

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL LEE ARNOLD,

Defendant-Appellant.

UNPUBLISHED

April 2, 2002

No. 223792

Genesee Circuit Court

LC No. 99-004694-FC

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant was sentenced as an habitual offender, MCL 769.10, to serve ten to fifteen years for the assault conviction, the mandatory two years for the felony-firearm conviction, and three to 7½ years for the felon-in-possession of a firearm conviction. We affirm.

Defendant first contends that the trial court abused its discretion when it denied defendant's motion for a new trial. Defendant asserts that he is entitled to a new trial because the jury's verdict was against the great weight of the evidence and because it was based upon insufficient evidence.

Our Supreme Court has stated that authority to grant a new trial because the verdict was against the great weight of the evidence should be invoked only in an exceptional case in which the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Defendant contends that there was no evidence that tended to support a conclusion that defendant had beaten the victim. We disagree. Given the testimony at trial that defendant had chased the victim and his companion, Frank, earlier in the day, the jury could infer that defendant was angry with the victim and Frank. The jury was also presented with the fact that defendant was present at the scene of the crime. Furthermore, the jury heard testimony that defendant had a gun at the crime scene. Considering that defendant was angry, at the scene of the crime, carrying a weapon when he got out of the car, and that the victim was beaten by a man with a gun, there was evidence to support defendant's conviction. This evidence was not outweighed by the evidence to the contrary. Defendant contended that he was present at the scene but not the attacker. Thus, the jury was merely confronted with a question of credibility. Clearly, they concluded that

defendant was the attacker. This Court may not resolve credibility questions anew. *People v Gadowski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Likewise, defendant's second argument – that the trial court abused its discretion by denying defendant's motion for a new trial because the verdict was based upon insufficient evidence – must also fail. Defendant contends that the evidence was insufficient to prove that he had attacked the victim. Because, as noted above, the question of identity was a credibility determination, we cannot say that the trial court abused its discretion when it concluded that the conviction was supported by sufficient evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992) (this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses). Thus, defendant is not entitled to a new trial.

Defendant's third argument asserts that the trial court abused its discretion when it sentenced him for assault with intent to do great bodily harm less than murder. Specifically, defendant asserts that the trial court's reasons for departing upward from the guidelines were not substantial and compelling because the court relied upon factors that were already taken into account in scoring defendant's guidelines' range. We disagree that the trial court abused its discretion.

Defendant's guidelines' range was established as thirty-four to eighty-three months. The trial court ultimately sentenced defendant to serve 120 to 180 months. Thus, his sentence was an upward departure from the range. This Court's review of a departure from the legislatively created sentencing guidelines is limited to whether the trial court abused its discretion when it determined that a substantial and compelling reason existed to depart from the guidelines. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 74, 76; 624 NW2d 479 (2000). This Court in *Babcock* indicated that such reasons "should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Id.* at 75, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The factors must also be objective and verifiable. *Babcock*, *supra* at 75.

Here, the trial court based its departure from the guidelines' range upon its findings that "[t]his was the most vicious beating [the court had] ever heard of where the victim survived," that defendant represented a danger to the community, and that defendant was capable of extreme violence. Defendant contends that these factors were considered within the guidelines and are therefore improper reasons upon which to base a departure.

According to the guidelines,

[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); see, also, *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).]

With respect to the severity of the beating reason stated by the trial court, we conclude that although the guidelines accounted for physical injury to the victim and excessive brutality,

the trial court did not err in finding that a departure from the guidelines was justified because the severity of the attack was given inadequate weight by the guidelines. MCL 769.34(3)(b); *Armstrong, supra* at 425. The undisputed, verifiable evidence showed that the victim required multiple surgeries on his head, was in the hospital for about a month, was unconscious for about two weeks after the attack, and has suffered numbness in his extremities, disfigurement, and some loss of his hearing and the loss of sight in his left eye. The brutal attack lacked provocation, and the victim was repeatedly hit with the butt end of a shotgun even after he was lying on the ground with such force that one witness testified that the blows were delivered as if a baseball bat were being swung. The trial court did not abuse its discretion by upwardly departing from the guidelines because the severity of the beating constituted a substantial and compelling reason that was given inadequate weight by the guidelines. We need not reach defendant claims regarding the other two reasons for departure because the trial court's first stated reason justified its upward departure from the guidelines.

Defendant also asserts that his sentence violates the principle of proportionality and constitutes cruel or unusual punishment. With respect to defendant's proportionality argument, this Court, in *Babcock, supra* at 77, specifically considered whether appellate courts could "further review the sentence once it has been determined that a substantial and compelling reason to depart exists" and concluded that no further review was permitted once a substantial and compelling reason has been found. This Court stated that there was "no authorization in the statute for this Court to further review the overall sentence under the . . . principle of proportionality." *Babcock, supra* at 78. Thus, this argument is without merit.¹

Defendant's contention that his sentence constitutes cruel or unusual punishment is also without merit. In determining whether a sentence is cruel or unusual, this Court looks to the "gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation." *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996). Applying this test to the instant case, we are not convinced that defendant's sentence is unconstitutional.

Addressing the first factor in the test, the trial court, in imposing this sentence, was concerned by the severity of the beating defendant inflicted on the victim. We agree with the trial court in its assessment that the beating here was especially violent and brutal. The victim suffered severe complications, such as loss of hearing, sight, and memory, numbness in his extremities, and physical disfigurement.

The departure from the guidelines in this case that forms the basis of defendant's argument represents an increase of thirty-seven months. Moreover, because defendant was sentenced as an habitual offender, his sentence does not violate the statutory rule that a minimum sentence not exceed two-thirds of the statutory maximum. MCL 769.10(1)(a); MCL 769.34(2)(b). Therefore, balancing the departure against the brutality of the attack, we conclude that the departure cannot be said to be cruel or unusual.

¹ In any event, we note that the sentence is proportionate to the circumstances surrounding the offense and offender.

Moving to the second factor in the test, according to the sentencing guidelines, other crimes in this state that carry the same sentence for defendant include assault with intent to maim, MCL 750.86; felonious assault, MCL 750.87; exposing children with intent to injure or abandon, MCL 750.135; and assault with intent to commit sexual penetration, MCL 750.520g(1). Comparing these crimes to defendant's conviction, there seems to be no distinguishing factor that would lead this Court to conclude that defendant's sentence is cruel or unusual. Indeed, these crimes all constitute crimes against the person, and all carry the same statutory maximum sentence, which in defendant's case was extended by his conviction as an habitual offender. MCL 769.10(1)(a).

The third factor requires this Court to examine the penalty imposed with regard to the sentence imposed in other states. In Michigan, the crime of assault with intent to commit great bodily harm, MCL 750.84, carries a statutory maximum sentence of not more than ten years. Reviewing the statutory schemes of Wisconsin, Indiana, and Ohio reveals that comparable crimes carry similar sentences. In Wisconsin, Wis Stat Ann § 940.19(5), aggravated battery that causes great bodily harm is a class C felony subject to imprisonment for not more than ten years, Wis Stat Ann § 973.01(2)(b)(a). In Indiana, an assault that causes serious bodily injury, Ind Code Ann § 35-42-2-1(3), carries a sentence of between four and eight years in prison, Ind Code Ann § 35-50-2-6(a). In Ohio, felonious assault, Ohio Stat Ann § 2903.11, the comparable statute, carries a sentence of between two and eight years in prison, Ohio Stat Ann § 2929.14(A)(2). Thus, crimes in other jurisdictions do not carry significantly disparate sentences for a similar crime. There is, therefore, no reason to consider defendant's sentence cruel or unusual under this part of the test.

Finally, the fourth factor – considering the goal of rehabilitation – does not lead to the conclusion that the sentence is unconstitutional. Defendant is a recidivist and was sentenced as an habitual offender. Therefore, the goal of rehabilitation is mitigated by the fact that rehabilitation was unsuccessful in the past. Moreover, given the factors outlined above, this Court does not believe that the goal of rehabilitation would supersede the finding that the sentence was not otherwise unconstitutional. Thus, this Court does not believe that this factor of the test transforms an otherwise constitutional sentence into an unconstitutional one. For all these reasons, this Court does not believe that defendant's sentence constitutes cruel or unusual punishment. Defendant is not entitled to relief on this basis.

We affirm.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey