

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALLEN HOLTZ, SR.,

Defendant-Appellant.

UNPUBLISHED

March 25, 2008

No. 274008

Lenawee Circuit Court

LC No. 05-011977-FH

05-011978-FH

05-011979-FH

05-011980-FH

05-011981-FH

05-011982-FH

05-011983-FH

05-011984-FH

05-011985-FH

05-011986-FH

05-011987-FH

06-012156-FH

06-012157-FH

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his convictions by guilty plea for two counts of indictable common law offenses, MCL 750.505, five counts of uttering and publishing, MCL 750.249, four counts of using a computer to commit a crime, MCL 752.796, and two counts of obtaining personal identification information without authorization, formerly MCL 750.285.¹ Defendant was sentenced to two to five years' imprisonment for his indictable common law offenses convictions, 2 to 14 years' imprisonment for his uttering and publishing convictions, two to ten years' imprisonment for his using a computer to commit a crime convictions, and two

¹ Defendant was also originally charged with two counts of larceny from the person, MCL 750.357, four counts of identify theft, MCL 445.65; MCL 445.69, four additional counts of uttering and publishing, MCL 750.249, and four counts of forgery, MCL 750.248, but those charges were dismissed pursuant to the plea deal defendant reached with the prosecution.

to five years' imprisonment for his obtaining personal identification information without authorization convictions.² We affirm.

Defendant first argues that the trial court improperly denied his motion for an adjournment and, as a consequence, he was deprived of his right to present an insanity defense. We disagree.

We review a trial court's ruling on a motion for an adjournment or continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). In challenging the denial of a motion for an adjournment, a defendant must show both good cause and due diligence. *Id.* at 18-19. "'Good cause' factors include 'whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.'" *Id.* at 18, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Snider*, 239 Mich App 393, 421-422; 608 NW2d 502 (2000).

The trial court did not abuse its discretion when it denied defendant's motion for adjournment because defendant did not show good cause or due diligence. Although he asserted a constitutional right, had a legitimate reason for asserting the right, and had not requested previous adjournments, defendant was negligent in pursuing his insanity defense. Trial counsel claimed that it received a letter from defendant's psychologist on February 28, 2006. In the letter, the psychologist stated that he treated defendant regularly since January 2005. The prosecutor initiated charges against defendant on October 13, 2005. Defendant did not explain, to the trial court or to this Court on appeal, why his psychologist did not notify trial counsel earlier of his concerns about defendant's mental health and the effect defendant's mental issues had on his criminal culpability. Also, it is not apparent from the record what, if anything, caused the delay. Because defendant has not offered an alternate explanation, we conclude that defendant had ample time, at least three months, to obtain an evaluation from his psychologist and file notice of an insanity defense. Only his own negligence and lack of due diligence prevented him from doing so. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for adjournment. See *Coy, supra* at 17.

We note that defendant's arguments challenging the trial court's factual findings are irrelevant to the issue of whether defendant was entitled to an adjournment. Whether the trial court properly evaluated the psychologist's qualifications and the substance of his letter does not negate the fact that defendant never explained why he was entitled an adjournment. Without a showing of good cause and due diligence, defendant cannot overcome his burden of proof on appeal. In any event, we note that MCL 768.21a(2) provides that one cannot utilize legal

² With the exception of his sentences for using a computer to commit a crime, defendant's sentences are concurrent. Defendant will serve his four sentences for using a computer to commit a crime concurrently and consecutive to his sentences for his other convictions. Defendant was also ordered to pay restitution as a condition of his parole.

insanity when premised on voluntary intoxication. The medical opinion offered in support of defendant's belated insanity defense merely concludes that defendant's intoxication was "involuntary." Thus, irrespective of the trial court's factual findings regarding the medical expert's qualifications, the trial court rightfully questioned the deficiencies of the content of the opinion to support the insanity defense.

Defendant next argues that the trial court erred when it departed from the sentencing guidelines because its reasons were not substantial or compelling. We review the trial court's determination that a particular factor warranting departure existed for clear error. *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003). The trial court's determination that a particular factor is objective and verifiable is reviewed de novo. *Id.* Also, we review a trial court's decision that substantial and compelling reasons exist to support a departure from the sentencing guidelines for an abuse of discretion. *Id.* at 274.

"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). A substantial and compelling reason must be objective and verifiable, must keenly or irresistibly grab the court's attention, be recognized as of considerable worth in deciding the length of a sentence, and exists in only exceptional cases. *Babcock, supra* at 258. An "objective and verifiable" reason must be based on "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. *Id.*; MCL 769.34(3)(b).

Defendant first argues that the trial court erred when it relied on defendant's status as a deputy sheriff to enhance his sentence. By doing so, defendant argues, the trial court violated MCL 769.34(3)(a), which prohibits using a defendant's "legal occupation" as a reason to depart from the guidelines. MCL 769.34(3)(a) provides:

The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

The trial court stated, "[a]cting as a police officer, over a period of years, you repeatedly and systematically exploited those over who you had authority for your personal financial gain." Looking at this statement, it is apparent that the trial court did not consider defendant's "legal occupation" as a strike against him. Rather, the trial court considered the way defendant used his position as a deputy sheriff to exploit his victims. Because the trial court did not depart from the guidelines based on defendant's legal occupation, it did not violate MCL 769.34(3)(a), and its consideration of this factor was proper.

Defendant next argues that the trial court erred when it cited defendant's exploitation of his victims as a departure reason, when OV 10 already accounted for exploitation. "The court

shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Offense Variable 10, as codified in MCL 777.40, considers whether a defendant exploited a vulnerable victim with regard to the sentencing offense. The trial court stated, “[a]cting as a police officer, over a period of years, you repeatedly and systematically exploited those who you had authority for your personal financial gain.” “The sheer magnitude of these criminal offenses committed by you and the abuse of your authority as a law enforcement officer are given inadequate weight in the guidelines.” From these statements it is clear that the trial court was appalled by the number of crimes defendant committed, and the manner in which defendant committed them, i.e., while serving as a sheriff’s deputy, and decided that the sentencing guidelines did not give sufficient weight to the exploitation defendant perpetrated. Given the way defendant flagrantly abused his position of authority to commit these crimes, we cannot disagree.

Next, defendant contends that the trial court’s statement that “the sheer magnitude of these criminal offenses” justified its departure from the sentencing guidelines “should be rejected both as an overstatement and as the Judge’s subjective view.” Given that defendant pleaded guilty to 13 felonies, as a part of plea deal that resulted in the dismissal of ten additional felony charges, it cannot be said that the trial court overstated the magnitude of defendant’s criminal operation. In addition, this reason is objective and verifiable because the number of offenses defendant committed is a fact that exists outside of judge’s mind and can be independently confirmed. See *Abramski*, *supra* at 74.

Defendant also argues that the trial court’s statement that defendant, “brought law enforcement officers into disrespect in the community,” is not objective and verifiable. An “objective and verifiable” reason must be based on “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski*, *supra* at 74. Both the probation officer who wrote defendant’s presentence report and defendant acknowledged the harm he caused the sheriff’s department. However, other than the statements by the judge, defendant and the probation officer, the record does not contain any evidence documenting the effect defendant’s actions had on the law enforcement community. The trial court’s general statement that the case generated media coverage does not, in and of itself, show that defendant’s actions negatively affected the law enforcement community. Therefore, it is not apparent that the “actions or occurrences are external to the minds of the judge, defendant and others involved in making the decision,” and this departure reason is not objective and verifiable. See *id.* The trial court erred when it relied this reason to depart from the sentencing guidelines, as it is not substantial and compelling. See *Babcock*, *supra* at 265.

However, because this error is unpreserved, defendant must show that it was a plain error that affected his substantial rights. See *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). That is, defendant must show that: “1) error . . . occurred; 2) the error was plain, i.e., clear or obvious; 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, it is apparent that the error occurred and that it is a clear and obvious error upon review of the record. But, defendant must also show that the plain error affected his substantial rights. Defendant failed to meet this burden. When a trial court provides multiple substantial and compelling reasons for departure from the sentencing guidelines range, and some reasons are not substantial and compelling, this Court must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Remand to the trial court for resentencing or rearticulation of its substantial and compelling reasons is necessary only if the appellate court cannot make such a determination or if the appellate court determines that the trial court would not have departed to the same degree. *Id.*

In this case, the trial court cited numerous reasons for its departure from the guidelines. The other reasons the trial court cited are substantial and compelling reasons to depart from the guidelines. Based on a review of the record, we conclude that the trial court would have departed to the same degree irrespective of its conclusion defendant brought disrespect onto law enforcement community because it focused so strongly on defendant's extreme abuse of his position of authority, the vast number of crimes he committed and severe exploitation of his victims. Remand for to the trial court for resentencing or rearticulation of its substantial and compelling reasons is not necessary. See *Solmonson*, *supra* at 670.

Defendant also challenges his sentences on the basis that the trial court did not impose proportionate and individualized sentences when it focused solely on defendant's crime and did not consider his many years of public service. We disagree.

Whether a sentence outside the guidelines range is proportionate to the crime and the defendant's criminal history is reviewed by this Court for an abuse of discretion. *Babcock*, *supra* at 264-265. Individualized sentencing for each defendant is the policy of this state. *People v Sabin*, 242 Mich App 656, 661; 620 NW2d 19 (2000). Thus, sentences must be "proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *Babcock*, *supra* at 262. The substantial and compelling reasons for departure should "contribute to a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 264.

Defendant's sentences were specifically imposed based on the seriousness of his conduct and his personal history. The trial court considered "the seriousness of these offenses, your history, the principle of proportionality, the statutory penalty, the cost of confinement, the sentencing guidelines, the report and recommendation of the Probation Department, the letters you've submitted, and what has been said upon the record at this hearing" to determine defendant's sentences. The trial court is not required to weigh some factors, such as defendant's honorable service as a law enforcement officer, more heavily than others. Rather, the trial court must assess the offender as a whole, taking into consideration all of the circumstances of the case, and tailor a sentence accordingly. See *Babcock*, *supra* at 262. Because the trial court tailored defendant's sentences to fit the circumstances of his case, no abuse of discretion occurred.

Defendant next challenges the scoring of offense variables (OVs) 9 and 13. However, defendant waived review of the OV scoring by expressing satisfaction, on the record, with the trial court's guidelines scoring. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144

(2000). Therefore, any error that occurred was extinguished and there are no errors for this Court to review.

Lastly, defendant raises ineffective assistance claims based on his attorney's failure to object to his scores for OVs 9 and 13. Defendant did not move for an evidentiary hearing or a new trial before the trial court; therefore, defendant failed to preserve his ineffective assistance claims for appeal. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). For that reason, our review is limited to errors apparent on the record. *Id.*

Generally, "[w]hether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court decides the facts and whether they constitute a violation of the right to effective assistance. *Id.* We review factual findings for clear error, and questions of law de novo. *Id.* To establish a claim of ineffective assistance, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for trial counsel's errors, there is a reasonable probability that the results of defendant's trial or sentencing would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that trial counsel's performance was deficient, defendant "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, *supra* at 302. Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant cannot show that trial counsel's performance was deficient. Trial counsel did not object to the trial court's scoring of OV 9. However, this was in accordance with precedent at the time, which allowed trial courts to score OV 9 for financial injury. See *People v Knowles*, 256 Mich App 53, 61-63; 662 NW2d 824 (2003), overruled by *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). The fact that this Court convened a conflict resolution panel on February 15, 2006, to resolve the conflicting opinions in *Knowles*, *supra* at 53, and *People v Melton*, 269 Mich App 542; 711 NW2d 430 (2006), superseded by 271 Mich App 590; 722 NW2d 698 (2006), does not affect this analysis because this Court did not indicate which opinion properly interpreted OV 9. Trial counsel could not have known that this Court would overrule *Knowles*, *supra*, based on the conflict panel resolution order. Had trial counsel objected, his argument would have been meritless, having no basis in the law. Trial counsel's performance is not rendered ineffective for failing to raise meritless arguments. *Matuszak*, *supra* at 58.

Defendant's argument that trial counsel should have objected to his score for OV 13 is similarly meritless. Offense Variable 13, as codified in MCL 777.43, instructs trial courts to score a defendant ten points if he committed "3 or more crimes against a person or property" MCL 777.43(c). Defendant admitted that he was guilty of all of the charges the prosecutor dismissed pursuant to the plea agreement, and agreed that his guilt could be considered for sentencing purposes. Two of the dismissed charges were larceny from a person, MCL 750.357, which is a crime against a person. The trial court, therefore, properly scored defendant ten points for OV 13, because he committed three or more crimes against a person or property: two crimes against a person, larceny from two people, plus the seven property crimes defendant concedes should be counted. See MCL 750.357. Therefore, trial counsel was not ineffective for raising a

futile objection to the score. *Matuszak, supra* at 58.

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood