

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN MICHAEL SHERRILL,

Defendant-Appellant.

FOR PUBLICATION

September 12, 2024

9:00 a.m.

No. 360133

Wayne Circuit Court

LC No. 19-002487-01-FC

Before: K. F. KELLY, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Allen Sherrill, was tried for first-degree murder, MCL 750.316, carrying a concealed weapon (CCW), MCL 750.227, and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury convicted Sherrill of the lesser offense of involuntary manslaughter, MCL 750.321, CCW, and felony-firearm. The trial court resentenced Sherrill to first serve two years for felony-firearm before he served terms of 10 to 15 years for manslaughter and three to five years for CCW. Sherrill appeals as of right. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

On March 1, 2019, Junika Hardy died after being shot in the back of the neck while in the driver’s seat of her vehicle. Sherrill, who was in the backseat with Hardy and his two-year-old child, claimed that Hardy had taken his loaded gun from the passenger seat next to her and had started waving it around while she was driving. When she held the gun up to her head, he tried to grab the gun from her and it went off. He claims that he managed to pull the vehicle into a parking lot and that when he opened the driver’s door, Hardy’s body fell out. Sherrill called Hardy’s mother and told her that Hardy had killed herself. Hardy’s mother directed him to call 9-1-1, which he did. He again stated that Hardy had committed suicide. When the police arrived, Sherrill was taken into custody. During a police interview, Sherrill consistently stated that Hardy had shot herself with his gun after they had had a dispute regarding their daughter’s relationship with his new girlfriend. The medical examiner, however, classified Hardy’s death as a homicide because, in his opinion, it was virtually impossible for her to have shot herself in the back of the neck.

Moreover, the evidence suggested that Hardy was facing forward when she was shot given that one of her teeth and some of her hair extensions were on the vehicle's dashboard. The shell casing from the bullet was also recovered from the backseat.

Following a jury trial, Sherrill was convicted of the lesser offense of involuntary manslaughter, CCW, and felony-firearm. This appeal follows.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Sherrill argues that there is insufficient evidence to support his conviction of involuntary manslaughter.¹ Challenges to the sufficiency of the evidence are reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). Due process requires, that when the evidence is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime established beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011).

B. ANALYSIS

“Involuntary manslaughter is the unintentional killing of another without malice in combination with a specified culpable act or mental state, which includes a causation component.” *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995) (quotation marks, citation, and emphasis omitted). As stated in M Crim JI 16.10, the first element of involuntary manslaughter is that the jury must find that the defendant caused the victim's death. See also *People v Crumbley*, ___ Mich App ___; ___ NW3d ___ (2023) (Docket Nos. 362210, 362211); slip op at 12. The causation element is construed according to the common-law meaning, which includes both cause-in-fact and proximate or legal cause. *Tims*, 449 Mich at 94-95. Factual causation exists if the jury finds that “but for” the defendant's conduct, the resulting harm would not have occurred. *Crumbley*, ___ Mich App at ___; slip op at 12-13. Factual causation alone will not establish a defendant's criminal liability. *Id.* at ___; slip op at 13. Rather, proximate cause is also required to prevent one from being convicted when the death is so remote from the defendant's conduct that it would be unjust to permit conviction. *Id.* “For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a direct and natural result of the defendant's actions.” *Id.* (quotation marks and citation omitted). The causal link may be broken if an intervening cause superseded the defendant's conduct. *Id.* at ___; slip op at 13. If the fact-finder determines that there was an intervening cause, proximate cause is lacking and criminal liability cannot be imposed. *Id.* Whether an intervening cause superseded the defendant's conduct is a question of reasonable

¹ The prosecutor argues that this issue is waived because Sherrill asked the court to instruct on involuntary manslaughter and approved of the court's instructions. See *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). We disagree. Sherrill is not challenging the court's instructions. Accordingly, his approval of the instructions given does not waive his challenge to the sufficiency of the evidence.

foreseeability. *Id.* If the claimed intervening act was reasonably foreseeable, then the defendant's conduct will still be considered a proximate cause. *Id.*

Sherrill argues that there was insufficient evidence to find that his actions were the proximate cause of Hardy's death. In support, he directs this Court to statements that he made during his police interview. Specifically, he told the police that he had placed his loaded gun on the front seat. Later, Hardy picked up the gun and put it to her head. He claimed that it only went off when he tried to grab it. He contends that Hardy shooting herself was not a foreseeable result of him leaving a loaded gun on the front passenger seat.

However, the evidence presented by the prosecution refuted his version of events. Hardy was shot in the back of her neck. She was facing forward when she was shot as evinced by one of her teeth and some of her hair on the dashboard. The medical examiner opined that the location of the entry wound made it unlikely that she had shot herself. The shell casing from the bullet was in the backseat. "All conflicts in the evidence must be resolved in favor of the prosecution." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Here, in light of the medical examiner's testimony and the location of the physical evidence, the jury could have reasonably inferred that Sherrill, who was sitting in the backseat, shot Hardy in the back of her neck, and that his actions were both the factual and proximate cause of her death.

Sherrill next contends that there is insufficient evidence of gross negligence. "Gross negligence means wantonness and disregard of the consequences that may ensue." *People v Head*, 323 Mich App 526, 532; 917 NW2d 752 (2018). Wantonness involves a defendant being aware of the risks, but being indifferent to the results. *Id.* "To prove gross negligence, a prosecutor must show:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.

(3) The omission [i.e., the failure] to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." [*Id.*, quoting *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997).]

Sherrill argues that his conduct did not rise to the level of gross negligence because he made a split-second decision to attempt to disarm Hardy. He again relies solely on his own version of events, and ignores the prosecution's evidence. However, as noted above, there was sufficient evidence for the jury to conclude that Sherrill was responsible for shooting Hardy. Further, the jury could reasonably infer that Sherrill was aware that his gun posed a danger to Hardy and his daughter. The gun was loaded and operable. It was not in a holster. Testimony established that Sherrill always carried the gun without a holster and with the safety off. Taken together, the evidence supported the jury finding that Sherrill handled the loaded firearm with wanton disregard

for the consequences of the results and with reckless disregard for the safety of the other occupants of the vehicle.²

III. COURTROOM CLOSURE

A. STANDARD OF REVIEW

Sherrill next argues that he was denied his right to a public trial because the courtroom was closed to spectators during his trial. Because Sherrill did not timely assert his right to a public trial, this issue is forfeited. See *People v Davis*, 509 Mich 52, 64-65; 983 NW2d 325 (2022). Accordingly, to prevail, Sherrill must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, (3) his substantial rights were affected, and (4) the error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. See *id.* at 67-68.

B. ANALYSIS

Because of the COVID-19 pandemic, our Supreme Court issued Administrative Order No. 2020-6, which required trial courts to make good-faith efforts to hold all proceedings remotely. See AO 2020-6, 505 Mich cxxxi (2020); *People v Anderson*, 341 Mich App 272, 282; 989 NW2d 832 (2022). The trial in this case was held in October 2021, shortly after when courts were cautiously resuming jury trials. In June 2021, the Wayne Circuit Court adopted 3d Circuit AO 2021-15 to address its plan to return to full capacity, primarily on the basis of the average of positive COVID-19 tests in the county.³ The court adopted limitations on the public entering the courthouse to prevent exposure to the virus, which included the following guidelines:

C. To facilitate increased activity in the courthouse, the Court is enacting the following measures related to court proceedings:

1. Proceedings will be conducted virtually to the maximum extent possible, consistent with Administrative Order No. 2020-6.
2. In-person court proceedings will be allowed on a limited basis to ensure six-foot social distancing at all times. Face coverings are required in accordance to the provisions outlined in the Return to Full Capacity Guidance. The public will be directed to view court proceedings remotely. The six-foot social distancing shall be required during proceedings.

² Sherrill also complains that he was unaware that Hardy was suicidal. However, the jury was not required to credit his statements that she put the gun to her head and shot herself when he tried to disarm her.

³ Sherrill does not challenge the validity of the circuit court's administrative order. Thus, for purposes of this appeal, we assume that it was appropriately entered and was in response to valid concerns raised by the COVID-19 pandemic.

3. The public is required to wear masks in court spaces pursuant to the provisions outlined in the Return to Full Capacity Guidance. The Court will provide masks at the time of entry.

4. Large venues and common areas in the courthouse (e.g. waiting areas, sit-down dining, etc.) will be open for use using limited six-foot distancing and masking requirements. Pursuant to MCR 8.110(c), members of the public or staff that refuse to adhere to social distancing requirements or other mitigation procedures may be asked to leave the court facility. The Court's personnel policies shall govern actions involving employees.

5. Any member of the public asked to leave the court facility must be offered an opportunity to conduct court business virtually, attend court proceedings virtually, file documents in an alternative manner, or confer with court administration to determine alternative arrangements for accessing the court.

At the start of voir dire, the court explained that precautions were taken to protect the jurors and keep them safe during "these trying circumstances," such as masking requirements, social distancing protocols, and the use of Plexiglas. At that time, the court noted that there had not been any problems for "many, many months here in this courthouse." The judge added, "I hope you feel as secure as we do. I'm sure we're justified in that sense of security." Only 20 potential jurors were allowed into the courtroom at a time for voir dire and those individuals not yet present in the courtroom for questioning remained in the jury assembly room, located on another floor where they could hear and observe the proceedings. Additionally, at the start of the trial, the court noted that "we're on YouTube so that members of the public can watch the proceedings if they want to." Additionally, the court pointed out that "any member of the public can go look at that record and read the transcript of the proceedings because these are public proceedings." Thereafter, on the fourth day of trial, the court was asked whether a police officer could remain in the courtroom after he testified. The court denied the request, noting that it had "already thrown somebody out the other day" and confirmed that there were "[n]o spectators" permitted.

In *People v Vaughn*, 491 Mich 642, 653; 821 NW2d 288 (2012), our Supreme Court addressed a defendant's right to a public trial, stating:

A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection:

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

If there is a timely assertion of the Sixth Amendment public trial right, the remedy for a violation must be "appropriate to the violation," although "the defendant

should not be required to prove specific prejudice in order to obtain relief”
[Footnotes omitted.]

See also MCR 8.116(D) (prescribing procedures for courts to follow when limiting access to court proceedings).

The record shows that the courtroom was closed to spectators attending Sherrill’s trial in person and access was limited to viewing the proceedings over a streaming service. A total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more individuals, but not all, from the courtroom. *United States v Simmons*, 797 F3d 409, 413 (CA 6, 2015). The closure of the courtroom due to COVID-19 restrictions would not qualify as a partial closure because all members of the public were prevented from attending this trial in person. Thus, Sherrill has shown that the courtroom was fully closed to the public.

The local court order closing the courthouse to spectators addressed an overriding interest that was likely to be prejudiced if the courtroom was open to the public. Despite Sherrill’s claims that the pandemic was no longer posing a threat to the local community, COVID-19 infections were still a problem in 2021 and continuing to limit large gatherings was intended to prevent the virus, including new variants, from reemerging. The decision to limit spectators from attending the trial in person was intended to make the courtroom a safer environment for the jury and others who were required to participate in the trial. Thus, there was an overriding interest that would have been prejudiced if the courthouse remained open to the public.

On the facts, the closure of the courtroom was also no broader than necessary. It appears that the court spread out the jurors to allow for social distancing during the trial, not just during voir dire. Even if there was some room to safely allow spectators, that number was likely very minimal. Keeping spectators out of the courtroom was necessary to keep the focus on the trial rather than on COVID-related safety concerns.

The trial court did not consider reasonable alternatives because there was no objection to the closure of the courtroom. However, 3d Circuit AO 2021-15 anticipated a reasonable alternative to viewing the trial in person because the trial was streamed over YouTube. This option allowed the public to view the trial while keeping those participating in the trial safe. Sherrill claims that this alternative was not available to certain communities because of limited access to internet service. However, because of the widespread availability of cellular service and smartphones, as well as the availability of internet services at public libraries, this argument does not present a significant enough reason to have prevented closing the courtroom to the public.

Finally, the trial court did not explicitly make findings on the record to support the closure. Nevertheless, 3d Circuit AO 2021-15 addresses the factors that caused the chief judge to begin implementing the limited plan to reopen the courtrooms to hold trials and conduct other business. The local court order adopts multiple procedures and rules to limit the spread of the virus. And, consistent with Administrative Order No. 2020-6, proceedings were to be conducted virtually to the maximum extent possible. The order reflects the court’s conclusion that allowing the public to sit through trials or other courtroom proceedings was a step that had to wait until public health conditions improved to the point that larger gatherings of individuals did not raise fears of causing cases of COVID-19 to spike. In light of the circumstances, 3d Circuit AO 2021-15 adequately

represented the underlying findings for limiting public access to the courtroom on a temporary basis. The trial court followed that order to keep spectators out of the courtroom. Thus, although the court did not make explicit findings, given the record, we conclude that the reasons why the court closed the courtroom to the in-person spectators is apparent.

In sum, the trial court relied on 3d Circuit AO 2021-15 as the justification for closing the courtroom. In light of the carefully implemented procedures adopted to gradually reopen the courthouse to full capacity, Sherrill has not shown that the temporary limit on in-person spectators amounted to plain error affecting his substantial rights.⁴

IV. MISTRIAL

A. STANDARD OF REVIEW

Sherrill next argues that the trial court abused its discretion when it denied his motion for a mistrial. A trial court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *People v Boshell*, 337 Mich App 322, 335; 975 NW2d 72 (2021). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

B. ANALYSIS

A mistrial should be granted only for an irregularity that is both prejudicial to the defendant and impairs his right to a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Here, during trial, the prosecution inadvertently and briefly displayed a photograph of Hardy's body that the trial court had previously ruled was inadmissible given its graphic nature. Sherrill's lawyer moved for a mistrial, which the trial court denied. The court explained that it excluded the photograph because it was one of multiple photographs that was extremely gory and disturbing and it did not offer much in the way of evidence. The court refused to grant a mistrial because the photograph was inadvertently displayed and it generally was duplicative of other photographs and testimony. Sherrill approved of the court giving the jury a cautionary instruction to disregard that photograph.

Sherrill claims that the prosecutor displayed other photographs excluded by the trial court to the jury by leaving them out on the table, making it possible for the jury to view them, suggesting that this incident was not an accident. While there is proof that the prosecutor may not have been careful in handling her proposed exhibits, the record does not show that the jury actually was able to view any excluded photographs left out on the prosecutor's table because there were also multiple photographs that the court admitted. The record does not prove that the prosecutor had a pattern of displaying inadmissible evidence to the jury. Moreover, the photograph in question was

⁴ We deny Sherrill's motion to remand on this issue to further develop the record. Sherrill requested a remand to have his mother testify about her exclusion from the courtroom. However, Sherrill never asked that she be allowed to remain. Further, the reason why the trial court excluded spectators is apparent on the record. Consequently, the testimony of Sherrill's mother would not affect the result of this issue.

on the jury's screen for only a short period of time. Given that the evidence was generally duplicative of other evidence and the court instructed the jury to disregard the photograph that mistakenly appeared on the screen, it was not an abuse of the trial court's discretion to deny the motion for a mistrial.

V. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Next, Sherrill argues that his lawyer provided ineffective assistance by not objecting to statements made by the officers when interrogating him. Because an evidentiary hearing was not conducted in this case, this Court's review of the facts is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. ANALYSIS

In order to establish that his lawyer provided ineffective assistance, a defendant must show (1) that his lawyer's performance was deficient, i.e., that "it fell below an objective standard of professional reasonableness," *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007), and (2) that he was prejudiced by his lawyer's performance, i.e., but for his lawyer's "deficient performance, there is a reasonable probability that the outcome would have been different," *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *People v Leffew*, 508 Mich 625, 637; 975 NW2d 896 (2022) (quotation marks and citation omitted).

The jury was shown an almost three-hour video recording of Sherrill's interview with the police. During the interview, the officers asked Sherrill to demonstrate how Hardy had grabbed the gun and positioned it so that she could shoot herself in the back of the neck. Multiple times during the interview, they told Sherrill that his description of what had occurred was "impossible" and that no reasonable person would believe it. On appeal, Sherrill argues that the officers' comments improperly impugned his credibility and should have been objected to by his trial lawyer. He notes that it is improper for a witness to comment on the credibility of another witness because credibility is a matter reserved for the jury. See *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). Moreover, police officers may not comment on a defendant's guilt or vouch for the complainant's credibility. *People v Hawkins*, 507 Mich 949; 959 NW2d 179 (2021).

Declining to raise objections to evidence can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). That a strategy does not succeed does not render its use ineffective assistance by the defendant's lawyer. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Here, Sherrill exercised his right not to testify. As a result, the 9-1-1 call and the police interview represented his opportunity to tell his version of events to the jury. During closing argument, Sherrill's lawyer relied upon his statements in the interview to argue that the prosecution had not met its burden of proof. He pointed out that Sherrill did not "lawyer up" even though the police were "slick" in the way that they got him to give a statement. He stressed that during the interview the police lied to Sherrill multiple times, stating that they knew it was an unintentional accident and that Hardy was at the hospital and that they were going to talk with her. Sherrill's lawyer stated that the officers were "pounding" at Sherrill, stating that they were going

to find DNA and were going to use CSI to find fingerprints and skin flakes. He also pointed out that they told him that they did not believe him. The defense lawyer argued that, despite all of that, the interview shows that Sherrill was consistent in his version of events. He did not falter when the police stated they did not believe him, nor when they suggested that Hardy would be able to tell them what had really happened. In light of the extensive argument relating to the police interview, it is clear that the defense strategy in this case was to highlight Sherrill's consistency in the face of a brutal, almost three-hour long interview where the police lied to him, suggested that they would find forensic evidence to refute his story, and expressed disbelief. On this record, Sherrill has not overcome the strong presumption that his lawyer's performance "was born from sound trial strategy." See *People v Douglas*, 496 Mich 557, 585; 852 NW2d 587 (2014).

VI. SENTENCE

A. STANDARD OF REVIEW

Finally, Sherrill argues that his sentence for involuntary manslaughter is not reasonable. This Court reviews a trial court's sentencing decision for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 476; 902 NW2d 327 (2017). An unreasonable sentence amounts to an abuse of discretion and a sentence is unreasonable if the trial court failed to follow the principle of proportionality or failed to provide adequate reasons for the extent of the departure from the sentencing guidelines. *Id.*

B. ANALYSIS

To determine a proportionate sentence, a trial court must consider the nature of the offense and the background of the offender. *Id.* at 472. The principle of proportionality primarily involves whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines. *Id.* This Court may consider the following, nonexhaustive list of factors when determining a sentence's proportionality:

(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019) (quotation marks and citation omitted).]

Sherrill argues that the departure from the guidelines resulted in an unreasonable sentence because the trial court relied upon acquitted conduct. "Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." *People v Beck*, 504 Mich 605, 609; 939 NW2d 213 (2019). Therefore, considering acquitted conduct at sentencing is fundamentally inconsistent with the presumption of innocence and violates the defendant's right to due process. *Id.* at 626-627. However, trial courts may still sentence for uncharged conduct under the preponderance-of-the-evidence standard. *Id.* at 626-627. In *People v Brown*, 339 Mich App 411; 984 NW2d 486 (2021), the defendant was sentenced for being a felon in possession of a firearm and felony-firearm. He had been acquitted of second-degree murder in an earlier trial where he was charged with a shooting involving the same facts, but he

raised self-defense. *Id.* at 414. The Court adopted a “rational jury” test to determine for what conduct the defendant was acquitted. The “rational jury” standard requires examining the record to determine the ground or grounds upon which a rational jury would have acquitted the defendant. *Id.* at 423-425. In *Brown*, 339 Mich App at 425-426, this Court concluded that the trial court erred by considering any facts related to the underlying shooting and the victim’s death because that was the conduct for which the defendant was found not guilty. Also, while the trial court in *Brown* stated that it could not sentence on the basis of the victim’s death, the court mentioned several times that if not for the defendant’s actions, the victim would still be alive. *Id.* at 427. Accordingly, the trial court’s comments indicated that it had considered acquitted conduct in its decision.

Here, the trial court was aware that it could not consider that Sherrill had intentionally caused Hardy’s death because the jury found that he did not act with malice. However, because he was convicted of involuntary manslaughter, involving gross negligence, the court could consider the impact his actions had on his child when the child was present when her mother was shot dead. Additionally, the trial court also appeared to base the departure on Sherrill’s conduct leading up to this incident. The court found that Sherrill exploited Hardy’s vulnerability as a victim because of their child to get close to Hardy, allowing this offense to occur, even if it was not intentional. The court confined these remarks to Sherrill’s possible harassment of Hardy, despite being told that their relationship was over. As the prosecutor points out, any stalking behavior by Sherrill could be considered by the court because it involves uncharged conduct, not conduct for which defendant was acquitted. Finally, when resentencing Sherrill, the court cited an additional basis for its sentencing decision, which was Sherrill’s poor adjustment to incarceration, which involved 55 misconducts.

Based upon the record before us, the trial court did not consider acquitted conduct when the court exceeded the sentencing guidelines. And because the court’s reasons for departure justify the departure and the amount of the departure, resentencing is not required.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly