

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 272989

Wayne Circuit Court

LC No. 06-002560-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of life in prison for the assault-with-intent-to-commit-murder convictions and 40 to 60 months in prison for the felon-in-possession conviction; he received a consecutive sentence of two years in prison for the felony-firearm conviction. Defendant now appeals as of right. We affirm in part, vacate in part, and remand for resentencing before a different judge.

Detroit police officers spotted a vehicle traveling at a high rate of speed. Defendant was one of two people inside the vehicle. When the police began following the vehicle, it accelerated, drove into a neighborhood, and parked. The vehicle's two occupants then jumped out and ran. Defendant jumped over a fence, and one of the pursuing officers heard three gunshots fired. The officer looked up after hearing the shots and saw defendant with his back turned toward him, holding his hands up, looking at a second officer sitting in the police car. The first officer then took cover alongside a garage and heard additional gunshots. He then heard even more gunshots, which came from defendant's direction. The first officer subsequently ran behind a house. As he was running, three or four more shots were fired. The last shot fired hit the corner of the house just inches from the officer's head. A police investigator who asked defendant why he shot at the police officer testified that defendant replied, "I thought it was some guys that were trying to kill me."

Defendant first argues that the prosecution presented insufficient evidence of intent to support his convictions of assault with the intent to murder. We disagree. "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was

guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

MCL 750.83 provides that “[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.” Assault with intent to murder is a specific intent crime. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). It is not enough that a defendant acted only with an intent to cause serious bodily injury or with a conscious disregard of the risk of death. *Id.* Rather, “[i]t must be shown that the defendant intended to kill the victim under circumstances that did not justify, excuse, or mitigate the crime.” *Id.* The intent to kill may be proven by inference from any facts in evidence. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). A trier of fact may “draw reasonable inferences to assist in making the finding of an actual intention to kill.” *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985).

Here, there was sufficient circumstantial evidence from which a reasonable trier of fact could have found that defendant acted with the intent to kill the officers. The first officer testified that he heard three or four gunshots as he began chasing defendant, and that he was near defendant when the shots were fired. The officer testified that defendant was facing in the direction of the second officer. The first officer took cover alongside a house, and when he looked around the corner of the house, he heard two or three more gunshots. He testified that these shots came from defendant’s direction. The second officer testified that he was looking directly at defendant that when he heard the second volley of shots and could see the muzzle flash. According to the first officer, the last shot fired hit the corner of the house just inches from his head. Although defendant testified that he only shot twice in the air, we defer to the trier of fact’s superior ability to assess witness credibility. See *People v Brown*, 43 Mich App 170, 176; 204 NW2d 72 (1972). Moreover, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Given the proximity of defendant and the officers, the number of shots fired, defendant’s admission to the police that he was shooting at people he believed were chasing him, and the fact that one shot struck a house within inches of the first officer’s head, a rational trier of fact could have concluded that defendant shot at the two officers with the intent to kill them.

Defendant next argues that the trial judge did not give substantial and compelling reasons for exceeding the sentencing guidelines. We agree. A trial court may depart from the minimum range established under the sentencing guidelines for substantial and compelling reasons. MCL 769.34(3). The existence or nonexistence of a particular factor supporting the departure is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether a particular factor is objective and verifiable is reviewed de novo as a matter of law. *Id.*; *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). The trial court’s determination that objective and verifiable factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *Babcock*, *supra* at 265.

“A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). “[T]he reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab [the court’s] attention.” *Fields*, *supra* at 67. When considering whether a departure would be warranted, “the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a

more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra* at 264.

The trial judge reasoned that an upward departure was warranted in this case because defendant was “a person who carries a gun around, that shoots at people, at houses where people are sleeping.” The trial judge also stated that defendant was “going to do life, that’s right, so you’ll never be out running around firing in the dark at people while you are hallucinating and high on drugs.” The court indicated that it was “trying to protect the public” and then chastised defendant for testifying, “Well, I did shoot at them, but I didn’t know they were the police.”

A sentencing court cannot base a departure on factors already taken into account by the guidelines unless the factors have been given inadequate or disproportionate weight. MCL 769.34(3)(b). Here, defendant received 25 points for offense variable (OV) 1, which takes into account the aggravated use of a weapon. MCL 777.31(1)(a). This was the maximum number of points that defendant could receive under OV 1 for discharging a firearm toward a human being. Defendant also received a score of ten points for OV 9 (number of victims). MCL 777.39. Ten points are given when the crime involves two to nine victims. MCL 777.39(1)(c).

In departing from the guidelines, the court indicated that it was troubled by the fact that defendant had shot not only at the two officers, but also “at houses where people [we]re sleeping.” While there was evidence that the shooting took place in a residential neighborhood, the conclusion that people were asleep in the homes is not supported by the factual record. Indeed, one of the officers testified at the preliminary examination that one of the houses “appeared to be vacant.” This factor was not objective and verifiable.

The court also referred to the facts that the crime occurred at night and that defendant admitted that he was “high on drugs” and “hallucinating” at the time of the offense. We concede that these factors were objective and verifiable and were not specifically addressed in the scoring of the offense variables. Yet, presuming that these factors justified a departure, it is still not clear that the departure at issue was warranted. As the *Babcock* Court observed:

[I]f there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines. Additionally, in departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason. [*Babcock, supra* at 264.]

In other words, if the extent of the departure is not proportionate, then the court does not have “a substantial and compelling reason for that departure,” regardless of whether it was stated on the record.

Defendant’s OV and prior record variable scores placed him in the 126 to 210 month minimum sentence range. MCL 777.62. In other words, the upper limit of defendant’s minimum recommended sentence under the guidelines was 17½ years. Nonetheless, the trial court sentenced defendant to life in prison. Accordingly, defendant’s sentence constituted a vast

departure from the recommended guideline range—indeed, his sentence of life in prison constituted the largest departure possible under the guidelines.

Given defendant’s prior record variable (PRV) score of 40, he could not have received a life sentence under the legislative guidelines even if he had received the highest possible number of OV points. MCL 777.62. Even deferring to “the trial court’s extensive knowledge of the facts and . . . direct familiarity with the circumstances of the offender,” *Babcock, supra* at 270, we conclude that the extent of the departure was disproportionate, and thus not supported by substantial and compelling reasons. *Id.* at 264. The life sentences therefore fell outside the range of principled outcomes. *Babcock, supra* at 269. That the crime occurred at night and that defendant was using drugs were insufficient reasons to justify the overwhelmingly large sentence departure in this matter. We consequently remand for resentencing. MCL 769.34(11).

Defendant also argues that resentencing should take place before a different judge. We agree. The trial judge’s comments strongly suggest that he could not reasonably be expected to set aside his previously expressed views. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). Moreover, justice will be better served if defendant is resentenced before a different judge. *People v Evans*, 156 Mich App 68, 72-73; 401 NW2d 312 (1986).

We affirm defendant’s convictions as well as his sentences for felon-in-possession and felony-firearm. We vacate the life sentences imposed for defendant’s assault-with-intent-to-murder convictions and remand for resentencing before a different judge. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering