

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PABLO FIGUEROA CASTILLO,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 243330
St. Joseph Circuit Court
LC No. 01-010884-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with a dangerous weapon, MCL 750.82, for which he was sentenced as a fourth habitual offender to concurrent prison terms of ten to fifteen years. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At defendant's preliminary examination, Curtis Babcock testified that while he was at the bottom of the stairwell leading up to his apartment, he observed defendant holding a knife and knocking on his apartment door. When Babcock asked defendant what he was doing, defendant came down the stairs, threatening Babcock. Babcock ran and warned Amy Strickland, who was nearby. Defendant then made an upward motion with his arm toward Strickland while the knife was up his sleeve. Strickland ran back into her apartment.

At trial, Babcock asserted his Fifth Amendment privilege against self-incrimination. Counsel was appointed for Babcock. When counsel subsequently reported that Babcock's concerns were valid, the trial court excused Babcock. Defendant initially argues that the trial court, and not the appointed attorney, should have determined the validity of the privilege. Defendant, however, fails to cite any authority in support of this argument. Rather, he simply claims that if the judge had conducted a hearing it was likely that the incrimination problem would have been identified as perjury, rendering the original testimony unreliable. Because defendant did not object on this basis below, our review is limited to plain error affecting defendant's substantive rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

A review of the record fails to show that the trial court would have reached a different conclusion on the incrimination issue. And there is no evidence that the procedure employed compromised defendant's rights or affected the outcome of the trial. Accordingly, defendant has not shown plain error.

Defendant next alleges that the introduction of Babcock's preliminary examination testimony violated his Sixth Amendment right of confrontation. We disagree.

Our Supreme Court addressed this precise issue in *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). In that case, the Court noted that a witness who asserts the right against self-incrimination is unavailable under MRE 804(a). *Meredith*, *supra* at 65-66. According to *Meredith*, the preliminary examination testimony given by such an unavailable witness should not be excluded on hearsay grounds because the party against whom the testimony was offered had an opportunity and similar motive to develop the testimony through cross-examination. *Id.* at 67. The Court therefore held that: "evidence properly within the former testimony hearsay exception is, by definition, not vulnerable to a challenge based upon the Confrontation Clause." *Id.* at 70. Thus, Babcock's preliminary examination testimony was properly introduced at trial.

Defendant ultimately asserts that his sentence constituted a gross departure from the legislative guidelines range of twelve to forty-eight months. He claims that the departure was based on factors already taken into account by the guidelines. We disagree.

The trial court in this case determined that societal protection necessitated a longer sentence because defendant would continue to commit violent crimes given his ongoing drinking problem. In this regard, the trial court noted defendant's nine prior felonies, including a homicide with malice, a murder without malice, and two assaults with intent to commit great bodily harm. Defendant's prior record variable score was fifty points more than the maximum threshold of seventy-five points. The record further reveals that defendant linked his drinking to his criminal history, always returned to drinking when not incarcerated, and justified his violent behavior as culturally appropriate within the Hispanic community. There was also evidence that defendant minimized his prior record by claiming that, with the exception of the homicide, he had never actually hurt anyone. Indeed, in the instant case defendant insisted that he was innocently walking down the stairs carrying the knife but not threatening anyone. While defendant claimed to know that he needed to quit drinking, he expressed no desire to stop.

From this evidence we conclude that the trial court had substantial and compelling reasons for departure. MCL 769.34(3), *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). The conclusion that defendant would continue to drink and commit violent crimes if not incarcerated was based on objective and verifiable considerations. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, defendant's prior record variable score was not adequately considered by the guidelines. Accordingly, the trial court's departure from the sentencing guidelines was not an abuse of its discretion. See *Babcock*, *supra* at 264-265.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood