

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT VANDEVENTER,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 230137

Wayne Circuit Court

LC No. 99-012254

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for two counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty-five to forty years' imprisonment for the assault convictions, to be served concurrently, and two years' imprisonment for the felony-firearm conviction, to be served consecutive to the assault convictions. We affirm defendant's convictions; however, we vacate his sentences and remand for resentencing.

This case arises out of defendant's actions in shooting two victims in the head before shooting himself in the head.

Defendant first contends that the prosecutor committed misconduct because she argued that defendant was "trying to pull the wool over the [jury's] eyes" and that the defense of diminished capacity was "garbage." We disagree.

Prosecutorial misconduct issues are decided on a case by case basis. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The reviewing court must examine the pertinent portion of the lower court record and evaluate the prosecutor's comments in context. *Id.* Prosecutors may not make statements of fact to the jury, but are free to argue the evidence and all reasonable inferences arising from it in relation to the theory of the case. *Id.* "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* (citation omitted). This Court reviews the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

A prosecutor need not confine argument to the blandest terms possible. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). A prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury; however, the prosecutor's comments must be considered in light of defense counsel's comments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument." *Id.* at 593, quoting *People v Kennebrew*, 220 Mich 601, 608; 560 NW2d 354 (1996).

The prosecutor did not specifically denigrate defense counsel or question defense counsel's veracity; rather, her arguments related to the defense of diminished capacity. When read in context, it is clear that the prosecutor's comments made during her rebuttal argument were in response to defense counsel's closing argument, and related to her argument that the defense of diminished capacity did not apply to this case. Accordingly, the prosecutor did not commit misconduct, and defendant is not entitled to a new trial.

Defendant next argues that the trial court abused its discretion in departing from the statutory sentencing guidelines because the reasons stated for departure do not constitute substantial and compelling reasons for departure under MCL 769.34. We agree.

We review the trial court's determination of the existence or nonexistence of a particular factor for clear error. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review the determination that a particular factor is objective and verifiable as a matter of law. *Id.* at 76. We review the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion. *Id.*

The offenses committed in this case occurred on September 13, 1999; therefore, the statutory sentencing guidelines apply to this case. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Defendant was sentenced to twenty-five to forty years' imprisonment for each of his assault convictions. The statutory sentencing guidelines provide for a minimum sentence range of 126 to 210 months or 10½ to 17½ years' imprisonment. Thus, the sentencing court departed significantly upward from the statutory sentencing guidelines range.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001), citing MCL 769.34(2). "[A] judge's discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature." *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). The sentencing court may depart from the guidelines range if there is a substantial and compelling reason for the departure, and the court has stated on the record the reasons for the departure. *Armstrong, supra* at 425, citing MCL 769.34(3). "The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight." *Armstrong, supra* at 425 (citations omitted).

Substantial and compelling reasons only exist in exceptional cases. *Babcock, supra* at 75, citing *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). "[T]he reasons justifying

departure should “keenly” or “irresistibly” grab our attention, and we should recognize them as being “of considerable worth” in deciding the length of a sentence.” *Babcock, supra* at 75, quoting *Fields, supra* at 67.

The trial court did not file a departure evaluation form in this case, but did state the reasons for departure on the record. At sentencing, the trial court indicated that, because this case came so very close to being a homicide or murder, the court was justified in departing from the guidelines. We disagree.

Although the fact that the victims came close to dying may be an objective and verifiable factor, this may not serve as the basis for a departure. According to the sentencing information report, defendant was assessed a score of twenty-five points for the first, third, and sixth offense variables [OVs]. Twenty-five points for OV 1 accounts for the aggravated use of a weapon where the firearm was discharged at or towards both victims. MCL 777.31(1). Twenty-five points for OV 3 considers the extent of the physical injury to a victim, as here, where there was a life threatening or permanent incapacitating injury to the victims. MCL 777.33(1). Twenty-five points for OV 6 considers the intent to kill or injure another individual, as here, where defendant had the unpremeditated intent to kill, knowing that death or great bodily harm was the probable result. MCL 777.36(1). The trial court did not indicate anywhere in the record that any of these characteristics had been given inadequate or disproportionate weight. MCL 769.34(3)(b). Accordingly, the trial court abused its discretion by departing from the statutory sentencing guidelines as the reasons stated for departure were accounted for by the guidelines, and the reasons do not represent a substantial and compelling reason for departure. Therefore, we vacate defendant’s sentences for his assault convictions and remand this case for resentencing in accordance with the statutory sentencing guidelines. The trial court is free to impose a sentence within the appropriate statutory guidelines or to depart from the guidelines if there are proper substantial and compelling reasons to do so.

Finally, defendant argues that his sentence for felony-firearm should run consecutive with and preceding only one of the assault sentences rather than both of his assault sentences.¹ We disagree. This issue presents a question of law, which we review de novo. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997).

In *People v Clark*, 463 Mich 459, 460; 619 NW2d 538 (2000), the defendant was a passenger in a van that was carrying a supply of weapons. The prosecutor charged the defendant with fifteen counts, including two counts for the felony of possessing a bomb with unlawful intent, pursuant to which the prosecutor charged two separate counts of felony-firearm. *Id.* at 460-461. The defendant was convicted of all the charges, and the trial court, in sentencing the defendant, stated that the two felony-firearm sentences were to be consecutive to **all** of the other charges, instead of consecutive to only the two bomb possession counts. *Id.* at 462.

The Michigan Supreme Court held that, under the plain language of MCL 750.227b, a sentence for felony-firearm is to be consecutive only to the sentence for a specific underlying

¹ The judgment of sentence provides that the sentences on the assault counts are concurrent but consecutive to the felony-firearm sentence.

felony. *Id.* at 463. The Court emphasized that the language of the statute refers to the predicate offense, which is the offense during which the defendant possessed a firearm. *Id.* at 464. Further, the Court stated that the statute contains no language that would permit consecutive sentencing with convictions other than the predicate offense. *Id.* The *Clark* Court concluded that the felony-firearm sentences could only be consecutive to the bomb possession sentences because of how the defendant was charged, despite the fact that it was obvious that the defendant possessed a firearm while committing the other crimes. *Id.* at 464-465.

Our Supreme Court focused on the jury and its findings with regard to the factual elements, and it stated that if the jury did not decide that the defendant committed felony-firearm in connection with a particular felony, a court could not supply its own findings. *Id.* at 464. The Michigan Supreme Court also noted that, “[a]t the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts.” *Id.* at 464 n 11. Therefore, *Clark* indicates that a prosecutor can file a separate felony-firearm count and list all of the underlying felonies supporting the count within the felony-firearm count.

Here, as opposed to *Clark*, the prosecutor filed a single felony-firearm count referencing the predicate felony as an assault with intent to murder. We think it clear from the context of the felony information that the felony-firearm count referenced and was premised on both assault counts. Moreover, the danger sought to be avoided as indicated in *Clark*, i.e., that a court and not the jury would decide that a firearm was possessed during the commission of a particular felony, is not implicated here. Defendant’s position at trial was not that he did not shoot both victims with a gun; his defense was diminished capacity, which defense acknowledged that he in fact shot the victims. Therefore, the jury was deciding between whether defendant shot the victims with the requisite intent or shot the victims without the requisite intent; either way defendant used a firearm under both circumstances, and when the jury found him guilty of both assaults as charged, it necessarily included a finding that he used a firearm in the commission of both felonies. Accordingly, it was proper to make the felony-firearm sentence run consecutive with and preceding both of defendant’s assault sentences, and the trial court may once again do so after resentencing on the assault convictions.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald