

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES BAILEY, II,

Defendant-Appellant.

UNPUBLISHED
February 21, 2008

No. 274132
Isabella Circuit Court
LC No. 05-002432-FC

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial on the charges of assault with intent to maim, MCL 750.86, felonious assault, MCL 750.82, aggravated stalking, MCL 750.411i, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court exceeded the sentencing guidelines for the assault with intent to maim conviction, sentencing defendant to 80 months to 120 months in prison. The court ordered that the sentence be served concurrently with sentences of two to five years for stalking and weapon possession charges, and two to four years for the felonious assault conviction. The court also sentenced defendant to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions arose from a fight with his girlfriend that began in a tavern and continued after the two returned home. According to the victim, after the encounter in the tavern, she returned to her brother's mobile home. Defendant's motor home, in which he and the victim had been living, was parked nearby. As she was attempting to lock the doors, defendant forced his way into the home. During the ensuing fight, defendant bit off the tip of her tongue, forced her to her knees, placed a loaded revolver to her head, and pulled the trigger. The gun did not fire. He withdrew the gun, pacing and spinning the chamber. He held the revolver to her head two more times and pulled the trigger, but the gun did not fire either time. When he finally fell asleep, the victim fled to a friend's home.

Defendant's first challenge is to the trial court's ruling on a motion in limine. In the motion, the prosecutor sought to preclude testimony about the victim's 1997 arrest for domestic violence. The trial court ruled that the evidence was not admissible under MRE 404. We review the ruling for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court's ruling is outside the range of

reasonable and principled outcomes. *Id.*, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404 generally precludes parties from introducing evidence of a person's character if offered to prove action in conformity. However, MRE 404(b)(1) provides that evidence of a person's acts may be admissible if offered to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act . . . when the same is material, whether such . . . acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." The rule applies not only to acts by defendants, but also can apply to evidence pertaining to the actions of victims and witnesses. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).

Defendant argues that the evidence of the victim's prior arrest demonstrated she had a common scheme or plan, i.e., that she attacked her romantic partners while they slept. But the record does not support a finding that the two events, as defendant described them, have a "concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *People v Sabin (On Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000) (internal quotation marks, emphasis, and citation omitted). The single other act in issue allegedly occurred in 1997. While defendant gave somewhat confusing versions of what happened in his videotaped police interrogation, he consistently indicated that the attack began at the tavern, not in his home. In one version, he seems to indicate that after he returned to his motor home and attempted to fall asleep, the victim came in and tried to stab him. Then, defendant claims, he entered the victim's brother's home and again tried to sleep, but the victim entered and the fight continued. In his second version of events, defendant stated that the two never fought in the motor home, just in the trailer. In this version, defendant accepts the interrogating officer's paraphrase of events, in which the officer states that defendant was sleeping in the motor home. In this version then, the assault did not occur immediately after the victim would have awakened defendant in the motor home. Rather, it occurred as the confrontation continued in the trailer. Thus, in neither scenario did defendant describe a situation where the victim surprised him as he slept and began to assault him without warning. Accordingly, defendant's argument is without merit because he fails to establish that there was a common scheme or plan at all.

Defendant next challenges the trial court's upward departure from the sentencing guidelines. This Court's review of the sentence requires the application of three standards. *Babcock*, *supra* at 264. The Court reviews for clear error the trial court's findings that factors supporting departure existed and reviews de novo the question of whether those factors are objective and verifiable. *Id.* The Court reviews for abuse of discretion the trial court's determination that the factors constituted substantial and compelling reasons to depart from the guidelines. *Id.* at 264-265.

The trial court delineated four separate factors to support the upward departure from the guidelines, and defendant presents no challenge to the first factor. Our review of the record indicates that the trial court would have departed to the same degree based on the first factor alone. *Id.* at 260. In the first factor, the court found that the guideline grid did not adequately reflect the severity of defendant's conduct. Defendant's prior record variable and offense variable (OV) score placed him in the D-VI cell of the guideline grid for class D offenses. MCL 777.16d. The guideline range for the D-VI cell is 34 to 67 months. *Id.* Defendant's OV score of 170 exceeded the OV points required for placement in the D-VI sentencing cell by 95 points. On

the basis of the excessive OV score, the court exceeded the guidelines. A trial court is within its discretion to depart upward from the sentencing guidelines when a defendant's offense variable score vastly exceeds the points for the highest level of severity. See *People v Stewart*, 442 Mich 937, 937-938; 505 NW2d 576 (1993).

The court's statements at the sentencing hearing confirm that the court would have increased the sentence based on this factor alone. The court told defendant, "Your conduct that night, the only way I can characterize it is it was depraved. And you've convinced me, by the manner in which you behaved that night, that you're a dangerous man who needs to be locked up for a long time." The court also stated, "[t]he guideline range doesn't reflect the full extent of your conduct that night." These statements demonstrate the court's intent to depart from the guidelines based on the guideline grid's failure to adequately provide for this situation.¹ Accordingly, we affirm defendant's sentence on the assault with intent to maim conviction.

Finally, defendant correctly points out, the maximum sentence for felonious assault is four years. MCL 750.82(1). At the sentencing hearing, the trial court correctly stated the maximum sentence for the felonious assault conviction is four years but the original judgment of sentence incorrectly lists the maximum sentence as five years for that conviction. Remand to correct the judgment is unnecessary because the trial court has already entered an amended judgment imposing the four-year statutory maximum term for the felonious assault conviction.

We affirm.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray

¹ Additionally, two of the remaining three reasons cited by the trial court were also objective and verifiable. Together, the three objective and verifiable reasons cited supported the departure. We believe without question that the court would have imposed the same sentence given these reasons even without the fourth reason cited.