

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LORIE ANN STUER,

Defendant-Appellant.

UNPUBLISHED

July 22, 2021

No. 354464

Isabella Circuit Court

LC No. 2019-000596-FH

Before: HOOD, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM.

Defendant pleaded guilty to using false pretenses to obtain \$100,000 or more, MCL 750.218(7)(a), using false pretenses to obtain at least \$20,000 but less than \$50,000, MCL 750.218(5)(a), and using false pretenses to obtain at least \$1,000 but less than \$20,000, MCL 750.218(4)(a). Relevant to this appeal, defendant was sentenced to 9 to 20 years’ imprisonment for the conviction of using false pretenses to obtain \$100,000 or more. The minimum sentence reflected a four-year upward departure from the top end of the minimum sentence guidelines range of three to five years in prison. Defendant appeals by delayed leave granted,¹ challenging the upward departure. We affirm.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

This case arises out of defendant’s actions in defrauding Bandit Industries, Inc., of over \$3 million from 2011 to 2018. Defendant’s husband owned a trucking company, Stoney Creek Trucking (SCT), and Bandit was an SCT customer. Defendant was in charge of handling the billing for SCT, and SCT used a factoring company named eCapital. SCT would send eCapital an invoice for trucking services performed by SCT for Bandit, and eCapital would immediately pay SCT, less a percentage as a fee. Then, eCapital would forward the invoice to and collect full payment from Bandit. In 2011, defendant began submitting duplicate invoices to eCapital, taking

¹ *People v Stuer*, unpublished order of the Court of Appeals, entered September 11, 2020 (Docket No. 354464).

the shipping number off an invoice and changing the date of the invoice. In other words, defendant was sending false invoices to eCapital for unperformed trucking services and receiving payment. eCapital would then send the invoices to Bandit for payment. Bandit calculated that they overpaid by \$3,653,095 on SCT invoices from 2011 to 2018. There was an agreement at defendant's plea hearing that she would pay restitution in the amount of \$3.3 million. As indicated, the trial court departed from the applicable minimum guidelines range of 36 to 60 months for the conviction of using false pretenses to obtain \$100,000 or more and sentenced defendant to 9 to 20 years' imprisonment for the offense.

II. ANALYSIS

On appeal, defendant argues that the trial court abused its discretion by upwardly departing from the guidelines range. We disagree.

This Court reviews for reasonableness "[a] sentence that departs from the applicable guidelines range." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). In *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017), our Supreme Court provided elaboration on the "reasonableness" standard, stating:

[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."

Factual findings related to a departure must be supported by a preponderance of the evidence and are reviewed for clear error. *People v Lawhorn*, 320 Mich App 194, 208-209; 907 NW2d 832 (2017). For purposes of sentencing, a trial court may consider all record evidence, including the contents of a presentence investigation report and plea admissions. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015).

The key test is not whether a sentence departs from or adheres to the guidelines range but whether the sentence is proportionate to the seriousness of the matter. *Steanhouse*, 500 Mich at 472. "The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). Sentencing judges are "entitled to depart from the guidelines if the recommended ranges are considered an inadequate reflection of the proportional seriousness of the matter at hand." *Milbourn*, 435 Mich at 661. A sentence within the guidelines might be disproportionality lenient. *Id.* "Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted." *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). In *People v Steanhouse*, 313 Mich App 1, 46; 880 NW2d 297 (2015), *aff'd in part, rev'd in part on other grounds* in 500 Mich 453 (2017), this Court indicated:

Factors previously considered by Michigan courts under the proportionality standard included, among others, (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. [Citations omitted.]

“[A] trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (quotation marks and citations omitted). “When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure.” *People v Smith*, 482 Mich 292, 318; 754 NW2d 284 (2008). We note that our Supreme Court has now held “that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019).

In this case, the trial court identified the following reasons for the upward departure from the guidelines range: (1) offense variable (OV) 16, MCL 777.46 (value of lost property), did not sufficiently reflect the severity of defendant's offense; (2) Bandit and its employees were negatively impacted by the theft; (3) defendant abused a relationship of trust that had existed between Bandit and STC; (4) a five-year sentence would not adequately deter others from taking millions of dollars, and (5) a large number of employees were hurt.

Defendant asserts that the trial court's rationale for the upward departure was, in part, that OV 16 did not fully take into consideration the amount of loss in this case. Defendant's assertion is accurate, but she fails to argue that there was any error connected to the court's determination that OV 16 was inadequate in view of the \$3.3 million theft. Regardless, we shall examine OV 16, which concerns property that is obtained, damaged, lost, or destroyed. MCL 777.46(1). Ten points must be assessed for OV 16 when “[t]he property had a value of more than \$20,000.00”² As the trial court emphasized, the amount of property obtained by defendant was \$3.3 million, or *165 times* the limit for assessing 10 points for OV 16. The trial court did not err in concluding that the theft of \$3.3 million was inadequately taken into consideration by OV 16 and that this was a proper departure factor. See *Steanhouse*, 313 Mich App at 46.

Defendant argues that the trial court incorrectly found that defendant's actions threatened to cause job losses at Bandit. Defendant contends that no jobs were lost and that Bandit continues to thrive. Defendant mischaracterizes the trial court's statements. The court indicated that defendant's conduct caused concerns with a valuation of Bandit, which was performed as part of a transitioning to an employee stock-owned trust, and resulted in reduced bonuses for employees.³ The trial court also simply noted that Bandit provided people with good paying jobs in the

² The maximum number of points that may be assessed for OV 16 is 25 points. But 25 points may only be assessed for OV 16 when a defendant was convicted under MCL 750.50, which prohibits the cruel and inhumane treatment of animals, and the property consisted of 25 or more animals. MCL 777.46(1)(a).

³ Additionally, Bandit's controller testified at the sentencing hearing that numerous hours were devoted to investigating and discovering the full extent of the fraud.

community and that defendant's conduct made it more difficult to do so given the theft of \$3.3 million. Accordingly, defendant's argument lacks merit.

Defendant does not challenge the other justifications the trial court provided for imposing a departure sentence, and we discern no error. It was appropriate for the trial court to consider the negative impact of defendant's theft on Bandit and its employees, including diminished bonuses, because such impact was not considered by the guideline factors. See *Steanhouse*, 313 Mich App at 46. For the same reason, there was also nothing improper with the court's taking into consideration defendant's exploitation and abuse of the existing strong relationship between SCT and Bandit. See *Steanhouse*, 313 Mich App at 46.

We further conclude that it was proper for the trial court to consider the lack of deterrence to others if a mere five-year minimum sentence was imposed for the theft of \$3.3 million. Deterrence of others from committing like offenses is a proper goal of sentencing. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Next, it was not improper for the trial court to consider the number of Bandit employees, over 400 at the time, harmed by defendant's behavior. Although OV 9, MCL 777.39, addresses the number of victims, it only contemplates victims who were placed in danger of physical injury, death, or property loss. OV 9 was assessed zero points for defendant. Because the number of people defendant affected or hurt was not adequately reflected in the sentencing guidelines, we conclude that the trial court properly considered the number of persons harmed. See *Steanhouse*, 313 Mich App at 46.

Defendant finally argues that the trial court failed to articulate the reasons why the nine-year minimum sentence was proportionate to the offense and the offender. This is the full extent of defendant's argument; there is no elaboration or acknowledgement of the trial court's fairly lengthy explanation with respect to why it was departing from the guidelines and imposing a minimum sentence of nine years. The record reflects that the trial court reasoned that five years in prison was woefully inadequate for the theft of \$3.3 million, especially in light of the surrounding circumstances, which the trial court closely examined and discussed. When speaking of deterrence, the court noted that a five-year sentence for fraudulently obtaining \$3.3 million would amount to over \$600,000 per year and provide little deterrence. The trial court also observed that the absolute highest minimum sentence it could impose was approximately 13 years,⁴ yet it effectively determined that a 13-year minimum sentence would not be reasonable, settling for the mid-range departure prison term of nine years. We conclude that the trial court adequately articulated the reasons why the nine-year minimum sentence was proportionate to the circumstances surrounding the offense and the offender. Defendant does not argue that the minimum sentence was unreasonable or disproportionate. In sum, we conclude that the minimum sentence of nine years' imprisonment was reasonable as it did not violate the principle of proportionality; therefore, the trial court did not abuse its discretion by imposing the sentence.

⁴ MCL 769.34(2)(b) provides that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."

We affirm.

/s/ Karen M. Fort Hood

/s/ Jane E. Markey