

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN LEE CHARBONNEAU,

Defendant-Appellant.

UNPUBLISHED

August 5, 2004

No. 246288

Alpena Circuit Court

LC No. 00-005467-FC

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b(1). For those respective convictions, he was sentenced to three to ten years' imprisonment and to two years' consecutive imprisonment. He appeals as of right, challenging only the sentence imposed on the assault conviction. We affirm.

Defendant first claims the trial court should not have scored five points under OV-10, exploitation of a vulnerable victim. We disagree.

We review a trial court's determination of the appropriate number of points to apply for a sentencing factor under the statutory guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). MCL 777.40(1)(c) provides for scoring five points under OV-10 if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(3)(b) explains, "[e]xploit' means to manipulate a victim for selfish or unethical purposes," and MCL 777.40(3)(c) states, "[v]ulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation."

Defendant was shooting a gun from inside a stone house. The police officer at whom he fired had little protection, crouching behind a car and out of ammunition. Given the more than twenty bullets which struck the car, it can be inferred that the victim easily could have been killed. The guidelines do not define the word "strength," but *Random House Webster's College Dictionary* (2d ed, 2000) defines it as meaning "physical power." One who has a gun and a protected position has the power to kill someone else who, even if initially armed, has no adequate cover. This creates a difference in strength. There can be little doubt defendant took advantage of this difference in strength for unethical purposes. Thus the requirements for

scoring five points under OV-10 were met, and the trial court did not abuse its discretion by doing so.

Defendant argues next that the trial court ought not have scored five points under OV-12, Contemporaneous Felonious Criminal Acts. OV12 provides for scoring five points if “[o]ne contemporaneous felonious criminal act involving a crime against a person was committed.” MCL 777.42(1)(d). Four persons – another police officer, a neighbor, defendant’s wife, and his daughter – all had bullets fired in close proximity to them. Thus there was evidence that four acts of felonious assault, in violation of MCL 750.82, were committed. The elements of felonious assault are (1) an assault (2) with a dangerous weapon (3) intended to injure or place the victim in reasonable fear of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). There was evidence of each of these elements. As we have ruled, “Scoring decisions for which there is any evidence in support will be upheld.” *Hornsby, supra*, 251 Mich App 468. Defendant asserts that there was no evidence of subjective fear of the potential victims of the shots. Subjective fear, however, is not an element of felonious assault. There was evidence that all the elements of the crime were met, and it is a crime against a person. The trial court did not abuse its discretion, therefore, by scoring five points under OV-12.

Finally, defendant argues that the trial court erred by departing upward from the sentencing guidelines, imposing a minimum sentence of thirty-six months, rather than the twenty-three-month minimum sentence provided by the statutory guidelines. We disagree.

We review statutory guidelines sentencing departures using a standard that is “more deferential than de novo, but less deferential than the . . . abuse of discretion standard.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We must determine “whether the trial court articulated a substantial and compelling reason, as required under MCL 769.34(3), to justify its . . . departure from the statutory sentencing guidelines.” *Id.* at 251. The test for determining the appropriateness of a departure is “whether taking into account an allegedly substantial and compelling reason would contribute to a more proportional criminal sentence than is available within the guidelines range.” *Id.* at 264.

Reviewing the sentencing departure under this standard, we find no clear error. The trial court clearly articulated three reasons for its departure: the duration of the incident: several hours; the number of bullets fired: over twenty; and that the fact that the targeted victim was a police officer trying to enforce the law, making the crime one which endangered not only the victim but the public safety itself. Each of these reasons, taken alone, was substantial and compelling, and the consideration of each permitted a more proportional sentence than would have been imposed absent such consideration. Therefore, the trial court did not clearly err by its upward departure from the guidelines range.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette