

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VIRGIL MITCHELL,

Defendant-Appellee.

UNPUBLISHED

July 22, 2004

No. 247130

Wayne Circuit Court

LC No. 01-005715

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for assault with intent to rob while unarmed, MCL 750.88. He was sentenced to ten to fifteen years' imprisonment for the assault with intent to rob while unarmed conviction that was to run consecutive to a sentence he was already serving. We affirm defendant's conviction, but remand for resentencing or rearticulation of substantial and compelling reasons for departure from the sentencing guidelines.

Oscar Robinson testified when he was leaving the Mobil Gas Station, on Euclid and Woodward Avenue in Detroit, defendant approached him and asked him for a match. Robinson explained that, when he replied that he did not have a match, defendant proceeded to block his way. According to Robinson, defendant, who had his right hand in his jacket pocket then said, "I've got a gun. This is a holdup." Darrius Summers testified that he saw someone knock defendant to the ground as he approached to aid in restraining defendant until the police could be called. Summers also testified that defendant was very combative.

Defendant's first issue on appeal is that the prosecution abused its discretion in charging him with assault with intent to rob while unarmed rather than charging him with attempted robbery unarmed. We disagree.

Defendant did not object to the charge of assault with intent to rob while unarmed and, thus, this issue has not been properly preserved. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An unpreserved issue is evaluated for a plain error affecting the defendant's substantial rights. *Carines, supra* at 763-764; *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To avoid forfeiture under the plain error rule, the defendant must show that the error was plain, i.e., clear and obvious, and affected the defendant's substantial rights by prejudicing the outcome of the proceedings. *Id.*

Defendant was originally charged with assault with intent to rob armed, MCL 750.89, but the trial court changed the charge to assault with intent to rob unarmed.¹ Defendant raised this issue in the table of contents of his brief and in the argument section, but did not state the issue in his statement of questions presented. Ordinarily, no point will be considered which is not set forth in the statement of questions presented. MCR 7.212(c)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nonetheless, the issue is without merit.

The prosecution is given broad charging discretion. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). The prosecutor has discretion to bring any charges supported by the evidence. *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996). A review of the record reveals that there was evidence to justify charging the defendant under MCL 750.88.

The elements of assault with intent to rob while unarmed are: “(1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed.” *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998) quoting *People v Sanford*, 402 Mich 473, 474 n 1; 265 NW2d 1 (1978). The elements of an attempted unarmed robbery, MCL 750.530, are “(1) an attempted felonious taking of property from the person of another or in his presence, (2) by force and violence or by assault or by putting in fear, and (3) the defendant being unarmed.” *Id.* quoting *Sanford*, *supra* at 474 n 1. The attempted unarmed robbery statute is disjunctive, requiring either force and violence *or* assault *or* putting in fear. See *Sanford*, *supra* at 492. The assault with intent to rob while unarmed prohibits more severe conduct by conjunctively requiring both an assault *and* force and violence. See *id.*

The testimony of Robinson provided evidence supporting the assault with intent to rob while unarmed charge. Robinson testified that defendant told him that “I’ve got a gun. This is a holdup.” This testimony supports that defendant intended to rob and steal from the victim. A defendant’s intent can be inferred from the circumstances and facts surrounding the incident. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). There was evidence that defendant purported to have a gun and from the use of the term holdup there is sufficient evidence supporting the intent to rob and steal element of this charge.

There is also evidence supporting the assault with force and violence element of assault with attempt to rob while unarmed charge. The Michigan Supreme Court has defined assault as, “apparent or actual present ability to commit a battery as long as the victim’s apprehension of imminent injury is reasonable.” *Reeves*, *supra* at 246. In addition to the testimony of Robinson discussed above, he also testified that he was “afraid” of “[b]eing hurt” and grabbed defendant’s hand in his pocket to see if he felt a gun, which resulted in a struggle between him and defendant. There is also testimony that during this struggle Robinson called out for help. This testimony supports that Robinson was in fear of being “hurt” by defendant, who Robinson thought had a gun, and that force and violence was used as there was a struggle. And, there is evidence to support that defendant had the apparent ability to carry out an assault with a gun even though he was unarmed. With regard to the last element, defendant was actually unarmed.

¹ We note this is a change in which defense counsel acquiesced.

The above noted testimony provides ample support for the assault with intent to rob unarmed charge, MCL 750.88, which carries a higher penalty than attempted unarmed robbery, MCL 750.530. See *Yeoman, supra* at 413-414.² As such, there was no plain error affecting defendant's substantial rights.

Defendant also contends that there was not sufficient evidence to support his conviction for assault with intent to rob while unarmed. We disagree.

A sufficiency of the evidence challenge is reviewed de novo and in a light most favorable to the prosecution in order to determine whether it presented sufficient evidence that any reasonable fact finder could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). As provided, hereinbefore, to convict defendant of assault with intent to rob unarmed, the prosecution must prove the following beyond a reasonable doubt: "(1) an assault with force and violence; (2) an intent to rob and steal; and (3) defendant being unarmed." *Reeves, supra* at 242, quoting *Sanford, supra* at 474 n 1.

Robinson testified that defendant told him "I've got a gun. This is a hold up." Robinson further testified that he was "afraid," and that he and defendant struggled. There was also evidence that Robinson called out for help. Viewed in a light most favorable to the prosecution, the testimony that Robinson was afraid that defendant had a gun when defendant had his hand in his pocket claiming to have a gun was sufficient for "apparent . . . present ability to commit a battery as long as the victim's apprehension of imminent injury is reasonable." *Reeves, supra* at 246. And, there is testimony that there was a struggle between defendant and Robinson, which is sufficient for force and violence.

Defendant argues that the evidence did not support that he had the requisite specific intent when committing the act. But, as noted, the requisite intent can be inferred from the circumstances and facts surrounding the incident. *Parcha, supra* at 239; *Lugo, supra*. Because it is difficult to prove his state of the mind, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 37 NW2d 335 (1985). Defendant's intent to rob and steal from the victim can be inferred from the fact that defendant placed his hand in his pocket and told the victim that he had a gun and it was "a holdup." This same statement also could have put the victim in fear of imminent harm, causing the victim to believe defendant was holding a dangerous weapon. It is the responsibility of the trier of fact, not this Court, to determine what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (1998). The evidence, when viewed in a light most favorable to the prosecution, supports that defendant assaulted Robinson with force and violence and intended to rob and steal from him while unarmed.

² We note that the prosecution actually attempted to charge defendant with assault with intent rob while armed, MCL 750.89, but the trial court reduced the charge to assault with intent to rob while unarmed.

Defendant's next issue on appeal is that the trial court erred in the scoring of offense variable (OV) 10.³ We disagree.

In *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2003), this Court provided the following standard of review for scoring issues:

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

There was evidence to support the trial court's scoring of OV 10, and, thus, the trial court did not go beyond its discretion.

Defendant argues that it was error to have assessed defendant ten points for OV 10, and, thus, the scoring improperly placed him in a higher guidelines range. Under OV 10, exploitation of a vulnerable victim, ten points may be assessed if "the offender exploited a victim's ... agedness." MCL 777.40(1)(b)(c). Specifically, "exploitation" is to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion or temptation." MCL 777.40(3)(c).

There is evidence supporting that defendant exploited the "agedness" of the seventy-nine year old Robinson. The trial court stated in its reasoning that there was no question that age played a factor in this case. The trial court could reasonably infer from the evidence that defendant singled out the victim due to his vulnerability based on his agedness. MCL 777.40(1)(b). Robinson testified that defendant approached him with his hand in his pocket leading him to believe that defendant had a gun was going to rob him, and from this evidence the trial court could reasonably infer that defendant intended to exploit the victim's vulnerability to get something from him, i.e., for a selfish or unethical purpose. MCL 777.40 (3)(b). Because there is evidence in the record to support the trial court's determination the trial court did not abuse its discretion in scoring ten points for OV 10.

Defendant's final issue on appeal is that insufficient reasons exist for departing above the sentencing guidelines and that the matter should be remanded for resentencing before a different judge.⁴ We find that the trial court did not properly depart from the sentencing guidelines and

³ Defendant did not comply with MCR 7.212(C)(7), requiring that he submit a copy of the presentence investigation report on appeal. See also *People v Lawrence*, 246 Mich App 260, 261 n 1; 632 NW2d 156 (2001). Nonetheless, we have addressed the merits of this issue because the information we need for review is in the transcript and there is no conflict between the parties with regard to what defendant was scored on OV 10.

⁴ In order to challenge a minimum sentence that is longer or more severe than the appropriate sentencing guidelines range, a defendant must provide this Court with the presentence
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that the matter should be remanded for resentencing or rearticulation of substantial and compelling reasons for departure; but we find no reason to remand for resentencing before a different judge.

Generally, under the sentencing guidelines act, a court must impose a sentence within the appropriate sentence range. MCL 769.34(2), *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *Hegwood*, *supra* at 439. A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3), *People v Hendrick*, ___ Mich App ___, ___ NW2d ___ (Docket No. 248892, issued May 4, 2004) slip op p 6. Factors meriting departure must be objective and verifiable, must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). And, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 264.

If the sentence constituted a departure from the guidelines range and this Court finds that the trial court did not have a substantial and compelling reason for the departure, this Court must remand for resentencing. MCL 769.34(11), *Babcock*, *supra* at 265. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Babcock*, *supra* at 258-259.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In terms of

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investigation report and any other documents used by the trial court in imposing the sentence. MCL 769.34(7); MCR 7.212(C)(7). Defendant has provided the transcript from the sentencing proceeding, however, the presentence investigation report and other documents used by the trial court in imposing the sentence were not furnished. In addition, there is not an updated sentencing information report in the file provided on appeal. Thus, defendant did not comply with MCL 769.34(8) or MCR 7.212(C)(7), requiring that he submit a copy of the presentence investigation report and other information on appeal. See also *Lawrence*, *supra* at 261 n 1. Nonetheless, we have addressed the merits of this issue because the information we need for review can be gleaned from the sentencing transcript, the lower court file, and the parties briefs to the extent they do not conflict.

sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

Defendant was sentenced to ten to fifteen years' imprisonment for his assault with intent to rob while unarmed conviction, which was enhanced due to his fourth habitual offender status, MCL 769.10. The legislative guidelines recommended a minimum sentence range of twenty-nine to one hundred and fourteen months for defendant's conviction. MCL 750.88; MCL 769.10. Therefore, the trial court departed upward from the legislative guidelines, and, in doing so gave the following rationale:

First of all, the Court very, looks at, at situations like this where you prey upon elderly in our society as despicable. Your actions, your actions were despicable, the Court had an opportunity to listen to the testimony of the complaining witness in this matter, and there's no question in this Courts [sic] mind that man was in fear of his life. Whether you believe it was justified or not, what your actions did on that date and time put this man in fear. And he also testified at the time of trial that he hasn't been right since; he's 79 years old.

And we have a right in this country and in the state, and in this County to protect individuals like Mr. Robinson from people like you.

It is the sentence of this Court [defendant], sense [sic] you don't seem to really understand what it is that you did. The Court is going to sentence you to a term of 12 years, a minimum of 12 years in prison and no more than 15.

And I'm exceeding the guidelines; [defense counsel] because [defendant] has not come to this Court understanding his role that he was convicted by a jury of his peers. I don't tolerate that [defendant]. This Court does not tolerate that...I'm going to give you 10 years to 15 years And I'm exceeding the guidelines by what is it about a year, about a year.

So the records clear, the guidelines are 29 to 114. The Court was inclined to give you 96 months but [defendant], I cannot believe that you would come into this Court and say that you absolutely did nothing to this man. You listened to him testify, you saw the fear in this man's face. This is not something that people make up just to make up, he has nothing to gain from that.

Seemingly, the trial court based its upward departure on defendant's failure to admit guilt, or, at the very least, based on this passage we cannot ascertain that the departure is based on a reason other than defendant's failure to admit guilt. The trial court expressed displeasure with defendant's denial of guilt even after conviction. It is improper for the trial court to premise its upward departure on defendant's failure to admit guilt. See *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977); *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). The notion that defendant fails to take responsibility for the crime is neither substantial nor compelling reason to depart above sentencing guidelines. To the extent the trial court was basing the departure on failure to express remorse rather than failure to admit guilt, remorse is a subjective factor that may not be considered in determining whether there are substantial and compelling reasons for a sentencing departure. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000).

Because neither defendant's failure to admit guilt or lack of remorse can be considered substantial and compelling reasons for departure this case should be remanded for rearticulation of substantial and compelling reasons for departure or resentencing within the proper guidelines range.⁵

Lastly, defendant also requests that this Court order resentencing before a different judge. Resentencing before a different judge is not required in this case. In deciding whether resentencing should occur before a different judge, we consider: (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Here, there is no reason to expect that the original judge would have difficulty properly sentencing defendant on remand. The record does not disclose any indication of inappropriate bias against defendant that would require resentencing before a different judge, but, rather, it appears the trial court's departure was based on an incomplete understanding of the correct application of the departure rules, which have not been without confusion. We believe reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. See *id.* Consequently, there exists no reason to assign a different judge to conduct the resentencing.

We affirm defendant's conviction, but remand for resentencing or rearticulation of substantial and compelling reasons for departure from sentencing guidelines.

/s/ Kathleen Jansen
/s/ Jessica R. Cooper

⁵ If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a sufficient reason exists, but must remand for rearticulation or resentencing. *Babcock, supra* at 258-259.