

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RAY SMITH,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 286479

Jackson Circuit Court

LC No. 07-004218-FH

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for involuntary manslaughter with a motor vehicle, MCL 750.321; intimidating a witness in a criminal case punishable by more than ten years' imprisonment, MCL 750.122(7)(b); and reckless driving, MCL 257.626. On May 29, 2008, the trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent terms of 10 to 22 years' imprisonment for the vehicular manslaughter conviction, 5 to 15 years' imprisonment for the interfering with a witness conviction, and 93 days in jail for the reckless driving conviction. For the reasons set forth in this opinion, we affirm defendant's convictions, but remand for resentencing pursuant to *People v McGraw*, ___ Mich ___, 771 NW2d 655 (2009).

This case arises from a traffic accident that occurred on June 19, 2007 in Jackson County. Defendant was driving his 1993 Cadillac with three passengers, Nicole Wolfe, who sat in the front passenger's seat, Jasmine Anderson, who sat behind Wolfe, and Michael Smith, who sat behind defendant. Wolfe testified that defendant was driving recklessly and at a high rate of speed when he pulled over into the lane of oncoming traffic as a green truck was coming toward them. Thomas Lantz, the driver of the green truck, noticed defendant's Cadillac "coming off of Sutton Road peeling its tires coming up, you know, coming up fast, then stopping, then flying out onto Ann Arbor Road." Lantz observed that defendant was traveling "at a high rate of speed" toward him in his westbound lane, and there was nowhere for him to move off of the road because there was an embankment to the side that came to the shoulder, and he was already driving on the shoulder of the road because of the construction. Lantz indicated that, "as we got close it was—we kind of did one of these numbers. I went to move over a little bit, and he went back over in his lane." Lantz "thought he [defendant] was driving in a reckless manner and that he was either going to cause an accident or kill somebody the way he was driving." Wolfe observed that Lantz's truck swerved to the right, its passenger side wheels leaving the road, but defendant then swerved back into the correct lane and a collision was avoided. Other witnesses

testified to a similar version of events. After the near collision, Wolfe testified that following the near collision, defendant sped up, and she then saw Diane Sigers in her red 2000 Hyundai car at the intersection of Ann Arbor Road and Thrush Road. According to Wolfe, Ms. Sigers had first stopped, and then was rolling forward trying to peek around the construction barrels in order to view oncoming traffic. Shortly thereafter, Wolfe testified that she could see the driver's side door of the red car and Ms. Sigers' head, and the red car appeared to have stopped. Defendant again increased his speed, and Wolfe testified that she "knew we were going to hit, and I covered my face" and then came the impact with Ms. Sigers' car. Wolfe remembered defendant applying the brakes before impact, but "[i]t was too late."

From his vantage point behind defendant's Cadillac, another witness, Kirt Warner, observed the victim's red car pulling out at the intersection as Warner crested the small hill right before Thrush Road. Warner testified that defendant was still accelerating at that point. Warner saw the cars collide and pulled his truck over to the side of the road, walked up to Ms. Sigers' car, and called 911. Warner claimed that when he arrived to Ms. Sigers' car she was unconscious, and Dr. Ortiz Reyes, a forensic pathologist, testified that Ms. Sigers died in "just a few seconds" because of the heart and brain injuries sustained as a result of the collision.

Wolfe, who was pregnant at the time of the accident, spent two days in the hospital as a result of the injuries she received in the collision. Defendant spent time with Wolfe while she was in the hospital, however there came a time when defendant stated to Wolfe that she "shouldn't talk to anybody, there was no proof of anything, he was innocent without me [Wolfe] saying anything, and that basically if he couldn't handle the situation, then he'd have somebody else deal with it."

Following his jury trial, defendant was convicted and sentenced as listed above. This appeal ensued.

Defendant first argues that there was insufficient evidence to support his witness intimidation conviction. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). It is the jury's function alone, when considering the evidence, to determine what weight and credibility to give the evidence. *Id.*, citing *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). And, we "draw all reasonable inferences and make credibility choices in support of the jury verdict" when reviewing the sufficiency of the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.122, the witness intimidation statute, provides in relevant part:

(3) A person shall not do any of the following by threat or intimidation:

(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

This statute evinces the Legislature's "attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding, as defined in subsection 12(a),¹" including "threats or intimidation (subsection 3)." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Subsection 9, "which applies to MCL 750.122 as a whole, makes clear that criminal liability attaches if the person [committing the witness tampering] *knows or has reason to know* the other person could be a witness at any official proceeding." *Id.* at 442 (Emphasis in original). MCL 777.122(9) provides: "This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding."

Viewing the record evidence in the light most favorable to the prosecution, there was sufficient evidence presented at trial to support defendant's conviction for witness intimidation beyond a reasonable doubt. *Wolfe, supra* at 514-515. According to Wolfe, defendant repeatedly discouraged her from providing information about the accident, and indicated that the police would not have any evidence against him unless she spoke with them. Defendant threatened Wolfe: "if I can't take care of the problem, then I'll have somebody else do it for me." He made this statement in the context of indicating to her that as long as she did not talk with the police, the police would not have proof of any wrongdoing, and it was clear to Wolfe that defendant understood that she could be a witness in a criminal case, as an investigation was being conducted. As a result, Wolfe testified that she was scared and reluctant to speak with the police or the prosecution. Thus, defendant, by threat or intimidation, attempted to discourage Wolfe from providing information to the police and the prosecution. MCL 750.122(3). Moreover, based on Wolfe's testimony regarding the context of defendant's statements and the fact that defendant knew there was an ongoing investigation into the crash, the evidence supported that defendant knew or had reason to know that Wolfe could be a witness against him in a future official proceeding. MCL 750.122(9). The witness intimidation statute applies regardless whether there was a pending proceeding or whether Wolfe had been ordered to appear in court. MCL 750.122(9); *Greene, supra* at 442.

Defendant's arguments as to other passengers not claiming that they were intimidated or that his statement was merely open to Wolfe's interpretation, fail to take into account that we must view the evidence in the light most favorable to the prosecution, *Wolfe, supra* at 514-515,

¹ MCL 777.122(12)(a) provides: "Official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding."

and make credibility choices regarding Wolfe's testimony in support of the jury's verdict, *Nowack, supra* at 400. In addition, only minimal circumstantial evidence was required to prove defendant's intent to intimidate or threaten Wolfe. Where he warned her not to speak with police, and if she did, he would take care of "the problem," the intent was proved. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). We similarly reject defendant's contention that the knowledge requirement could not begin until his arrest or arraignment. The plain language of MCL 750.122(9) dictates that this statute "applies regardless of whether an official proceeding actually takes place or is pending." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Whether an official proceeding is actually pending is not an element of the offense. Moreover, the language of MCL 750.122 also does not set forth the specific moment when a person is deemed to know or have reason to know that another person could be a witness at an official proceeding, and we decline to read such a provision into the statute. *Id.* Accordingly, there was sufficient evidence presented at trial for a jury to find beyond a reasonable doubt that defendant had violated MCL 750.122(7)(b).

Next, defendant argues that there were errors in scoring his sentencing variables. Defendant preserved these scoring issues for appeal because he objected to the trial court's scoring of offense variable (OV) 9, MCL 777.39, and OV 19, MCL 777.49, during the sentencing hearing. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10). We review the trial court's scoring of the offense variables to ascertain "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The trial court's determination must be supported by adequate evidence on the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where there is any evidence in support of the scoring decision, that decision will be upheld. *Id.* The proper construction of the sentencing guidelines presents an issue of law reviewed de novo. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

Based on defendant's total prior record variable score (PRV) of 42, and his total OV score of 75, the legislative sentencing guidelines' recommended minimum range for defendant's vehicular manslaughter conviction was 50 to 125 months' imprisonment. MCL 777.64; MCL 777.21(3)(a). Defendant was sentenced within the guidelines to 10 (120 months) to 22 (264 months) years' imprisonment.

We affirm defendant's score of ten points for OV 9. MCL 777.39(1)(c) scores ten points where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." The trial court is directed to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). "The instructions for OV 9 provide that a victim is each person who is placed in danger of injury or loss of life. MCL 777.39(2)(a). The instructions do not necessarily require that a separate criminal offense have occurred with respect to that victim." *People v Sargent*, 481 Mich 346, 350 n 2; 750 NW2d 161 (2008). The record reflects that at the time of the collision that killed the victim, witness Wolfe, and fellow passengers Jasmine Anderson and Michael Smith were in defendant's car and were placed in danger of physical injury. MCL 777.39(1)(c); MCL 777.39(2)(a). Wolfe suffered fractured ribs, a ruptured spleen, and a bruised heart as a result of the crash, and Anderson suffered difficulty breathing and injured her spine. Michael was thrown over Anderson upon impact. There is no indication that these passengers

were implicated in or assisted defendant's criminal actions. *People v Kisielewicz*, 156 Mich App 724, 728 n 1; 402 NW2d 497 (1986) (Finding that other passengers, besides the passenger that was killed, in the car that was struck by the defendant could be counted as victims placed in danger of personal injury or loss of life), citing *People v Latzman*, 153 Mich App 270, 274; 395 NW2d 56 (1986), vacated on other grounds 429 Mich 866 (1987) (Holding that the passengers in the *defendant's* automobile could be counted for sentencing variable scoring purposes as victims.)

Defendant next contests his score of 15 points for OV 19, and we agree that OV 19 was improperly scored. MCL 777.49 provides for a score of 15 points where "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services."² The Michigan Supreme Court recently decided *People v McGraw*, ___ Mich ___; 771 NW2d 655 (2009), and ruled that "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *Id.* at 21. The Court indicated that the sentencing guideline scheme did not intend to use a transactional approach, and that "[i]f assessing points for conduct beyond the sentencing offense were to be the norm, the Legislature would have delineated the scope of that conduct, as it did with several specific offense variables." *Id.* at 10-11.

In the present case, MCL 777.49(b) does not expressly or specifically provide that conduct beyond the sentencing offense may be used in scoring OV 19 for the sentencing offense. Additionally, the evidence presented at trial clearly reveals that the offense was committed after the sentencing offense of manslaughter with a motor vehicle was completed. In accordance with our Supreme Court's ruling in *McGraw*, *supra*, defendant was therefore erroneously scored 15 points for OV 19 instead of zero points. MCL 777.49(d). Scoring OV 19 at zero points reduces defendant's total OV score to 60. This new score places him in grid cell level V, D instead of VI, D. MCL 777.64. The new recommended minimum sentence range under the legislative guidelines is 43 to 107 months' imprisonment. MCL 777.64; MCL 777.21(3)(a). Defendant's sentence of 10 to 22 years falls outside this range, accordingly, defendant must be resentenced for involuntary manslaughter because the scoring error altered the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

In defendant's final claim of error on appeal, he argues that the trial court failed to state objective, verifiable, and compelling reasons to support its departure from the legislative sentencing guidelines for his witness intimidation sentence. Although defendant did not raise this issue at sentencing, where a sentence is outside of the guidelines range, it "is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand[,]" and is reviewed for plain error. *Kimble*, *supra* at 310-310, 321; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The trial court must articulate on the record substantial and compelling reasons for departure that are also objective and verifiable. *People v Babcock*, 469 Mich 247, 258, 261-262; 666 NW2d 231 (2003); MCL 769.34(3) and

² On appeal, defendant does not dispute that his behavior constituted use of force or threat of force to interfere or attempt to interfere with the administration of justice. MCL 777.49(b).

(11). We review the trial court's factual findings for clear error, whether the reasons were objective and verifiable de novo, and whether the reasons were substantial and compelling for an abuse of discretion. *Id.* at 264-265.

Defendant's Presentence Investigation Report (PSIR) indicates that his PRV score was 27 and his OV score was 20 for the witness intimidation conviction. The legislative guidelines recommended minimum sentencing range was 5 to 28 months' imprisonment with the second-offense habitual offender increase. MCL 777.65; MCL 777.21(3)(a). Defendant was sentenced to 5 to 15 years' imprisonment, which is a clear departure.

Defendant first argues that the trial court's finding that he lacked remorse was not objective and verifiable. During allocution, defendant apologized to the victim's family: "I'm sorry for what happened to Ms. Diane Sigers. I don't know why or what all happened that day. I know the truth hasn't totally come out, but at the same point in time I am very sorry that you guys have lost a loved one[.]" When questioned by the trial court about his statement, defendant explained that "my ex [Wolfe], the one that was the main witness in this case, got paid so many extra thousands of dollars if I got found guilty, through my car insurance company." The trial court noted that defendant expressed remorse, but he also intimidated Wolfe, discouraged her from testifying and obstructed justice, and then accused Wolfe at sentencing of lying about the accident in order to collect insurance money. We find that the trial court's consideration of defendant's "failure to accept responsibility" was objective and verifiable on the facts of this case. Defendant apologized to the victim's family, but then essentially accused the main witness against him of lying about the accident at trial. The trial court's findings were based on defendant's objective, and contrary, statements. This was not a situation where a defendant verbally expressed remorse but the trial court subjectively decided that the defendant was insincere. *People v Daniel*, 462 Mich 1, 8, 11; 609 NW2d 557 (2000). See also, *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

Defendant next argues that the trial court improperly considered prior not guilty verdicts and past contact with law enforcement. Although a trial court may not independently find a defendant guilty of another charge and sentence him on that basis, the record does not support that the trial court here sentenced defendant based on this prior conduct that did not result in a conviction. *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986), overruled on other grounds, *People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006). Rather, the trial court specifically stated that it was *not* considering those factors in sentencing defendant. And, defendant's prior encounters with the justice system were objective and verifiable, and the trial court properly considered them as evidence of defendant's poor potential for rehabilitation. *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008). Defendant has demonstrated no abuse of discretion or use of inaccurate information under the circumstances. *Babcock*, *supra* at 258; *Kimble*, *supra* at 310-311; MCL 769.34(3).

The trial court also stated as objective and verifiable reasons, defendant's conduct before and during the accident, by indicating that the actions of defendant which led to the collision, were "no accident," as well as defendant's attempt to avoid or minimize prosecution by threatening Wolfe.

Defendant fails on appeal to analyze whether any of the stated, objective and verifiable reasons were compelling and substantial enough to justify the departure. *Babcock*, *supra* at 258.

He therefore abandoned his claim that the departure was justified. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We nonetheless conclude that the objective and verifiable reasons were substantial and compelling where they keenly and irresistibly grab our attention and justify departure. Although we find the trial court's reasons objective and verifiable, we must also find that the sentence was proportionate. Defendant's witness intimidation sentence of 5 to 15 years' exceeds the minimum for the higher class felony conviction, vehicular manslaughter (43 to 107 months), after taking into consideration the scoring error in OV 19. *People v Mack*, 265 Mich App 122, 126-129; 695 NW2d 342 (2005). Thus, resentencing is required for both the vehicular manslaughter and witness intimidation convictions.

In *People v Mack*, *supra*, this Court noted that the principle of proportionality in sentencing was part of the sentencing guidelines, and it "question[ed] (but did not expressly decide) whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines pursuant to MCL 771.14(2)(e)(ii) and (iii) could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional." *Id.* at 128-129. In *Mack*, the defendant was sentenced to equal concurrent sentences for his higher and lower class felony convictions, the lower offense was not scored separately, and the sentence for the lower class felony conviction fell outside the guidelines range that would have been applicable. *Id.* at 124-128. However, defendant's sentence for witness intimidation now exceeds a proper sentence within the guidelines for the higher crime class felony conviction, vehicular manslaughter, because the sentencing guidelines for that offense are lower than previously determined based on the misscoring of OV 19. Where the witness intimidation sentence exceeds the guidelines for the higher felony under the new scoring, we express concern, though do not specifically find that defendant's witness intimidation sentence is not proportionate, *Babcock*, *supra* at 262, and we remand for reconsideration of that sentence. See, *People v Mack*, *supra*, at 124-129.

Defendant also asserts that he should be resentenced by a different judge because the trial court let its emotions affect its sentencing in that it ordered that a laminated photograph of the victim be placed in his prison cell. However, defendant does not argue that this aspect of his sentence should be reversed. Moreover, defendant fails to cite any authority for his assertion that resentencing by a different judge is required, and we do not find from the record that the trial court exhibited any personal bias or prejudice against defendant or his counsel. Accordingly, the trial judge is not disqualified. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); MCR 2.003(B)(1).

We affirm defendant's convictions, but remand to the trial court for resentencing on the manslaughter charge and reconsideration of the proportionality of defendant's witness intimidation sentence. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly