STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2006
v CONNY GEORGE MORITZ, Defendant-Appellant.	No. 251265 Macomb Circuit Court LC No. 03-000991-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CONNY GEORGE MORITZ, Defendant-Appellant.	No. 258436 Macomb Circuit Court LC No. 03-000991-FC

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

In Docket No. 251265, defendant appeals his jury trial convictions for kidnapping, MCL 750.349, first-degree home invasion, MCL 750.110a(2), carrying a dangerous weapon with unlawful intent, MCL 750.226, four counts of assault with a dangerous weapon, MCL 750.82, and three counts of possession of a firearm when committing or attempting to commit a felony, MCL 750.227b. In Docket No. 258436, defendant appeals his resentencing for the above convictions. We affirm defendant's convictions, but reverse his sentences for kidnapping and first-degree home invasion and remand for further proceedings consistent with this opinion.

I. Docket No. 251265

Defendant argues that the trial court erred by allowing Carl Cooper's preliminary examination testimony to be read into the record in lieu of requiring the prosecution to provide Cooper's live testimony. We disagree.

"The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant contends that the trial court admitted his testimony in violation of his Sixth Amendment right to confront the witnesses against him. Pursuant to the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 177 (2004), "testimonial statements of a witness who did not appear at trial [are inadmissible] unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Id.* at 53-54. Cooper's preliminary examination testimony was clearly testimonial. *Id.* at 68 ("Whatever else the term covers it applies at a minimum to prior testimony at a preliminary hearing . . . ."). However, Cooper was unavailable to testify at trial and defendant had an opportunity to cross-examine him at the preliminary examination.

MRE 804(a)(5) states that a declarant is unavailable when the declarant "is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Our Supreme Court has also explained:

> The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. [*People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (citations omitted).]

Similarly, the test for whether a party exercised due diligence in attempting to procure a witness' attendance at trial is one of reasonableness, that being diligent good-faith efforts, not whether more stringent efforts would have produced it. *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968); *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

Here, on the third day of trial, the judge stated:

> Apparently, the prosecution has one witness left. His name has come up plenty of times, Mr. Carl Cooper. Unfortunately, Mr. Cooper is indisposed as we know, it sounds like he was picked up by Southgate Police, a probation violation. Optimistically, to try and get him here today, I don't even really see it. It would have to be tomorrow. I told counsel I intend to proceed, we have the benefit of a preliminary examination transcript where Mr. Cooper was called as a witness, was subject to cross-examination. I'm finding that Mr. Cooper is unavailable as a witness, and as a result, that's why we have exam transcripts, we might as well use them.

Before reading Cooper's preliminary examination testimony into the record, the trial court informed the jury that Cooper had been arrested for driving with a suspended license and that "to get him over here today would be a massive product" and that the court was going to instead use

his preliminary examination transcript. We hold that the trial court correctly ruled that Cooper was unavailable.[1]

Further, defendant's attorney had and used the opportunity to cross-examine Cooper on the same issues at the preliminary examination. Therefore, the trial court's admission of Cooper's testimony did not violate MRE 804 or the Sixth Amendment.

II. Docket No. 258436

The trial court sentenced defendant to 23 to 50 years' imprisonment for kidnapping, 11 to 20 years for first-degree home invasion (consecutive to defendant's kidnapping sentence), two to five years for carrying a concealed weapon, two to four years for each count of assault with a dangerous weapon and two years for each count of felony-firearm. Defendant argues that the trial court erred in imposing his sentences for the kidnapping and home invasion convictions. We agree.[2]

Defendant says that the trial court imposed sentences for kidnapping and home invasion that exceed the statutory guidelines without stating substantial and compelling reasons for an upward departure. A trial judge may depart from the sentencing guidelines if he has a substantial and compelling reason to do so, and if he states his reasons on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the sentencing guidelines based on an offense or offender characteristic already considered in determining the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, factors must be actions or occurrences that can be confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). This Court also reviews a departure from the guidelines to determine if the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock, supra* at 264.

