

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 21, 2014

v

JAMARR DARRELL MILNER,

Defendant-Appellant.

No. 315810
Wayne Circuit Court
LC No. 12-011224-FC

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. The trial court sentenced defendant to 35 to 70 years' imprisonment for the conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case stems from the death of Ronnita Bradberry (Bradberry) that occurred on November 4, 2012. Defendant's and Bradberry's son, JM, was five years old at the time of Bradberry's death. Defendant, Bradberry, and JM shared a bedroom in the home. Defendant's brother, Dwight Milner (Dwight), lived upstairs in the same home.

On the night of November 3, 2012, defendant and Windall Hall (Hall) were drinking alcohol at defendant's home. Defendant and Hall left the home at approximately 11:00 p.m. or midnight to go to a party. Defendant returned to the home at approximately 2:00 a.m. or 3:00 a.m.

JM testified that he was sleeping with Bradberry in her bed. JM awoke to Bradberry yelling at defendant. Defendant punched Bradberry's face and head while she was lying down. Dwight heard Bradberry say, "Stop, Jamarr." While Bradberry was on the floor, defendant hit her with the bedroom door and a fan. JM never saw Bradberry hit defendant during the altercation. Dwight did not see the altercation, but only heard the sounds of fighting. JM testified that after defendant stopped beating Bradberry, she was on the floor and motionless. Defendant walked out of the bedroom as Dwight entered. Dwight testified that Bradberry was on the floor, leaning against the bed, and her mouth was open. Dwight saw JM in the bedroom. Dwight tried to give water to Bradberry, but she was unresponsive. Defendant had a gun and left the home. Dwight called for the police and ambulance. Dwight told the 911 operator that

someone had broken into the home and injured Bradberry because he was scared, nervous, and did not want to implicate defendant. JM testified that he was scared when he witnessed defendant beat Bradberry.

Ebony Towns (Towns) testified that defendant arrived at her home at approximately 5:00 a.m. Defendant told her that he had left a party and needed a ride home. However, Towns originally told the police that defendant said that he had a house and wanted her to move in with him. Defendant's shirt was ripped and he said that he had been wrestling with Dwight. Later that morning, defendant bought a different shirt from a gas station. Defendant told Towns that he and Bradberry were no longer dating.

Officer Douglas Mart responded to defendant's home and observed Bradberry on the ground with her eyes "wide open." JM was on the bed and leaning against Bradberry's shoulder. Officer Jamie Vajen also testified that JM was next to Bradberry and was in shock. JM told Vajen that his mother and father were arguing, his father picked up a fan, hit his mother in the face with the fan, and then left the home. There were no signs of forced entry at the home. Officer Johnell White, the officer in charge of the case, testified that defendant misled the police regarding his whereabouts at the time of the murder. The medical examiner concluded that Bradberry died of asphyxiation.

II. SENTENCING DEPARTURE

Defendant's 35-year minimum term of imprisonment is an upward departure from the recommended sentencing guidelines range of 162 to 270 months. Defendant first argues that the trial court abused its discretion in departing upward from the sentencing guidelines because the reasons stated on the record were not substantial and compelling. Specifically, defendant asserts that the guidelines adequately accounted for JM's psychological injury and defendant's interference with the administration of justice. We disagree.

"This Court reviews for clear error a trial court's factual findings at sentencing." *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008) (citation omitted). "Specifically, the existence or nonexistence of a particular sentencing factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *Id.* (internal quotation marks and citation omitted). This Court reviews de novo whether the departure factor is objective and verifiable. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). This Court reviews for an abuse of discretion the trial court's determination that there were substantial and compelling reasons to depart from the guidelines. *People v Hardy*, 494 Mich 430, 438 n 17; 835 NW2d 340 (2013). "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Smith*, 482 Mich at 300. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

A trial court may depart from a defendant's sentencing guidelines range if it states on the record a substantial and compelling reason for its departure. MCL 769.34(3); *Smith*, 482 Mich at 299. In order to be substantial and compelling, the reasons must be "objective and verifiable" and "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. "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 Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012) (citation omitted). 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.” *Id.* at 300, citing MCL 769.34(3)(b) (internal quotation omitted). The trial court’s departure must be proportionate to the defendant’s conduct and criminal history. *Smith*, 482 Mich at 300. “The sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender.” *Id.* at 318.

In the instant case, the trial court did not err in concluding that the unique circumstances at hand supported an upward departure from the sentencing guidelines. At sentencing, the trial court assessed 15 points for OV 5 and 10 points for OV 19. OV 5 addresses psychological injury to a member of the victim’s family. A score of 15 points is warranted if “[s]erious psychological injury requiring professional treatment occurred to a victim’s family.” MCL 777.35(a). OV 19 addresses interference with the administration of justice. MCL 777.49. The trial court must assess 10 points for OV 19 if “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). The trial court then made the following statement regarding the departure:

And the Court believes that the sentence I’ll impose -- any sentence I impose would not be appropriate for what you did here. Because what I -- I consider this to be one of the most heinous crimes that a person could commit. And that is one -- I mean it would be one thing you and your girl friend [sic] got into a fight and you killed her. But, again, to do that in front of your son, I don’t see how you could do that. And then to run away and leave him there with her body and then to go to another woman --

* * *

To go to another woman to set up a [sic] alibi, to attempt to set up a [sic] alibi, which to me is what that testimony -- to me I thought made it even more -- I mean not only did you go, you grabbed a gun and some money, went to another woman’s house, gave another woman some money for whatever and right after you committed this crime.

So to me I think -- going back to the crime itself, I think 15 points for psychological damage doesn’t do it. The Court is not going to go as high, but I think there are substantial and compelling reasons to go above the guidelines for the following reasons: First, the psychological injury is not sufficient. That alone, I think, is enough to go above the guidelines. But when you add together the flight, you add together you had an opportunity to come clean with the police, you weren’t there for the whole time, most of the time, and then that switched to your brother and then your son was lying about it, to me I think all of those factors -- I don’t think that the 16 and a half to 22 and a half years is appropriate.

In departing from the sentencing guidelines, the trial court stated that the guidelines did not adequately account for JM's psychological injuries and defendant's fabrications to the police. Regarding JM's psychological injuries, defendant brutally beat Bradberry to death in front of JM. Defendant punched Bradberry's face and head while she was lying down on her bed with JM. Bradberry told defendant to stop, but he admittedly proceeded to hit her with a fan and the bedroom door. Defendant, JM, and Dwight testified that while Bradberry was motionless and on the floor, defendant left JM by himself in the room with Bradberry, left the home, and went to meet another woman. When the police arrived, JM was on the bed and leaning against Bradberry's shoulder. Bradberry's eyes and mouth were open.

In *People v Lockridge*, 304 Mich App 278, 282; ___ NW2d ___ (2014); (opinion by O'CONNELL, J.), lv granted on other grounds ___ Mich ___ (2014), the trial court departed upwards in sentencing the defendant for his involuntary manslaughter conviction. The trial court gave the following reasons for the departure: "(1) that defendant violated court orders regarding contact with the victim; (2) that the sentencing guidelines did not reflect the extent of defendant's prior altercations with the victims; (3) that defendant killed the victim in the presence of their children, and then left the residence while the children attempted to revive the victim; and (4) that during and after the offense, defendant showed no concern for the physical or emotional well-being of the children." *Id.* On appeal, the defendant argued that the sentencing guidelines adequately accounted for the psychological injury to the victim's family. *Id.* This Court concluded that the trial court did not err in finding that the prior record and offense variables inadequately accounted for the defendant's conduct, stating that "the escalation of the domestic violence conduct toward the victim, the fact that the crime occurred in plain view of the children, and that defendant left his children alone with the trauma of attempting to revive their mother," supported the trial court's departure, given the unique circumstances in the case. *Id.* at 283.

Similarly, the brutal beating and murder of Bradberry, the fact that the crime occurred in plain view of JM, and the fact that defendant left JM with Bradberry's body, are objective and verifiable factors that support the trial court's conclusion that OV 5 had been given inadequate weight in this case, and the conclusion that the unique circumstances of this case supported an upwards departure. *Lockridge*, 304 Mich App at 283.

