a contested fact. See MCL 777.31(1)(a); MCL 777.32(1)(d). Defendant references the testimony of the defense forensic pathologist who opined that the use of a round probe by police to find Lewis' body may have caused the wounds. However, the forensic pathologist who performed the autopsy testified that the wounds were slit-like, consistent with a knife-like stabbing, inflicted while Lewis was alive, some were defensive in nature, and one extended into her lung causing her death. In light of the evidence, the trial court's conclusion that defendant possessed and used a stabbing weapon to inflict injuries to Lewis was not clearly erroneous. See *Osantowski*, 481 Mich at 111.

Defendant also argues that OV 6, which was scored at 25 points, should have been scored at 10 points because the death occurred in a combative situation. Pursuant to MCL 777.36(1)(b), OV 6 must be scored at 25 points if "the offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." However, MCL 777.36(2)(b) provides for a score of 10 points "if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent." Defendant argues that the death occurred in a combative situation; thus, only 10 points should have been scored under this variable. However, the evidence included that Lewis had defensive-like stab wounds. There was no evidence that defendant had any injuries. And, as the trial court noted, even if Lewis died by strangulation, she would have been unconscious—and thus not "combative"—for a period of time before dying. In light of the evidence, the trial court's conclusion that the death did not occur in a combative situation was not clearly erroneous. See *Osantowski*, 481 Mich at 111.

Next, defendant argues that OV 10 was improperly scored at five points because he did not exploit any vulnerability of Lewis. Pursuant to MCL 777.40(1)(c), OV 10 must be scored at

five points if “the offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” The record evidence included that there was a significant size difference between Lewis, who was 5’2” tall, and defendant who is 6” tall. Further, defendant isolated Lewis by bringing her into an abandoned building, gave her marijuana, and then overpowered her with his physical strength allowing him to choke and stab her. Accordingly, the evidence adequately supported the trial court’s scoring of OV 10 at five points. See *Osantowski*, 481 Mich at 111.

Defendant also argues that OV 13 was improperly scored at 25 points. Pursuant to MCL 777.43(1)(b), OV 13 must be scored at 25 points if “the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person.” The trial court scored OV 13 at 25 points because defendant had an on-going sexual relationship with a girl under the age of 16, constituting third-degree criminal sexual conduct, MCL 750.520(d)(1)(a). The evidence relied on in support of the score was the trial testimony of the defendant’s underage girlfriend, and the PSIR report which indicated that sexual intercourse had occurred over 30 times. Defendant did not challenge the factual accuracy of the PSIR in that regard; thus, the PSIR is presumed accurate and the trial court was entitled to rely on the information. See *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *Waclawski*, 286 Mich App at 689. MCL 777.43(2)(a) provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” Accordingly, the trial court’s scoring of OV 13 was supported by the record evidence. See *Hornsby*, 251 Mich App at 468.

Defendant also argues that OV 19 was improperly scored at 10 points. Pursuant to MCL 777.49(c), OV 19 must be scored at ten points if “the offender otherwise interfered with or attempted to interfere with the administration of justice.” In assessing points under OV 19, a court may consider the defendant’s conduct after the completion of the sentencing offense, including acts that interfere with the investigation of the crime by law enforcement. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Here, in brief, when questioned by police defendant denied having any information about Lewis’ disappearance, asked two people to provide an alibi, hid the scissors, moved out from the building, buried Lewis’ body, and then reburied Lewis’ body so that it would not be found. Because there is evidence to support the scoring decision, it is upheld. See *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

In summary, defendant’s challenges to the trial court’s scoring of OV 1, 2, 6, 10, 13, and 19 are without merit.

Second, defendant argues that the trial court failed to provide substantial and compelling reasons in support of the extent of the upward departure from the sentencing guidelines range for the minimum sentence. Defendant had no prior record variable points and his offense variable score was 110 which is just above the 100 points minimally required for level III. This score places defendant in the Level A-III grid which provides for a minimum sentence range of 162 months to 270 months, or life. Thus, the highest minimum term of years allowed by the guidelines in this case was 22 ½ years. The court, however, imposed a minimum sentence of 40 years along with a maximum of 70 years. The minimum sentence, at 180% of the upper end of the guidelines, and 17 ½ years above that upper guideline, is an extraordinary departure.

In the face of the senseless murder of a young woman it is difficult to deem any sentence excessive. However, the legislature has adopted the sentencing guidelines in order to create consistency in minimum term sentencing and a trial court's departure from them must be grounded in substantial and compelling objective reasons that are not accounted for in the guidelines and that justify the particular extent of the departure. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003); *People v Portellos*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 301190, 301333, issued November 13, 2012).

The trial judge in this case emphasized that a guideline sentence was inadequate because he did not believe he would still be on the bench when defendant became eligible for parole and so it would be up to his successor to bar parole in the event the parole board elected to grant it. He stated, “[t]hat’s having more faith in the process than I really care to have.” This is not a proper basis to depart from the guidelines. The legislatively-imposed guidelines, the sentencing court and the parole board as well as the successor judge each have a distinct role to play in determining the actual length of time that the defendant ultimately remains in prison. The court imposed a maximum term of 70 years, and defendant is by no means guaranteed parole at any time prior to the completion of that maximum, let alone upon completion of his minimum sentence. A court may not impose a longer minimum sentence simply to deprive the parole board of jurisdiction; nor may it impose a sentence intended to prevent a successor judge from making whatever determination he or she believes is appropriate years or even decades from now.

The trial court did offer two reasons that would properly justify a departure from the guidelines. First, that the victim could have been alive for one half hour to one hour after being stabbed during which time defendant took no action to call for medical assistance; although the court noted that defendant may have been unaware that the victim could have been saved. Second, that the defendant betrayed the trust of the victim’s family that had taken him in and provided him with a home. These are objective, substantial and compelling grounds for which the court could depart from the sentencing guidelines by some amount. However, the trial court failed to set forth any analysis as to how the extent of this departure—17 ½ years, nearly doubling the upper limits of the guidelines—was justified by these two factors, which tragically are common to many murders.

In *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) our Supreme Court stated that “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made” (emphasis in original). As in *Smith*, “[h]ere the trial judge gave no explanation for the *extent* of the departure independent of the reasons given to impose a departure sentence.” *Id.* at 305-306. While *Smith* does not require mathematical specificity or precise words, it does require “an explanation of why the [minimum] sentence imposed is more proportionate to the offense and the offender than a different [minimum] sentence would have been.” *Id.* at 311.¹

¹*Smith* went on to discuss the use of the entire sentencing guideline grid as a means of comparison of the reasons for departure to the extent of the departure. While such a comparison

Defendant's betrayal of the trust of the victim's family and his failure to summon medical help were objective and compelling reasons sufficient to justify some degree of departure from the guidelines.² However, the trial court did not articulate why these reasons justify imposing a minimum sentence nearly double the highest minimum sentence under the guidelines. Accordingly, we remand the case to the trial judge to articulate why the factors he cited justify the extent of the departure from the guidelines, or for resentencing. We retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Douglas B. Shapiro

is not required, the *Smith* Court noted that "reference to the grid can be helpful." *Id.* at 309. Here, for the minimum sentence imposed to have been a guideline sentence, defendant's score would have had to place him in E-III, four levels above his actual scoring.

² The dissent lists several other factors mentioned by the trial court during the sentencing hearing. However, the only factors specifically referenced by the trial court as reasons for departure from the guidelines were: (a) the defendant's cruelty in leaving the victim dying "for half an hour to an hour [during which] she could have been saved, which [defendant] wouldn't necessarily know"; (b) the defendant's betrayal of the Lewis family's trust; and (c) the lack of remorse until the sentencing hearing which the trial court noted was a subjective, not an objective finding and so did not rely upon. *See, People v Fields*, 448 Mich 58, 69; 528 NW2d 176 (1995). The dissent also infers that the trial court concluded that the evidence could have supported a first degree murder conviction, but the trial court did not make a finding of premeditation and the jury specifically rejected such a conclusion. Lastly, the dissent notes that defendant took affirmative actions to cover up the murder, but he was scored under OV 19 for those actions.

Court of Appeals, State of Michigan

ORDER

People of MI v Robert Jensen Schwander

Docket No. 307921

LC No. 2011-011239 FC

Mark J. Cavanagh
Presiding Judge

Joel P. Hoekstra

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 42 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

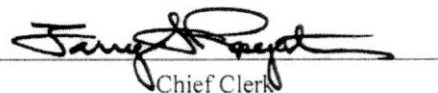
Cavanagh, P.J. concludes, as I did in my dissent to the majority opinion, that remand is not necessary.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 31 2013

Date


Chief Clerk

STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN,
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UNPUBLISHED
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v

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Defendant-Appellant.

No. 307921
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Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

CAVANAGH, P.J. (*dissenting*).

I disagree that the trial court failed to articulate why its departure sentence was proportionate to this specific offense and offender and that remand is necessary; accordingly, I respectfully dissent.

A minimum sentence that departs from the sentencing guidelines recommended range must be supported by a substantial and compelling reason that is articulated by the trial court and justifies the particular departure sentence. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 255-256, 259-260; 666 NW2d 231 (2003). That is, the actual departure sentence imposed because of the substantial and compelling reason must be proportionate to the crime and criminal, i.e., the punishment must fit the crime. *Id.* at 262-264.

Because the trial court has extensive knowledge of the facts involved and is directly familiar with the circumstances of the offender, *Babcock*, 469 Mich at 267, 270, we review whether the reasons given are substantial and compelling enough to justify the departure, and the amount of departure, for an abuse of discretion. *Smith*, 482 Mich at 300. But in our review we need not

examine only the sentencing transcript to determine if the court abused its discretion in imposing a sentence. Under MCL 769.34(11), appellate courts review the record to ascertain if the court articulated adequate reasons for the departure and to justify the extent of the departure. If, after reviewing the whole record, the connection between the reasons given for departure and the extent of the departure is unclear, then the sentence cannot be upheld. [*Id.* at 313-314.]

Accordingly, this Court may not speculate about conceivable reasons supporting the trial court's departure sentence, but we may consider whether the reasons can "reasonably be inferred from what the trial court articulated." *Id.* at 318.

In this case, before the trial court imposed sentence it noted that defendant was convicted of second-degree murder and agreed that the court "certainly [found] it to be at least that." The court also provided a short factual summary of the events that led to defendant facing the charge, including that he had been living on his own, after having disputes with his parents. He had been taken in by a couple of other households in the community before the victim's family provided defendant with a place to live; however, eventually problems developed and defendant was asked to leave their home as well. Shortly after he was asked to leave the victim's mother's house, defendant made a plan to meet with the victim to allegedly smoke marijuana. Then he killed her. The trial court discounted defendant's claim that the 5'2" victim physically attacked, and gained the advantage over, him, a 6' tall man. The trial court also discussed the facts that defendant had "said some very cruel things" about the victim during the investigation, had denied any knowledge about her disappearance over the extended period of time in which her family, friends, and law enforcement were frantically looking for her, and, in fact, had shared his false hope that she would reappear. After stating the facts that defendant buried and then reburied the victim's body, burned her clothes, sent her fake messages, and lied to people about what had happened to her, the trial court recognized that defendant's "motivation throughout the whole affair . . . has been to avoid responsibility for it." Consistent with that motivation defendant claimed that he unknowingly strangled the victim to death but, the court opined, that explanation was incredible in light of the numerous and bleeding stab wounds the victim sustained—wounds which would not have resulted in death for "a period of a half hour to an hour" during which she would have been "struggling to [] breath and to survive," but defendant did nothing to help her. And, the court noted, even if defendant had strangled the victim, it would have taken "a minute and a half to two minutes of continued strangulation before she died." In either case, the court stated, the circumstances of the victim's death were "particularly cruel."

The court then turned to the minimum sentence recommended by the guidelines and concluded that it was "just too light . . . this death is just too cheap for what happened here." In other words, in light of substantial and compelling circumstances, the guidelines recommended sentence would not be proportionate to the crime and criminal. See *Babcock*, 469 Mich at 264. The court then stated two substantial and compelling reasons that justified a departure sentence. First, the victim was in the process of dying for a half-hour to an hour and could have been saved but defendant did nothing to help her. Although the jury convicted defendant of second-degree murder, the court noted that defendant failed to act during the significant amount of time in which he could have acted to save the victim's life—facts consistent with first-degree murder, as charged, and would have resulted in a mandatory sentence of life imprisonment. The second reason given by the trial court in support of a departure sentence was defendant's "betrayal of the Lewis family trust and their charity." That is, defendant was trusted, shown kindness, and given a place to live but, in return, he killed their daughter which was "reprehensible."

After review of the record, it appears to me that the trial court adequately explained why substantial and compelling reasons justified the extent of departure imposed. I note, and infer from what the trial court articulated, *Smith*, 482 Mich at 318, that:

- the evidence supported a first-degree murder conviction which would have resulted in a mandatory sentence of life imprisonment;
- defendant's prior relationship with the victim and her family was an aggravating circumstance because he may have killed the victim in retaliation for being asked to move from the victim's mother's house where he had been living after being homeless;
- defendant's claim that his actions against the victim were in response to a "combative situation" was incredible in light of the relative size difference, his obvious animus toward the victim, and the numerous, bleeding stab wounds that the victim suffered;
- defendant took several conscious and concerted actions to conceal the murder, mislead police, and avoid detection, including: (1) stripping the victim naked and burning her clothes, (2) giving away her personal effects, (3) burying, then moving and reburying her body in a more discreet location, (4) sending the victim fake, but discoverable messages, (5) repeatedly denying any knowledge of the victim's whereabouts to her family and friends, as well as police, and (6) joining in the search for the victim with the expressed, yet false, hope of her return;
- defendant had a significant amount of time to assist the victim after he stabbed her numerous times, before she died from her wounds, but did nothing to help her;
- because of the nature of the victim's wounds, her struggle to breathe and her need for assistance would have been plainly obvious to defendant, but he ignored her and let her slowly die which illustrates significant depravity;
- even if defendant's claim that he strangled the victim to death was true, he would have had to strangle her for a significant period of time, even after she lost consciousness, for death to result which illustrates significant depravity; and
- the murder and defendant's actions after the murder were particularly heinous considering the fact that the victim's family had provided defendant a home when he was homeless.

In summary, I believe the trial court adequately justified its departure sentence. Mathematical specificity and precise words are not necessary to justify a particular departure. *Smith*, 482 Mich at 311; *Babcock*, 469 Mich at 260 n 14. In this case, it is clear from the record that the trial court, which presided over the trial in this matter, thoroughly understood and meticulously considered the nature of this crime and this criminal before sentencing this defendant. In my opinion, although the trial court did not employ "magic words" to justify its sentence, the connection between the reasons given for departure and the extent of the departure is clear. See *Smith*, 482 Mich at 313-314. And I agree with the trial court that the sentence it imposed was more proportionate to this offense and offender than one within the guidelines recommended range. See *Babcock*, 469 Mich at 264. Accordingly, I would affirm the departure sentence and conclude that remand is not necessary.

/s/ Mark J. Cavanagh