Here, the trial court sentenced defendant to a minimum of 23 years for kidnapping, which is a departure from the statutory sentencing guidelines range. The sentencing guidelines are 135 months (11.25 years) to 225 months (18.75 years). The Presentence Investigation Report (PSIR) provides that the substantial and compelling reason to depart "was the vulnerability of the victim, an 8 year-old child," because "defendant shot three innocent people, one being a children [sic],

---

[1] While we would have preferred the trial court to make a more thorough record with regard to the logistical difficulties of obtaining Cooper's presence at trial, this failure by the trial court was harmless because Cooper was unexpectedly incarcerated in another jurisdiction and, as the prosecutor notes, the jury acquitted defendant of the crimes to which Cooper was a witness.

[2] Defendant argues that the trial court erred by relying on facts that were not determined by the jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We reject this argument because, as our Supreme Court recently reiterated in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), *Blakely* does not apply to Michigan's indeterminate sentencing system.

and placed others in danger," and "the guidelines do not represent the victims' helplessness, innocence and inability to protect themselves." Yet, at defendant's resentencing, although the trial court initially indicated that it intended "to stay within the guidelines," it nevertheless sentenced defendant to 23 to 50 years for kidnapping. The record contains no explanation why the trial judge chose to depart from the guidelines. Though the PSIR discusses the reasons for a departure, the trial court did not state whether it agreed with those reasons. Clearly, if the judge imposes a minimum sentence that represents a departure from sentencing guidelines' range, the judge must state on the record the reasons for the departure. MCL 769.34(3). Because the trial court did not state on the record a substantial and compelling reason for departure, we remand for articulation of such a reason or resentencing. *Babcock, supra* at 258-259.

Defendant argues, in the alternative, that the trial court was required to calculate the sentencing guidelines for his home invasion conviction because the sentence runs consecutively to his kidnapping sentence. If a single offender is convicted of multiple offenses and the sentences will be served concurrently, a sentencing information report (SIR) must be prepared only for the highest crime class. MCL 777.21(2); MCL 777.13(2)(e). If the sentences imposed will be served consecutively, an SIR must be completed for every crime that will be served consecutively.

At the hearing for defendant's motion for resentencing, the prosecutor acknowledged that Prior Record Variable (PRV) 6 was incorrectly scored at ten points. Defendant's attorney stated that after reducing the ten points for PRV 6, the appropriate range for defendant's home invasion conviction would be 57 (4.75 years) months to 95 months (7.93 years). The trial court requested that a corrected SIR be prepared and the prosecution agreed it would provide one. Resentencing was ultimately scheduled for August 3, 2004, and the trial court sentenced defendant to 11 to 20 years for his home invasion conviction. The prosecution submitted on appeal an undated SIR that shows a corrected PRV 6 score of "0" and that the appropriate range for defendant's home invasion conviction would therefore be 57 months (4.75 years) to 95 months (7.93 years). Further, the prosecution asserts in its brief on appeal:

> The corrected presentence report reveals that the probation department did in fact correct the scoring and SIR to eliminate 10 points from PRV 6 (see attached). The corrected SIR reflects a recommended sentence of 57 to 95 months consistent with what defense counsel argued at the motion for resentencing and consistent with the legislative sentencing guidelines.

Though the prosecution provided an SIR for defendant's home invasion conviction, because the guidelines call for a sentence of 57 to 95 months for home invasion, the trial court's order sentencing defendant 11 to 20 years was an upward departure for which the trial court did not articulate substantial and compelling reasons. In fact, the record indicates that the trial court did not intend to depart from the guidelines. Though the prosecution argues that remand for the purpose of correcting the PSIR or SIR is not warranted, the prosecution concedes on appeal that "remand for resentencing is appropriate to allow the trial judge to articulate his substantial and compelling reasons on the record for upward departure of the sentencing guidelines for home

invasion and kidnapping." Based on the record, we agree. Accordingly, with respect to defendant's first-degree home invasion conviction, remand is appropriate for articulation of a substantial and compelling reason for departure or resentencing. *Babcock, supra* at 258-259.[3]

In Docket No. 251265, we affirm. In Docket No. 258436, we affirm defendant's convictions but reverse and remand for resentencing of defendant's convictions for kidnapping and first-degree home invasion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper

[3] Defendant asserts that the trial court erred by scoring PRV 6 at ten points in calculating his sentence for kidnapping. As stated, however, the trial court relied on the correct score of "0" for PRV 6 when it resentenced defendant, but nevertheless chose an upward departure from the guidelines. The trial court did not err in this regard.