

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 17, 2014

v

Nos. 318200, 318201 and  
318202  
Crawford Circuit Court  
LC Nos. 12-093460-FH  
12-093461-FH  
12-093459-FH

SANDRA LYNN ENOS,  
  
Defendant-Appellant.

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Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of embezzlement of \$1,000 to \$20,000, MCL 750.174(4)(a), and one count of forgery, MCL 750.248. Defendant was sentenced to three concurrent terms of imprisonment for 3 to 5 years, an upward departure from the sentencing guidelines. The case is before us on remand from the Michigan Supreme Court.<sup>1</sup> Defendant raises two challenges to the sentence imposed, and for the reasons set forth in this opinion we remand for resentencing.

**I. FACTS.**

Defendant is a 58-year-old woman with no prior criminal history. On February 12, 2013, defendant pleaded guilty to two counts of embezzlement of \$1,000 to \$20,000 and one count of forgery in consideration for dismissal of several other charges.<sup>2</sup> According to her plea, defendant had access to the checkbook of a high school club and admitted that from February 2011 until

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<sup>1</sup> *People v Enos*, 495 Mich 923; 843 NW2d 188 (2014).

<sup>2</sup> As part of the plea agreement, the prosecutor dismissed three counts from LC No. 12-093461-FH (one count of embezzlement over \$1,000 and two additional forgery counts), LC No. 12-093462-FH (embezzlement over \$1,000), LC No. 12-09178-FH, a misdemeanor (embezzlement under \$200), and LC No. 12-09183-FH, a misdemeanor (embezzlement under \$200).

May 2012, she deposited funds from that account into her own.<sup>3</sup> She also admitted that she controlled the checkbook for Grayling Little League and deposited money from that account into her own from January 2012 to March 2012, and that she signed the name of another Grayling Little League officer to the bottom of a check and deposited the funds in her own account.

Embezzlement of \$1,000 to \$20,000 and forgery are both class E felonies. MCL 777.16i; MCL 777.16n. Defendant's prior record variable (PRV) and offense variable (OV) scores for the embezzlement charges were calculated at 20-Level C and 15-Level II, for a guideline's range of 0 to 11 months. Defendant's PRV and OV scores for the forgery charge were calculated at 20-Level C and 10-Level II, likewise resulting in a guideline's range of 0 to 11 months falling within an intermediate sanction cell.<sup>4</sup> Michigan law states that where the upper limit of the recommended minimum sentence is 18 months or less, as in the instant case,

the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a)].

The definition of "intermediate sanction" can include jail, but expressly excludes "imprisonment in a state prison or state reformatory." MCL 769.31(b).

Notwithstanding the recommended guidelines, the court sentenced defendant to the Michigan Department of Corrections for three concurrent terms of 3 to 5 years on each of the embezzlement charges, and one term of 3 to 14 years on the forgery charge.<sup>5</sup> The court offered the following rationale for its departure from the guidelines:

[T]here were children involved in this. We're dealing with several organizations that deal strictly with kids, nurturing those kids, providing an environment for those kids that's safe where their minds and bodies can be nurtured. And as we all know, children are one of the most vulnerable members of our society. . . . I do think that in a lot of ways you took money right out of these kids' pockets and

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<sup>3</sup> Although defendant was ordered to pay restitution to two clubs—Grayling Vikings Football Club and Grayling Spirit Club—she said in her admission that she was "the agent for the high school club," thus suggesting that the two clubs may have shared one account. Defendant was charged with embezzling from the two high school clubs in LC No. 12-93459, embezzling from Grayling Little League in LC No. 12-93460, and forging a Grayling Little League officer's name on a check and depositing the funds into her account in LC No. 12-93461.

<sup>4</sup> The facts and legal arguments have all been gleaned from the record evidence and defendant's briefs. Plaintiff did not submit a brief on appeal.

<sup>5</sup> Defendant was also ordered to pay a total of \$22,870.22 in restitution, crime victim assessments, attorney fees, and court costs.

took away opportunities that they might have had. And I don't think you can get more substantial or compelling than that.

The organizations themselves are victims. They put a huge amount of trust in their volunteers and you, Ms. Enos. They depend on their volunteers to act in the best interest of the organization, and they depended on you to do that. And you exploited that vulnerability. You exploited that expectation that those organizations had.

And aside from just paying the money back, there's damage that was done by you to these organizations by your abuse of their trust. That's going to have a ripple effect for many years to come. Children and these organizations may have a hard time trusting the volunteers, their coaches, the other adults that they're going to be dealing with. There may be people who would volunteer for this type of thing that aren't going to do that now because of what took place. There may be people that would have donated money to these organizations in the past that now may not because they're concerned about what's going to happen to that money. What you've done here was much worse than just taking money, and the repayment of that money isn't going to make this right.

Those organizations suffered a lot of harm with their inability to operate and do things with the money that they otherwise should have had and would have had had you not taken it. And so I think that . . . all three of these organizations have lost more than just the cash. They've lost potential donations in the future, and so the loss is much greater than just the money, in addition to the loss of trust.

Another reason that the Court finds particularly compelling in this case is the donation that was made by the McClains on the behalf of their father. You can imagine these people going through a terrible time of losing their father, finding a way to honor him by donating money in his memory to these groups or to the little league, and I can imagine that was a great comfort to them during a time where they were grief-stricken. And for you to take that money knowing that it was for the memory of their father, in the memory of somebody who truly did volunteer his time and truly did do something and give of himself towards these programs, I just find that particularly reprehensible. What should have been a loving and fitting tribute to their father is now going to be tarnished forever because of what you did. And the guidelines are—they're just woefully inadequate to account for the effect that that has to have had on them and their family.

There were a number of charges that were dismissed in this case, which could have resulted in a greater sentence, and I don't think that those—that the totality of the acts of what you did are adequately covered by the guidelines. The number of instances in which you took money, the length of time over which you took this money shows that you had a lot of chances to come to your senses and say, what am I doing, and you didn't do that. You continued to take money and so we're not dealing with just one isolated mistake here. We're dealing with a course of conduct over a

long period of time and conduct that I think just exceeds what was—or goes way beyond what was factored in to the guidelines.

And so for all these reasons, the Court finds that your conduct in this case goes far beyond what was accounted for in the guidelines, that there are substantial and compelling reasons for an upward departure.

Defendant was then sentenced as stated above. This appeal then ensued.

## II. ARGUMENTS OF DEFENDANT ON APPEAL.

On appeal, defendant contends that the trial court's rationale for departure from the guidelines is speculative rather than objective and verifiable. She argues that the trial court's conjectures about the future impact of defendant's actions on the children of the community or on the organization's ability to attract volunteers and donors "require an inquiry into the subjective mind of children, volunteers, and donors." Further, she states: "These speculations do not represent factors that are 'external' to the mind of the trial judge, nor are they in any sense objectively verifiable."

Defendant also argues that the emotional impact to a person who donated to the Little League in honor of a deceased relative "cannot be considered 'external' to the mind of the trial judge." Nor, defendant maintains, "is an individual's grief objectively verifiable."

Defendant also argues that, even if this Court were to find the trial court's reasons objective and verifiable, they are not exceptional. She asserts that the embezzlement statute, MCL 750.174(1), calls for the embezzler to be an "agent, servant, or employee" of the victim, thus implying an abuse of trust and the commonplace repercussions of such abuse. Because some of the trial court's reasons—such as disappointment, loss of morale and trust, heartache, future uncertainty—are characteristics of the offense, there is nothing exceptional about them, as defendant asserts: "nothing that should grab the attention of this Court."

Furthermore, defendant argues that some of the reasons which the trial court based its departure from the guidelines were actually taken into account by the guidelines; specifically, the "number of charges that were dismissed" and defendant's "course of conduct." While the prosecutor did dismiss charges, defendant argues, "the entire course of conduct was taken into account by the guidelines, as [defendant] was assessed 20 points on PRV 7 for subsequent or concurrent felony convictions, and five points on OV 13 for a continuing pattern of criminal behavior (i.e., uncharged conduct)." According to defendant, the trial court did not explain how the scoring of PRV 7 and OV 13 "did not adequately take into account the entire course of conduct." Defendant also argues that even if this Court finds one of the reasons for departure to be valid, "a remand is still appropriate where this Court cannot determine from the record that the trial court would have departed to the same extent without the offending reasons."

Lastly, defendant argues that even if this Court were to affirm the trial court's rationale for its upward departure from the guidelines, she would still be entitled to resentencing because the scope of the departure was not proportionate to either her or the offenses to which she admitted.

## III. ANALYSIS AND CONCLUSIONS.

Appellate review of a sentence imposed under the guidelines is limited to determining whether the sentence was imposed within the appropriate guidelines range and, if not, whether the departure from the range was based upon a substantial and compelling reason as articulated by the trial court. *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003); See also, *People v Hardy*, 494 Mich 430; 835 NW2d 340 (2013). The existence of a particular factor is reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, and the determination that the factor constitutes a substantial and compelling reason is reviewed for an abuse of discretion. *Babcock* at 264-265. See also, *Hardy*, 430 Mich at 438 n17. Clear error is present when the Court is left with a definite and firm conviction that an error occurred. *People v Fawazz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Smith*, 482 Mich at 300.

We begin our analysis of the issues presented by defendant by examining whether the trial court abused its discretion in departing from the sentencing guidelines.

The statutory sentencing guidelines allow a court to depart from the appropriate sentence range established under the guidelines if it has “a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). Relevant to the instant case is the following prohibition:

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. [MCL 769.34(3)(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. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). “[C]ommonplace repercussions of criminal activity do not support departures, which may be made only in exceptional cases.” *Smith*, 482 Mich at 302.

Defendant is correct with regard to the trial court’s speculations about the future of the sports programs from which defendant embezzled. While it may prove true that the sports clubs might experience difficulty enlisting volunteers and obtaining donations in the future, it is also possible that the community might rally around the organizations, volunteering and donating in record numbers. Only time will tell which scenario is correct. Accordingly, such suppositions are neither objective nor verifiable. Mere speculation about the future cannot serve as a basis for a departure from the sentencing guidelines because a factor cannot be substantial and compelling unless it is also objective and verifiable. *Babcock*, 469 Mich at 257-258.

Relative to the trial court’s reliance for its upward departure on the McClain family donation, whether one donor’s grief is sufficient to support a departure from the sentencing guidelines is arguable. Justice Cavanagh noted in his partial concurrence in *Babcock* that factors such as remorse or family support may be considered objective by one sentencing judge and subjective by another.

*Babcock*, 469 Mich at 279 (CAVANAGH, J., concurring in part and dissenting in part). The same could be said of grief. Perhaps more to the point is the extent to which grief is a “commonplace repercussion” of the offense itself. Embezzlement is the “fraudulent appropriation of another’s property by a person to whom it has been entrusted.” 3 Gillespie, Mich Crim L & Proc (2d ed), § 72.1, p 523. The violation of one’s trust, and its accompanying despair, could be considered characteristic of the offense, and thus an inappropriate factor on which to base a departure from the sentencing guidelines. MCL 769.34(3)(b).

Likewise, the number of times defendant redirected money to her own account, and the period of time over which she embezzled funds could also be considered unexceptional characteristics of the offense. The guidelines, which group together offenses by crime group for purposes of scoring the OVs and by crime class for purposes of determining the proper minimum range, generalize criminal offenses and then provide a mechanism (scoring) for differentiating within the generality.

However, the trial court did articulate one reason for departure from the sentencing guidelines that defendant overlooks: the category of victim from which defendant embezzled. The concept that embezzling from charities or non-profit organizations deserves special treatment permeates the statutory scheme. See MCL 750.174(3)(c),(4)(c), and (5)(c). Not only does the statute provide distinctive charges for embezzling from these vulnerable organizations, but MCL 750.174(12) provides for enhanced sentencing under certain circumstances where the victim of embezzlement is a nonprofit organization or a charity, a person 60-years of age or older, or an otherwise “vulnerable adult.”<sup>6</sup> Defendant embezzled from Grayling Little League, Grayling Viking Football Club, and Grayling Spirit Club, all of which effectively—if not technically—are nonprofit organizations.<sup>7</sup> Regardless of whether the court abused its discretion with respect to the degree of

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<sup>6</sup> MCL 750.174(12) states:

The court may order a term of imprisonment imposed for a felony violation of this section to be served consecutively to any term of imprisonment imposed for any other criminal offense if the victim of the violation of this section was any of the following:

(a) A nonprofit corporation or charitable organization under federal law or the laws of this state.

(b) A person 60 years of age or older.

(c) A vulnerable adult as defined in section 174a.

<sup>7</sup> We are mindful of the fact that defendant was charged under MCL 750.174(4)(a) and not (4)(c). Because plaintiff did not submit a brief in this matter we do not have a definitive answer as to why defendant was not charged under (4)(c), however, our review of the record leads us to conclude this was probably due to the fact that the organizations from which she embezzled did not meet the technical requirement of being non-profit organizations “under federal law or the laws of this state.” MCL 750.174(4)(c). Nevertheless, the organizations functioned as and were as vulnerable as nonprofits, even if not licensed as such.

departure from the sentencing guidelines, this statute supports the notion that the victims of embezzlement are not all equal, and that the law provides for a greater measure of punishment for those who embezzle from especially vulnerable victims.<sup>8</sup>

The trial court's first reason for departing from the sentencing guidelines emphasized the vulnerability of the organizations from which defendant embezzled, as well as the vulnerable nature of the organizations' clientele. The court explained:

[T]here were children involved in this. We're dealing with several organizations that deal strictly with kids, nurturing those kids, providing an environment for those kids that's safe where their minds and bodies can be nurtured. And as we all know, children are one of the most vulnerable members of our society. . . . I do think that in a lot of ways you took money right out of these kids' pockets and took away opportunities that they might have had. And I don't think you can get more substantial or compelling than that.

The organizations themselves are victims. They put a huge amount of trust in their volunteers and you, Ms. Enos. They depend on their volunteers to act in the best interest of the organization, and they depended on you to do that. And you exploited that vulnerability. You exploited that expectation that those organizations had.

The trial court did not say precisely it is the category of victim that provided a substantial and compelling reason to depart from the sentencing guidelines. However, this Court may reasonably infer the trial court's reasons for departure from what the trial court did say. See *Smith*, 482 Mich at 318 (stating that this Court "may not speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated"). The primary reasons the court gave for its departure—lost future opportunities for the children of the community, loss of trust, loss of volunteers and donations for the affected organizations, loss of morale, loss of reputation—stem from the fact that the organizations were, or were tantamount to, nonprofits. Therefore, it is not unreasonable for this Court to infer from the trial court's statements that the category of the victims provides a reason for the trial court's upward departure from the guidelines.

In sum, the trial court's observations about the future impact of defendant's actions on the children of the community and on the affected organizations are neither objective nor verifiable and, therefore, not substantial and compelling such that they would support a departure from the sentencing guidelines. Likewise, the dismissal of the other charges, and the number of

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<sup>8</sup> In *People v Harper*, 479 Mich 599, 654; 739 NW2d 523 (2007), one of the reasons the court gave for departing from the sentencing guidelines was that the defendant "ripped-off a charity that was trying to do good for cold children." The majority did not address the sufficiency of this reason, but in her dissent, Justice KELLY affirmed that embezzling from a charity is substantial and compelling and "of considerable importance at sentencing given that it distinguishes [Harper] from the typical defendant." *Id.* at 654 (KELLY, J., dissenting).

times and the period of time over which defendant embezzled funds are either taken into account by the sentencing guidelines or are unexceptional characteristics of the offense of embezzlement. However, the fact that the organizations from which defendant embezzled were nonprofit, be it actually or effectively, that primarily served the needs of children, does provide a substantial and compelling reason to depart from the sentencing guidelines.

Presuming the trial court to have articulated a substantial and compelling reason for its departure from the guidelines, we next turn to the issue of whether the trial court would have departed to the same extent absent the invalid reasons. *Babcock*, 469 Mich at 260. According to *Babcock*:

If the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, or determines that the trial court would not have departed to the same degree on the basis of the substantial and compelling reasons, the Court of Appeals must remand the case to the trial court for resentencing and rearticulation of its substantial and compelling reasons to justify its departure. [*Id.* at 260-261.]

Here, the trial court obviously relied on the fact that defendant had embezzled from school and community organizations that served children. However, because the trial court did not clearly indicate that it would depart to the same extent even if some of its reasons for departure were found to be invalid, *Babcock* requires us to remand this case to the trial court for resentencing and rearticulation. *Id.*

We next consider defendant's final argument. Here, defendant argues that the extent of the trial court's departure from the sentencing guidelines was not proportionate to her or her offenses. Because we are remanding the matter to the trial court, we decline to address this issue. Additionally, to decide the proportionality question now would only serve to circumscribe the trial court's discretion by setting the domain of any sentence. Further, contrary to defendant's assertions on appeal, we are confident that the trial court is well aware of the fact that the principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Babcock*, 469 Mich at 254 (citation omitted). We also concur with defendant that statutory guidelines "require more than an articulation of reasons for a departure; they require justification for the *particular* departure made." *Smith*, 482 Mich at 303 (internal quotation and citation omitted; emphasis in original).<sup>9</sup> Accordingly, when departing from the sentencing guidelines, 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 304. "[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Id.* at 305. We are confident that should the trial court again exceed the

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<sup>9</sup> Justice Markman makes this point very clear when he explains the wording of the statute thusly: "[T]he sentencing court must articulate its reasons in support of 'that' departure, not 'some' departure, not 'any' departure, and not 'a' departure." *Smith*, 482 Mich at 320 (MARKMAN, J., concurring).



sentencing guidelines, the trial court will aptly address the proportionality issue. If the trial court sentences defendant within the guidelines, then the proportionality issue is moot.

In summation, because we cannot discern whether the court would depart to the same extent if it relied on only the legitimate reason(s) articulated, we remand this case to the trial court for resentencing and rearticulation of the reasons supporting departure. *Babcock*, 469 Mich 260. Additionally, we decline to address the issue of proportionality for the reasons herein stated.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ Deborah A. Servitto  
/s/ Jane M. Beckering