STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2005
v	No. 257441 Jackson Circuit Court
GERALD DUANE LANDRUM, Defendant-Appellant.	LC No. 04-000550-FC

Before: Fitzgerald, PJ. and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83; attempted disarming a peace officer of a firearm (2 counts), MCL 750.479b(2); assaulting, resisting, or obstructing a police officer causing injury requiring medical attention, MCL 750.81d(2); and assaulting, resisting, or obstructing a police officer (2 counts), MCL 750.81d(1). Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, acquitted of the disarming a police officer charges, and convicted on all other counts as charged. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent sentences of 10 to 15 years' imprisonment for the assault with intent to do great bodily harm conviction, 4 to 6 years' imprisonment for the assaulting, resisting, or obstructing a police officer causing injury conviction, and 2 to 3 years' imprisonment for the remaining two assaulting, resisting, or obstructing a police officer convictions. We affirm.

This case arose when defendant and three City of Jackson police officers became involved in an altercation during the early morning hours of April 17, 2004. Officers Hibbard and Lepeak, who were on bicycle patrol, had made contact with a group of people near a van and a truck on Williams Street, and learned that defendant, who was resisting the officers' commands, was in violation of two conditions of his parole: an 11:00 p.m. curfew and a prohibition against consuming alcohol. The physical altercation between Hibbard, Lepeak, and a third officer, Craft, began when the officers attempted to place defendant in handcuffs after he continued to defy their orders to stand still and remove his hands from his pockets. The altercation progressed, and the officers used mace and stuns to apprehend defendant and stop him from choking Hibbard. The incident was captured on a videotape that was shown at trial.

Defendant testified that he was grabbed, maced, and beaten for no reason, and that he did not respond to the officers' commands to place his arms behind his back because his left arm was

stuck and his right arm was "asleep" from Hibbard's weight. Defendant denied choking Hibbard, or intending to kill, injure or harm anyone.

Defendant argues that his right to due process was violated because the prosecutor did not satisfy the due diligence standard in attempting to secure endorsed witnesses' presence at trial. We disagree. "A trial court's determination of due diligence will not be overturned on appeal absent an abuse of discretion. That determination is a factual matter, and the court's findings will not be reversed unless clearly erroneous." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

In support of his argument, defendant cites MRE 804(a)(5) and several cases, including *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979). However, MRE 804(a)(5) is inapplicable. Additionally, *Pearson* has been superceded by statute and does not reflect the current state of the law. See *People v Cook*, 266 Mich App 290; 291-292; 702 NW2d 613 (2005). Under the current statute, the prosecutor's duty is to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. *Id.* at 295. MCL 767.40a(5) states,

> The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs.

The record indicates that at least one defense witness, Isaac Riley, was personally served, and that the subpoenas for three other witnesses, including Isaac's father, Edward, were left with Isaac. Defense counsel stated that he was unaware whether witnesses Patterson and Ramona Gant were actually served. However, the record is devoid of any written request for assistance by defendant or defense counsel. The record indicates that defendant's witness list was filed with the trial court on June 15, 2004. MCL 767.40a(5) requires that assistance be requested not less than ten days before trial, and defense counsel first raised this issue on July 6, 2004, the first day of trial. Therefore, defendant has not demonstrated that the trial court's decision to commence the trial without defendant's witnesses constituted an abuse of discretion.

Defendant next argues that the trial court's comments during his testimony improperly attacked his credibility and denied him a fair trial. We disagree. This Court reviews claims of judicial misconduct to determine whether the trial judge's statements evidenced partiality that could have prejudiced the jury against the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Id.*

The trial court's comments were proper attempts to direct defendant to answer the prosecutor's questions. The record reflects that on cross-examination, defendant often evaded the prosecutor's questions and offered unresponsive commentary instead of answering the questions directly. "A trial court has broad discretion in regard to controlling trial proceedings."

People v Taylor, 252 Mich App 519, 522; 652 NW2d 526 (2002). Therefore, we conclude that the trial court did not engage in improper conduct and did not deny defendant a fair trial.

Defendant also argues that he was denied a fair trial when the trial court refused to instruct the jury on CJI2d 7.3a, accident as a defense to a specific intent crime. We disagree. "[A] trial court's determination whether a jury instruction was applicable to the facts of the case is reviewed for an abuse of discretion." *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

A trial court must clearly present the case to the jurors and instruct them on the applicable law. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *Id*. Even if the instructions are somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and sufficiently protected the rights of the defendant. *Id*.

In this case, the evidence did not support a jury instruction on accident. According to Hibbard's and Lepeak's testimony, defendant's right arm was around Hibbard's neck while the men were still standing, and Hibbard, Lepeak, and Craft all testified that defendant choked Hibbard while they were on the ground. Although defendant yelled "[y]ou got choked the f--- out" to Hibbard while at the police station, defendant, at trial, denied choking Hibbard and suggested that Hibbard invented the allegation because he was crazy. Defendant's assertion of an accident theory contradicts his repeated testimony denying that he choked Hibbard. Defendant testified that when they fell, Hibbard's neck "pretty much fell in my arms," and that he did not intend to kill, injure, or harm anyone. However, instead of asserting that if any choking occurred, it was accidental, defendant repeatedly testified that Hibbard was never choked. The evidence does not support a jury instruction that defendant was not guilty because his conduct was accidental. The trial court did not abuse its discretion when it declined to instruct the jury on accident.

Defendant challenges his sentence on several grounds. Defendant argues that the trial court erred in scoring offense variables 3 and 13. Defendant preserved his objection to the scoring of offense variable (OV) 13 by objecting to the score at his sentencing. *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004). Because defendant's challenge to OV 3 is unpreserved, we review it for plain error affecting defendant's substantial rights. *Kimble*, *supra* at 312. A sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Ten points are scored under OV 3 for bodily injury to a victim that requires medical treatment. MCL 777.33(1)(d). The statute provides that "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment. MCL 777.33(3). Defendant argues that the testimony at trial demonstrated there was no urgency in obtaining treatment for Hibbard's injuries; therefore, medical treatment was unnecessary.

The evidence supports a ten-point score for OV 3. Hibbard testified that various abrasions and bruising on his neck resulted from the incident, and that his shoulder bothered him after the incident. Hibbard testified that his throat became increasingly sore while at the hospital,

and that it bothered him for two weeks afterward. Dr. Busschots testified that the swelling that occurs in a choking victim is usually deeper than that visible to the eye, and occurs around the trachea, which could cause airway loss hours later, if the swelling was significant. She testified that Hibbard had significant pain while speaking and swallowing, and which is a sign of injured tissue. She also testified that an inability to talk, which Hibbard testified that he experienced during the altercation, evidenced the loss of an airway. She stated that she prescribed a steroidal and a non-steroidal anti-inflammatory to stop the swelling and to prevent further swelling. She stated that she took this action to prevent what she expected to happen. This evidence supports the trial court's determination that Hibbard's medical treatment was necessary. Therefore, the trial court did not err in scoring ten points for OV 3.

Nor did the trial court abuse its discretion in scoring twenty-five points for OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Defendant argues that note 1 to the instructions for scoring OV 13 states that the sentencing offense shall be counted in the scoring, but "does not state that multiple offenses should be counted separately if they were part of the same offense." However, the complete instruction reads: "[f]or determining the appropriate points under this variable, *all* crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a) (emphasis added); see also *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). These concurrent convictions were sufficient to establish a pattern of felonious criminal activity to support a twenty-five point score for OV 13.

Defendant also argues that the trial court did not state substantial and compelling reasons that justified its upward departure from the sentencing guidelines. We disagree. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination 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 factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion and the amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The trial court based its upward departure on the following reasons:

> 1. Guidelines do not adequately consider that defendant had a previous conviction for attempted resisting and opposing police, nor that he was on parole for the assaultive crime of assault with intent to do great bodily harm when he committed the new offense of assault with intent to do great bodily harm on a police officer.
>
> 2. I am persuaded that the Defendant should serve the sentence I have rendered and it is my intention that this sentence be sustained if an appellate court determines that any of my rationales for departure survive review.

Defendant argues that the reasons the trial court articulated were already accounted for in defendant's status as a habitual offender and in the sentencing guidelines. We agree that parole status was already accounted for in PRV 6. However, the trial court's other stated reason was his concern was that the score did not adequately reflect that defendant committed the same crime in

the instant case. This is an objective and verifiable fact that is also substantially and compelling. It was not otherwise accounted for in the scoring. Further, the trial court clearly articulated its intent that the sentence be sustained if any one of its reasons for departure survived review. *Babcock, supra* at 271. Therefore, we conclude that the trial court articulated a substantial and compelling reason that justified its upward departure from the sentencing guidelines.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly