

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY GIBSON,

Defendant-Appellant.

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UNPUBLISHED

February 26, 2008

No. 276688

Wayne Circuit Court

LC No. 06-009281-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant James Gibson appeals as of right from his sentence of three to ten years in prison for his jury conviction of assault with intent to cause great bodily harm less than murder.<sup>1</sup> We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

**I. Basic Facts And Procedural History**

At trial, the evidence showed that Gibson encountered Shawntaze Washington while Washington was walking with his eight-months-pregnant girlfriend and his brother. Gibson and a companion were riding bicycles, and the companion rode over the foot of Washington's girlfriend, nearly hitting her in the stomach with his handlebars. Washington and his girlfriend demanded an apology. Gibson punched Washington in the jaw, knocking him to the ground. Washington and his girlfriend testified that Gibson continued to kick and stomp Washington in the head after he had been knocked to the ground. An ambulance transported Washington to the hospital, where he was diagnosed with an intracranial bleed. Washington testified that he continues to experience hearing problems and headaches.

The sentencing guidelines recommended a minimum term range of ten to 23 months. The trial court sentenced Gibson to a term of three to ten years in prison. The trial court stated that its reasons for departing from the guidelines included Washington's permanent hearing loss, as well as the unprovoked nature and brutality of the attack.

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<sup>1</sup> MCL 750.84.

## II. Sentencing

### A. Standard Of Review

Gibson argues that the trial court abused its discretion by departing from the guidelines for the following reasons: the facts relied on to support the departure were not substantial and compelling; the factors relied on were already accounted for in the guidelines; and the sentence imposed violated the principal of proportionality. In reviewing a trial court's departure from the sentencing guidelines, we must apply three standards: clear error as to the trial court's determination that a sentencing factor exists; de novo as to whether a factor is objective and verifiable; and abuse of discretion as to whether the trial court's finding that an objective and verifiable factor amounts to a substantial and compelling basis for departure.<sup>2</sup>

### B. The Sentencing Guidelines

The sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range, as determined by the points assigned to the defendant.<sup>3</sup> However, the guidelines allow for departure from the recommended range, as long as the trial court can articulate substantial and compelling reasons for the departure on the record.<sup>4</sup> The substantial and compelling reasons on which a trial court relies to support a departure must be based on objective and verifiable factors.<sup>5</sup> These factors must "keenly" or "irresistibly" grab the attention of the court.<sup>6</sup> The trial court may not rely on factors that were already accounted for in the sentencing guidelines to support a departure from the recommended minimum range, unless the factors were given inadequate or disproportionate weight in the guidelines.<sup>7</sup>

### C. The Trial Court's Decision

Here, the trial court supported its decision to depart from the guidelines by pointing to the permanent injury that Washington suffered, as well as the unprovoked and brutal nature of the attack. We are satisfied that these factors are substantial and compelling. The trial court scored Gibson ten points under OV 3<sup>8</sup> for an injury requiring medical treatment. This score does not take into account the fact that Washington continues to experience hearing problems and headaches. In addition, even assuming that the brutal nature of the attack was accounted for

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<sup>2</sup> *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

<sup>3</sup> MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007).

<sup>4</sup> MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

<sup>5</sup> *Babcock*, *supra* at 257.

<sup>6</sup> *Id.*

<sup>7</sup> MCL 769.34(3)(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

<sup>8</sup> MCL 777.33(1)(d).

under OV 7,<sup>9</sup> this score failed to account for the unprovoked nature of the attack. Washington simply asked for an apology for careless behavior on the part of defendant's companion, and was beaten severely, never having thrown a punch.

Finally, even when a trial court provides substantial and compelling reasons to support a departure from the sentencing guidelines, the principal of proportionality must still be satisfied. That is, the trial court must consider the circumstances surrounding the offense and the offender in imposing sentence.<sup>10</sup> Gibson argues that his sentence violates the rule of proportionality because he has no prior adult convictions and only minor convictions as a juvenile. However, lack of a prior record or lack of an adult record is insufficient to overcome the presumption of proportionality.<sup>11</sup> Moreover, the trial court individualized Gibson's sentence. The trial court addressed Gibson before imposing sentence and expressed concern that the details of the offense indicated that Gibson is "a dangerous, volatile young man."

We conclude that the trial court articulated substantial and compelling reasons to support a departure from the recommended minimum sentence range. The factors on which the trial court relied were objective and verifiable and were not already accounted for in the guidelines point calculation. The sentence imposed did not violate the rule of proportionality.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis

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<sup>9</sup> MCL 777.37 (scoring based on "aggravated physical abuse.")

<sup>10</sup> *Babcock*, *supra* at 264.

<sup>11</sup> *People v Piotrowski*, 211 Mich App 527 Mich App 533; 536 NW2d 293 (1995).