

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE LASALE BRASWELL,

Defendant-Appellant.

UNPUBLISHED

January 8, 2008

No. 271210

Wayne Circuit Court

LC No. 05-012013-01

Before: Saad, P. J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to 10 to 20 years' imprisonment for the assault conviction, 40 to 60 months' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts and Proceedings

Defendant and his uncle, Gilbert Williams, shared caretaking responsibilities for Marie Cooper, who is elderly and suffers from Alzheimer's disease. Cooper is defendant's grandmother and Williams's mother. Defendant was living at Cooper's house in Detroit, and Williams stopped by every evening to assist Cooper by cooking for her, bathing her, and spending time with her. Williams was preparing to bathe Cooper one evening when defendant confronted Williams, accusing him of "trying to set him up to be killed" and saying that he would "crush" Williams. Williams claimed that he replied that he was not scared of defendant and they could "deal with" whatever defendant's problem was. From a distance of three or four feet, defendant fired a small handgun at Williams, and Williams sustained a gunshot wound in his chest or abdomen. Williams underwent surgery and survived.

Defendant was charged with assault with intent to commit murder, MCL 750.83, but the jury convicted him of the lesser-included offense of assault with intent to do great bodily harm less than murder.

II. Defendant's Request for Substitution of Counsel

Defendant requested that the trial court appoint new counsel at a pretrial hearing. Defendant argues that he is entitled to a new trial because his relationship with defense counsel broke down and the trial court failed to appoint new counsel without an adequate inquiry into the breakdown. We disagree. We review a trial court's decision regarding a request for the substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The Sixth Amendment affords criminal defendants the right to have counsel of their own choosing, *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003), and an indigent defendant has the right to have appointed counsel represent him, *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). However, an indigent defendant is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *Traylor, supra* at 462; *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Rather, the defendant must show good cause for substitution and demonstrate that it will not unreasonably disrupt the judicial process. *Bauder, supra* at 193; *Traylor, supra* at 462. Good cause is shown where "a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Mack, supra* at 14.

When a defendant contends that his appointed attorney is not adequate, diligent, or interested, the trial court should "hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record[.]" *Bauder, supra* at 193, and the defendant must state any differences of opinion regarding trial tactics with specificity, *Traylor, supra* at 464. A defendant's "mere allegation that he lacked confidence in his trial counsel is not good cause to substitute counsel." *Id.* at 463. Although the trial court's inquiry into defendant's disputes with counsel may have been limited in this case, nothing on the record indicates any irreconcilable differences of opinion. Defendant made only vague allegations that his counsel was not trustworthy, that defendant was unable to "correspond" with him, and that his counsel was not helping him. Further, defense counsel was effective to the extent that defendant was convicted of the lesser-included offense of assault with intent to do great bodily harm less than murder. Defendant has not shown that good cause existed to justify a substitution of his trial counsel and, therefore, we hold that the trial court did not abuse its discretion by refusing to order substitution of counsel.

III. Sentencing

A. Departure

Defendant contends that the trial court erred in departing from the sentencing guidelines because it failed to articulate its reasons for the departure. We agree. Defendant's minimum sentence range under the guidelines was 29 to 57 months, MCL 777.65, but the upper range was increased by 50 percent (to 85 months) because he was sentenced as a third habitual offender,

MCL 769.11; MCL 777.21(3)(b). The trial court departed from this range and imposed a minimum sentence of 10 years (or 120 months) in prison.

A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. MCL 769.34(3); *Babcock, supra* at 255-256. A substantial and compelling reason is “an ‘objective and verifiable’ reason that ‘keenly’ or ‘irresistibly’ grabs our attention.” *Babcock, supra* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). If the trial court fails to articulate the reason for a departure from the sentence range recommended by the guidelines, this Court must remand for rearticulation or resentencing. *Babcock, supra* at 258-259.

Defendant bases his challenge solely on the assertion that the trial court failed to articulate its reasons for departure; he does not claim that the trial court’s reasons were not substantial and compelling. The trial court acknowledged that the sentencing guidelines range was 29 to 85 months. After observing that defendant shot his relative, that he refused to accept responsibility for the shooting, and that the jury had given him “a break” in convicting him of the lesser-included charge of assault with intent to do great bodily harm less than murder, the trial court imposed a sentence of 10 to 20 years, departing upward from the guidelines. When imposing this departure, the trial court did not articulate its reasons for the upward departure; instead, it merely stated, “Ten to 20, for the Assault with Intent to do Great Bodily harm. And that’s because of the guidelines. Five prior felonies.” Although the trial court indicated that it imposed the sentence of 10 to 20 years “because of the guidelines,” it did not indicate whether it imposed this upward departure because defendant had five prior felonies, because defendant’s actions and lack of remorse warranted an upward departure from the guidelines, or for some other reason. Accordingly, remand is necessary to permit the trial court to articulate on the record its reasons for an upward departure from the minimum sentencing range recommended by the guidelines.

B. Offense Variable 4

Defendant claims that offense variable (OV) 4 was misscored. We disagree. We review a challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002).

Defendant received ten points for OV 4, which takes into account serious psychological injury to the victim that “may require professional treatment.” MCL 777.34(1)(a), (2); *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005) (emphasis added). Although there was no evidence that Williams sought professional psychological treatment, this is inconclusive. *Id.* Williams testified that, after defendant shot him, he was “scared because [his] life was hanging in the balance[.]” His niece, to whose house he ran for assistance, described Williams as “hysterical.” A trial court’s scoring decision will be upheld if there is any evidence in the record to support it, *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), and this Court has held that a victim’s testimony about being fearful was sufficient to support a score of ten points for OV 4, *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). We therefore find that there was sufficient evidence to support the trial court’s score of ten points for OV 4.

C. Resentencing Before A Different Judge

Finally, defendant argues that he is entitled to resentencing by a different judge. We disagree. We are not vacating defendant's sentence; we are merely remanding the matter to the trial court for articulation of the reasons for the upward departure in the sentence. Clearly, only the judge who imposed a sentence can articulate the reasons he had for imposing it. Only if a judge cannot articulate substantial and compelling reasons for a departure will we vacate the sentence and remand for resentencing.¹

Defendant's convictions are affirmed, but the case is remanded for articulation of the reasons for the upward departure from the minimum sentencing range recommended by the guidelines. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Donald S. Owens

¹ Of course, if on remand the trial court cannot articulate the reasons for its upward departure, resentencing would be necessary.