

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 17, 2014

v

EBONY CRYSTAL MALCOM,

Defendant-Appellant.

No. 315265
Wayne Circuit Court
LC Nos. 12-003895-FH;
12-003896-FH;
12-003897-FH;
12-003898-FH;
12-003899-FH

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant, Ebony Malcom, appeals as of right her jury trial convictions of operating a criminal enterprise (“racketeering”), MCL 750.159i(1), two counts of false pretenses with intent to defraud, MCL 750.218(5)(a), nine counts of forgery, MCL 750.248, nine counts of uttering and publishing false or forged records, MCL 750.249, 17 counts of identity theft, MCL 445.65, and recording a false conveyance of realty, MCL 565.371. Defendant was sentenced to 8 to 20 years’ imprisonment for the racketeering conviction, and to 5 years’ probation for each of the 38 other convictions. We affirm.

Beginning in the spring of 2011, defendant orchestrated a series of fraudulent real estate transactions in Wayne County, Michigan, for the most part targeting vulnerable homeowners facing foreclosure and engaged in short sales. Defendant fraudulently transferred homes by means of quitclaim deeds for small amounts of money. Defendant forged deeds she was never given permission to create with homeowner signatures, transferring them in most cases to M. Financial, LLC, as grantee. M. Financial is a company of which defendant is the sole member and proprietor. In total, defendant obtained an interest in at least five properties this way.

After acquiring the interest to the properties, defendant changed the locks on many of the homes, and in some cases contacted realtors to sell the homes and provided the realtors with keys. One of the homes was in too bad of a condition to sell because defendant had left water running in an upstairs bathroom and in so doing created a mold problem. This damage, along with general misplacement of the original homeowners’ personal belongings and a fraudulent credit card application, was discovered by the original homeowners after they changed the locks back.

In all cases but one, the homeowners had no knowledge of defendant or M. Financial. However, one of the victims, Kimberly Pearson, formerly Kimberly Davis, knew defendant and had maintained a friendship with her for several years. Defendant had attended trips and parties with Pearson, and even made the bridesmaids' dresses for Pearson's wedding. The signature on the deed to Pearson's home was not her own and she was shocked that defendant had defrauded her.

For four of the properties, the quitclaim deeds were purportedly notarized by Antonio Close. Close is the friend of defendant's brother, Gino Davis, and knows defendant through that mutual acquaintance. Close has learning disabilities and difficulty reading. On one occasion, defendant brought him on a trip to be sworn in as a notary. However, Close had no idea that was the reason for their trip and did not understand the documents he signed or the oaths he swore. Later, a notary stamp in Close's name was found in defendant's basement; defendant had been notarizing her own quitclaim deeds without Close's knowledge.

Following trial, a jury convicted defendant in the manner noted above. At sentencing, the trial court decided to depart upward from the recommended minimum guidelines range for defendant's racketeering conviction by imposing a sentence of 8 to 20 years' imprisonment for the racketeering conviction. The trial court imposed 5 years' probation for each of defendant's remaining convictions.

Defendant contends that the trial court erred in departing upward from the recommended minimum guidelines range. We disagree.

This Court reviews de novo issues concerning the proper application of the statutory sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Statutory interpretation presents a question of law, which is also reviewed de novo. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). However, the determination of whether the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence, as is the amount of departure. *Id.* at 264–265. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible range of reasonable and principled outcomes. *Id.* at 269.

“A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court.” MCL 769.1(1). The circuit court has the responsibility to impose a sentence within the limits set by the Legislature. *Hegwood*, 465 Mich at 437. If a court departs from the legislative sentencing guidelines range, it must state on the record a substantial and compelling reason for the departure. MCL 769.34(3); *Babcock*, 469 Mich at 256. 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.” *People v Young*, 276 Mich App 446, 449-450; 740 NW2d 347 (2007) (quotations omitted). “To be objective and verifiable, a reason must be

based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.” *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005). Furthermore, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and prior criminal history. *People v Smith*, 482 Mich 292, 300, 305; 754 NW2d 284 (2008).

A sentencing court “shall not use an individual’s gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.” MCL 769.34(3)(a). Further,

[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. [MCL 769.34(3)(b).]

The final sentencing guidelines range in this case provided a minimum sentence range of three to five years’ imprisonment for defendant’s racketeering conviction. The trial court sentenced defendant to a minimum of eight years’ imprisonment, providing the following as justification for its departure:

I went over the guidelines, and the guidelines [range] on the most serious charge, the criminal enterprise, is thirty-six months to sixty months. That’s five years.

And then we have all of these other counts. And what I have noted here is there is no recognition that what this lady did harmed anybody in any way.

One complainant, or victim, couple, husband and wife, married for years, working hard every day, both of them, so they could get a house. They got caught up like we all got caught up, in the real estate stuff. So easy.

You got a house. It goes up in value. Go take money out. You do whatever. Get another mortgage. You’re going to watch an ARM. You’re going to do all kinds of things. And it eventually got to the place where they could not continue. Even two people working every day, they couldn’t do it. So what did they do? They got ready to short sale their house. Had got permission from the bank.

And I don’t think people who haven’t had to go through the process know how hard that has been over the last three or four years when you’re trying to talk to Bank of America, or Countrywide, or any of those other bandits that do nothing to little people but rob us with a pen instead of a gun.

They finally got permission from the bank, Bank of America, to short sale. Whoa [sic] unto them! House has now had the locks changed. Ms. Malcom changed the locks. Suddenly the house suffers a whole lot of damage—we don’t

know how that happened—and they can't short sale the house anymore. They are still together, that couple. They must have a real[ly] strong foundation.

We saw the lady who sent the letter, her friend. Boy, can you imagine the person who makes your bridesmaids' dresses, been in your house, comes to your parties, knowing you're getting married, and then forges your name so the house is no longer—that you had worked for for years so you could buy a house, now it's not even in your name.

Then I got to see—I can't remember. I'd have to go way back in my notes to try to remember the young man who was quite obviously [intellectually disabled], at least, who became, quote, a notary, and whose notary seal is in Ms. Malcom's basement. And now suddenly he's having to answer to the cops because he took a ride downtown with her.

The damage done to all of these individuals and to the system itself is not disclosed in a five-year minimum sentence. Not when you've got twenty-nine [sic—39] counts; not when after you've been interviewed by the cops—well, a person working for the prosecutor's office, investigator, you continue to try to do another deal.

And it's only money, but money is what we feed our children with. Money is what we send them to school with. Money is what we protect our homes with. And for a shyster to come along and take away from me, even if I was in the process of having to sell it because I couldn't afford it anymore, is reprehensible beyond the five-year guideline.

Those are substantial and compelling reasons why I'm going to depart, and I'm going to depart from the guidelines. I think a sentence of eight . . . to twenty years is the proper amount on the criminal enterprise conducted.¹

We conclude that the trial court, albeit rather casually executed, articulated substantial and compelling reasons that were not adequately accounted for under the sentencing guidelines.² Initially, the trial court did not clearly err in finding that defendant sought out and took advantage of an individual with an intellectual disability. *Babcock*, 469 Mich at 264. Close testified that defendant convinced him to sign papers that he was incapable of reading because of his intellectual disability, and directed him to register for a state identification card and to become a notary public. When Close asked defendant what he was signing, she told him not to

¹ With regard to the other convictions, the trial court noted, "I think on each one of those counts she should have been able to get a prison sentence, but the guidelines, they claim she shouldn't. So she'll get probation on those because that's what they require I give her."

² The trial court's articulation of reasons for its departure are sufficient to allow adequate appellate review. See *Smith*, 482 Mich at 318.

worry about it. Defendant then used Close's notary stamp to further her criminal enterprise without Close's knowledge. Offense variable ("OV") 10, i.e., "exploitation of a vulnerable victim," MCL 777.40(1), was scored at zero points because Close was not considered a victim of defendant's racketeering behavior. Consequently, the trial court did not err in finding that defendant exploited Close's intellectual disability and that the guidelines did not adequately address that factor. Defendant's actions in taking advantage of Close were an objective and verifiable reason for departure and of considerable worth; thus, the trial court did not abuse its discretion in finding that this factor supported departure.

A second reason the trial court gave for justifying a departure was the harm defendant's actions caused to the homeowners. At trial, Voltaire Pace testified that Bank of America, the bank that held his mortgage, foreclosed on Voltaire's and his wife's home as a result of the difficulties they experienced because of defendant's actions. Further, Pearson provided a written statement to be read at sentencing in which she stated that defendant's actions have caused "havoc, disarray, . . . extreme complications, stress, and most of all, an overload of unnecessary pain." The trial court did not err in finding this to be an objective and verifiable reason for departure. The trial court properly noted that the guidelines did not adequately recognize the harm that defendant's actions caused to numerous homeowners, and the magnitude of the harm was a substantial and compelling reason for departure. See *Young*, 276 Mich App at 449-450. Therefore, the trial court did not abuse its discretion in finding that the harm defendant caused to numerous homeowners was a substantial and compelling reason to depart from the guidelines.

Defendant contends that the harm caused was already taken into account by OV 16. Under OV 16, the trial court in this case scored ten points for property taken that had a value of more than \$20,000.00, pursuant to MCL 777.46(1)(b). Defendant, through fraud and forgery, obtained title to several houses, the aggregate value of which was significantly in excess of \$20,000. In addition, one of the properties had been subjected to water damage that resulted in mold, thereby preventing the Paces from completing a short sale and subjecting them to foreclosure. Because of OV 16's failure to account for the aggregate value of the stolen property, as well as the damage to the Paces in addition to the theft of their home, the trial court did not err in concluding that the offense variables did not adequately account for defendant's conduct.

In a cursory fashion, defendant argues that the trial court's articulated reasons for departure were taken into account by OV 9, which directs the trial court to score points for the number of victims who were placed in danger of physical injury, death, or property loss. MCL 777.39. Contrary to defendant's assertions, the trial court did not cite the number of victims as a reason for departing from the guidelines. Rather, the trial court focused on the aggregate amount of harm caused by defendant, which, as noted above, was not adequately considered by the guidelines.

As to its third reason for departure, the trial court did not err in finding that the sheer number of defendant's convictions constituted a substantial and compelling reason for departure. Defendant had 39 convictions, and, contrary to her contentions, the trial court did not err in recognizing that the guidelines—notably prior record variable ("PRV") 7 and OV 13—did not adequately account for this multitude of convictions. The record reveals that defendant received 20 points under PRV 7, which provides for the scoring of subsequent or concurrent felony

convictions. MCL 777.57. Under the statute, 20 points shall be assessed for “2 or more subsequent or concurrent convictions[.]” MCL 777.57. Here, defendant’s 39 convictions went well beyond two convictions. Similarly, OV 13 did not adequately consider the sheer number of defendant’s convictions. The trial court scored ten points under OV 13, which permits a court to score points for a continuing pattern of criminal activity. MCL 777.43. The highest number of felonies delineated under OV 13 is three felonies. Here, defendant had 39 convictions. Given the multitude of defendant’s convictions, which were a part of a continuing pattern of criminal behavior, the trial court did not err in finding that the offense variables did not adequately consider defendant’s conduct. See *People v Cline*, 276 Mich App 634, 652-653; 741 NW2d 563 (2007).

Finally, the trial court’s departure from the guidelines range rendered the sentence proportionate to the seriousness of defendant’s conduct and prior criminal history. *Smith*, 482 Mich at 300, 305. The presentence investigation report recommended a minimum sentence of three to five years’ imprisonment. The trial court sentenced defendant to an upward departure of three years, for a minimum sentence of eight years imprisonment, because the trial court found that 8 to 20 years’ imprisonment was the proper sentence for the crime of racketeering. As the trial court found, defendant’s PRVs did not adequately reflect the sheer number of concurrent convictions against defendant, nor did defendant’s OVs properly reflect the harm defendant caused in this case. The record reveals that the trial court weighed the appropriateness of a guidelines sentence against the gravity of defendant’s conduct before concluding that defendant’s conduct warranted a longer sentence. Where the trial court discussed the appropriateness of different sentences and the gravity of defendant’s offense, we conclude that the court provided an adequate justification as to why the sentence imposed produced a more proportionate sentence. See *id.* at 304-305. Therefore, the trial court did not abuse its discretion in departing upward from the sentencing guidelines range by three years. See *id.* at 300.³

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

³ Because we conclude defendant is not entitled to resentencing, we decline to consider her claim that any resentencing ordered in this case must be heard before a different trial judge.