With regard to OV 19, the trial court referenced defendant's flight, his fabrications to the police, his claim that both his brother and son were lying, and his immediate attempt, following his crime, to establish an alibi with Towns. Attempting to deceive police during an investigation supports a score of 10 points for OV 19. See *People v Hershey (On Remand)*, 303 Mich App 330, 344; 844 NW2d 127 (2013), oral arg gtd on other grounds 495 Mich 1003 (2014). Here, defendant attempted to perpetrate multiple deceptions on police, including the establishment of a false alibi as well as attempting to implicate his brother, each of which individually would have supported a score of 10 points for OV 19. The trial court therefore did not err in holding that OV 19 was given inadequate weight in the instant case.

For many of the same reasons, the trial court's departure was proportionate to defendant and the gravity of the offense. Defendant viciously beat JM's mother to death in front of him, left him with his mother's body, attempted to establish a false alibi, and lied to police, attempting

to implicate his brother in his crime. Therefore, the trial court did not abuse its discretion in departing upward from the sentencing guidelines. *Hardy*, 494 Mich at 438 n 17.

IV. EXERCISE OF RIGHT TO JURY TRIAL

Defendant also argues that he was punished by the trial court for exercising his right to trial. We disagree. Before trial, the trial court held a *Cobbs*¹ hearing and indicated that if defendant were to plead guilty to second-degree murder, it would sentence defendant to 15 to 40 years' imprisonment. At a January 24, 2013 pretrial hearing, defendant stated that he did not want to accept the plea offer, even though he was facing more time if found guilty at trial. The trial court told defendant that the sentence imposed for the plea was lenient because it "was trying to spare your child the agony of having to testify against you, the father." At a pretrial hearing on February 22, 2013, defense counsel requested an opportunity to return to court after he spoke with defendant about the possibility of pleading guilty to second-degree murder and receiving a minimum sentence of 15 years' imprisonment. The trial court stated:

If the case does go to trial and your client is convicted, it won't be anywhere near the 15. I think there are -- I indicated earlier that this is a case where a -- the victim's son and the defendant's son witnessed what happened here. I think that would be very traumatic and I think that's ground -- if he is convicted, that's grounds for a severe upward departure, from my standpoint, based upon what happened here.

So I thought that the cap, 15 *Cobbs* was extremely generous on the Court's part. But if he goes to trial and wins, then I will have to deal with that. But I'm just putting the parties on notice that the top of the guidelines I don't think are appropriate if that child has to testify again.

In determining the term of a sentence, a trial court may not consider that a defendant exercised his constitutional right to a jury trial. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). "However, it is not per se unconstitutional for a defendant to receive a higher sentence following a jury trial than he would have received had he pleaded guilty." *Id.* A defendant takes certain risks by not accepting a plea offer and choosing to proceed to trial, which includes the possibility that he may receive a higher sentence following a jury trial than he would have received had he pleaded guilty. *Id.*

The record does not establish that the trial court punished defendant for exercising his right to trial. Rather, the trial court expressly stated during sentencing that it was not imposing the sentence because defendant exercised his right to trial, but that it was basing defendant's sentence on information learned during trial. The fact that more damaging information was revealed at trial was a risk that defendant faced by proceeding to trial. *Id.* In addition, the trial court's willingness to consider a more lenient sentence if defendant pleaded guilty pursuant to the prosecution's offer does not equate to a post-jury-trial sentence being imposed as a penalty

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

for exercising his right to trial. See *People v Godbold*, 230 Mich App 508, 613; 585 NW2d 13 (1998) (rejecting the defendant’s argument that “an implied promise of leniency if a jury trial is waived is the equivalent of an implied threat of punishment if the right to a jury trial is exercised.”).

Finally, because we find that defendant is not entitled to resentencing, his request to be resentenced before a different judge is moot. See *People v Richmond*, 486 Mich 29, 37; 782 NW2d 187 (2010).

Affirmed.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra