STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 283364 Oakland Circuit Court
VON CEDRIC LARRY, Defendant-Appellant.	LC No. 2007-216890-FC

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for solicitation to commit murder, MCL 750.157b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 99 to 155 years' imprisonment. We affirm defendant's conviction, vacate his sentence, and remand for resentencing.

Defendant first argues that the prosecution presented insufficient evidence for a rational trier of fact to conclude that defendant committed the crime of solicitation of murder. We disagree.

This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of solicitation to commit murder are: "(1) the solicitor purposely seeks to have someone killed and (2) tries to engage someone to do the killing." *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998). "Solicitation is complete when the solicitation is made." *Id*. "Actual incitement is not necessary for conviction." *Id*. "Solicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder

would in fact be committed." *Id.* For purposes of a prosecution for solicitation to commit murder, "solicit" is statutorily defined as an "offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." MCL 750.157b(1).

Here, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude, beyond a reasonable doubt, that defendant purposely sought to have the victim, who was also the victim in an unrelated criminal sexual conduct prosecution against defendant, killed, and tried to engage defendant's cell-mate, Frederick Henderson, to commit the killing. *Crawford, supra* at 616. One of defendant's other cell-mates, Robert Noell, testified that during a conversation relating to the practice of morticians breaking bones of corpses in order to counteract the effects of rigor mortis, defendant interjected that defendant would "like" for "the witnesses" in his pending criminal sexual conduct case "to end up like that." According to Henderson, defendant had maintained his innocence of the CSC charges. However, soon after his comments relating to rigor mortis, defendant stated that the police matched his DNA with the DNA evidence recovered from the victim, and acknowledged that, because the police had matched defendant's DNA with that recovered from the victim, he "was gonna get found guilty."

Henderson testified that defendant promised to procure $1,000 from his employer, representing a deposit or down payment to Henderson, "so the girl would never show up in court." Henderson further testified that defendant attempted to contact defendant's employer by telephone in order to procure the money. Defendant also indicated to Henderson that he would pay Henderson between $20,000 and $30,000 after defendant was released from custody. However, Henderson did not actually receive any money from defendant.

As a result of an altercation between defendant and another of defendant's cellmates, defendant was relocated to a different cell in the Oakland County Jail. After defendant collected his personal effects, defendant sat on Henderson's bunk and wrote a note, which defendant then gave to Henderson. As defendant handed Henderson the note containing the victim's name, her birth date, the names of the victim's parents, and defendant's name and inmate number, defendant admonished Henderson to "make sure she never shows up in court." At trial, expert document examiner Ruth Holmes opined that there was "the highest degree of probability" that the handwriting on the note defendant handed to Henderson matched the handwriting on other documents written by defendant. Further, during previous conversations, defendant provided Henderson with a physical description of the victim, told Henderson where the victim went to school, and suggested that the best way to find the victim was "going or coming from school." Henderson testified that the police report did not provide a physical description of the victim.

From this evidence, a rational trier of fact could infer, beyond a reasonable doubt, that defendant intended to have the victim killed, and tried to engage Henderson to do the killing. *Crawford, supra* at 616. The evidence regarding defendant's awareness that he was likely to be convicted of the criminal sexual conduct charge, pursuant to which he could be subject to a sentence of life imprisonment, defendant's statement that he wanted the victim to "never" appear in court, defendant's attempts to procure money offered to Henderson in order for Henderson to ensure that the victim "never" appeared in court, and that defendant supplied Henderson with a physical description of the victim and advice on how she could be located, is sufficient evidence from which a rational trier of fact could conclude that defendant solicited Henderson to commit the murder of the victim.

Moreover, after Noell reported defendant's attempt to procure money in order to prevent the victim from appearing in court to testify against him, Oakland County Sheriff's Deputy David Hendrick and Madison Heights Police Officer Corey Haines sent defendant a note through the jailhouse mail system which stated, "Your boy didn't get out. If you still need help with your problem maybe I can help. Call me, Dave." The note included a telephone number for defendant to call, which was actually the number of an extension in Hendrick's office. Defendant called the number listed on the card, and asked Hendrick, posing as "Dave Ray," if Henderson had supplied sufficient details regarding the problem for which defendant wanted a solution, and told "Dave" that defendant needed the problem to be solved "as soon as possible." Defendant also asked "Dave" to contact two people in order to obtain money. This evidence further demonstrates that defendant purposely sought to have the victim killed, and took steps to engage "Dave," as Henderson's substitute or subcontractor, to commit the killing. *Crawford, supra* at 616. Accordingly, we conclude that there was sufficient evidence for a rational trier of fact to conclude that defendant solicited the murder of the victim.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. "This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). If "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand," the verdict is against the great weight of the evidence. *Id*.

Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). Reversal is necessary only where the testimony is "inherently implausible" to the extent that it "contradicts indisputable physical facts or law." *People v Lemmon*, 456 Mich 625, 642-647; 576 NW2d 129 (1998). "A verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925). Further, issues with respect to witness credibility are, generally, insufficient grounds for granting a new trial. *Lemmon, supra* at 643.

Here, although defendant attacks, piecemeal, certain aspects of the testimony of Noell and Henderson, defendant fails to demonstrate that the testimony is inherently implausible, or results from an improper extraneous influence. *Lemmon, supra* at 642-647; *DeLisle, supra* at 661. Further, defendant fails to acknowledge that significant aspects of Noell's and Henderson's testimony were corroborated by physical evidence, such as the note defendant handed to Henderson, which in defendant's handwriting, named the victim and her parents. Moreover, although defendant correctly points out that he did not directly incriminate himself in his conversations with undercover officers David Hendrick and Terrence Mekoski, the evidence that defendant attempted to contact the fictional "Dave Ray" at the telephone number provided by the undercover officers, that defendant referred to the "problem" that defendant discussed with "Freddie," and that he needed this "problem" to be solved as soon as possible, was consistent with the great weight of the evidence, and supported defendant's conviction. Because defendant fails to show that the testimony was inherently implausible, or the result of an improper

extraneous influence, his argument that the verdict was against the great weight of the evidence fails. *Lemmon, supra* at 642-647; *DeLisle, supra* at 661.

Defendant contends that the testimony of Henderson and Noell was inherently implausible because defendant's other cellmates did not overhear defendant's attempts to solicit the victim's murder. According to defendant, because defendant and his cellmates were housed in close quarters, defendant's cellmates would or should have overheard defendant's attempts to solicit the victim's murder, if such attempts had in fact taken place. Allen Ayot testified that he did not overhear defendant attempt to solicit anyone to commit the murder of the victim, and further testified that he did not overhear a conversation involving the effects of rigor mortis. However, Ayot also admitted that he did not overhear every conversation that took place in the cell. Lance Harring testified that he did overhear a conversation relating to rigor mortis, but did not hear defendant attempt to solicit the victim's murder. Juton Neuo denied that he overheard defendant solicit the victim's murder; however, Neuo admitted that if a person intends to solicit another person to commit a murder, the person soliciting the murder would likely speak directly to the person he intended to solicit, instead of broadcasting his request before everybody present. Moreover, none of defendant's other cellmates could unequivocally state that defendant did not solicit Henderson or Noell to murder the victim.

Accordingly, we conclude that the testimony of defendant's other cellmates does not render the testimony of Henderson and Noell incredible, and that, therefore, the verdict was not against the great weight of the evidence. *Lemmon, supra* at 642-647; *DeLisle, supra* at 661.

Defendant next challenges the jury instructions given by the trial court. Where a party expressly approves the instructions before they are given by the trial court, the party waives any challenges to jury instructions on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, a party expressly approves the trial court's jury instructions where the trial court asks if there are any objections to the instructions and, as in the present case, in response to that direct question by the trial court, the party denies any objections to the jury instructions. *Id*. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Accordingly, we conclude that this issue is waived on appeal, and we decline to discuss it further. *Id*.

Defendant next argues that defense counsel was ineffective when counsel failed to challenge the trial court's jury instruction concerning the elements of solicitation to commit murder, and that counsel also should have requested a jury instruction defining "specific intent," and a cautionary instruction relating to the credibility of the incarcerated witnesses. We disagree.

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Toma, supra* at 302. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id*.

Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Counsel's failure to challenge the jury instructions given by the trial court was not ineffective because, viewing the jury instructions as a whole, "the instructions adequately protected defendant's rights by fairly presenting the issues to the jury to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Defendant's vigorous assertion, that solicitation to commit murder requires proof of incitement or immediacy, contradicts binding precedent. In *People v Sexton*, 250 Mich App 211, 226; 646 NW2d 875 (2002), this Court clearly held that proof relating to incitement is no longer required under the more recent version of MCL 750.157b. Because the trial court correctly instructed the jury on the two elements of solicitation to commit murder, the request by counsel for instruction regarding incitement would properly have been denied. Because an ineffective assistance of counsel claim may not be premised on failure to advance a meritless argument, defendant's argument fails. *Snider, supra* at 425.

We also reject defendant's argument that defense counsel was ineffective because he failed to request an additional jury instruction with respect to specific intent. The trial court adequately instructed the jury regarding the necessary intent for solicitation to commit murder, and therefore, the trial court was not required to give a special instruction reiterating the intent requirement. See *People v Maynor*, 470 Mich 289, 296; 683 NW2d 565 (2004) (holding that where a defendant had been charged with first-degree child abuse, because the requisite degree of intent was included within the definition of the crime, it was unnecessary for a trial court to give an additional instruction with regard to specific intent). As such, the request for a specific intent instruction would properly have been denied. Again, because an ineffective assistance of counsel claim may not be premised on failure to advance a meritless argument, defendant's argument fails. *Snider, supra* at 425.

Lastly, defendant contends that his counsel was ineffective because counsel failed to request a cautionary instruction regarding the credibility of Henderson and Noell. However, defendant cannot rebut the presumption that counsel's decision not to request an instruction with regard to credibility of incarcerated witnesses was a matter of sound trial strategy, and further fails to show that counsel's failure to request the instruction affected the outcome of the case. *Toma, supra* at 302-303. First, although Noell was incarcerated at the time he testified at

defendant's trial, all three of the defense witnesses, Ayot, Harring, and Neuo, were also incarcerated at the time of defendant's trial. Thus, defense counsel could have reasonably decided, as a matter of trial strategy, not to request a special cautionary instruction with respect to the credibility of incarcerated witnesses because such an instruction would have been equally applicable to all of the defense witnesses. Furthermore, Henderson was not incarcerated when he testified at trial, or when defendant solicited Henderson to commit murder. Thus, the cautionary instruction at issue would have been inappropriate as to Henderson.

Second, defendant cannot show that counsel's failure to request a jury instruction regarding Noell's credibility affected the outcome of the case. Our review of the record reveals that the trial court adequately instructed the jury with respect to assessment of the credibility of all of the witnesses. As a general rule, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendant cannot show that counsel's failure to request a cautionary instruction with regard to the credibility of the incarcerated witnesses affected the outcome of the case, this argument lacks merit. *Toma, supra* at 302-303.

Defendant next argues that the trial court erroneously permitted testimony regarding the circumstances underlying his pending criminal sexual conduct charge. We disagree. A trial court's decision to admit or exclude evidence is reviewed by this Court for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion occurs where a trial court admits evidence that is inadmissible as a matter of law. *Id.* A question of law underlying a trial court's decision to admit or exclude evidence is reviewed de novo. *Id*.

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only to the defendant's privilege against self-incrimination.

Evidence regarding other crimes, wrongs or acts is admissible under MRE 404(b) where the evidence is presented for a purpose other than to show that the defendant had a propensity to commit the charged crime, the evidence is relevant under MRE 402, and the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Further, upon request, the trial court may give a limiting jury instruction pursuant to MRE 105.

Id. Our Supreme Court has also held that MRE 404(b) is an inclusive and flexible rule that sets forth a nonexclusive list of permissible reasons for the admissibility of evidence regarding prior crimes or acts. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

In addition to the grounds set forth under MRE 404(b)(1), evidence of prior criminal acts is admissible if the evidence is presented as part of the res gestae of the charged offense, for the purpose of setting forth a comprehensive overview of the circumstances of the case for the jury's consideration. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). As explained by the *Sholl* Court:

> Evidence of other criminal acts is admissible when so blended with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. [*Sholl, supra* at 742, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Here, the trial court correctly concluded that the evidence relating to defendant's criminal sexual conduct charge was admissible under MRE 404(b) and as res gestae evidence. MRE 404(b)(1) specifically provides that evidence of other crimes, wrongs or acts may be admissible for purposes including "proof of motive." The evidence pertaining to the collection and testimony of the DNA sample given by defendant during the criminal sexual conduct investigation at issue was highly relevant to defendant's motive to solicit Henderson to murder the victim, and the trial court did not abuse its discretion by allowing this evidence to be admitted.. The evidence pertaining to the commission of the criminal sexual conduct crime, such as Haines's description of the sexual assault itself, which occurred in the back of defendant's van and involved penile-vaginal penetration, was also relevant and admissible. Despite defendant's objection that this evidence was irrelevant under MRE 403 and could confuse the jury, the trial court did not err in allowing the testimony to be admitted for the purpose of establishing defendant's motive and the reasons Haines took further steps in his investigation, including Haines's decision to obtain a DNA sample from the victim. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994). Further, the evidence relating to the assault was relevant to defendant's motive, because it explained the source of the DNA evidence, linking defendant to the sexual assault, which in turn, demonstrated why defendant sought to have the victim killed. MRE 404(b)(1). The trial court, in cautioning the jury that the evidence was relevant only for its probative value of demonstrating defendant's motive and explaining why Haines conducted further investigation, shielded the defendant from the jury's use of the evidence for an improper purpose, and protected against the danger of unfair prejudice to defendant. Generally, jurors are presumed to follow instructions. *Graves, supra* at 486. Thus, the trial court did not abuse its discretion when it admitted evidence relating to the sexual assault itself.

Further, the trial court did not err when it concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. The trial court stated that any danger of unfair prejudice would be eliminated with a proper jury instruction, which the trial court gave in this case. Generally, jurors are presumed to have followed their instructions. *Graves, supra* at 486.

Further, the trial court did not abuse its discretion when it concluded that the evidence relating to the criminal sexual conduct case was res gestae evidence. The circumstances relating

to the criminal sexual conduct charge was inextricably linked to defendant's motive to solicit the victim's murder. *Sholl, supra* at 742. Lastly, with regard to defendant's argument, that the trial court's curative instruction was insufficient to cure the error arising from Holmes's display of an unredacted copy of a document, because defendant specifically and affirmatively approved the trial court's offer to give the curative instruction, we conclude that defendant has waived this part of his argument. *Carter, supra* at 214-216 (holding that waiver extinguishes any error). In summary, we reject defendant's claim that the jury erroneously received evidence relating to the underlying circumstances of the criminal sexual conduct charge

Defendant next argues that he was denied his right under the United States and Michigan Constitutions to confront the witnesses against him because he was unable to cross-examine the victim with respect to the criminal sexual conduct charges. We disagree. In order to preserve a constitutional challenge for appellate review, a defendant is required to have first raised the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Defendant failed to raise his argument, that the prosecution's failure to produce the victim violated defendant's constitutional right to confront his accusers, before the trial court; therefore, this issue is not preserved on appeal. *Id*. This Court reviews unpreserved constitutional claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 763.

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Similarly, the Michigan Constitution protects a criminal's right to be confronted with his accusers. Const 1963, art 1, § 20. By protecting a defendant's right to cross-examine such witnesses, the right to be confronted with the witnesses against him ensures the reliability of the evidence. *People v Jambor*, 273 Mich App 477, 487; 729 NW2d 569 (2007).

This Court has recognized that "for testimonial evidence to be admissible against a defendant, the declarant must be unavailable and the defendant must have had 'a prior opportunity for cross-examination' of the declarant." *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004), quoting *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "Testimonial statements" include "statements taken by police officers in the course of interrogations." *McPherson, supra* at 132, quoting *Crawford, supra* at 68. However, the Confrontation Clause "'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *McPherson, supra* at 133, quoting *Crawford, supra* at 59 n 9.

Here, even assuming that the victim's statements to Haines were "testimonial," defendant's right under the Confrontation Clause to cross-examine the victim was not implicated because the victim's statements were not offered for the purpose of proving the truth of the matter asserted. *McPherson, supra* at 133. Rather the victim's statements regarding the criminal sexual conduct charge pending against defendant were offered to support the proposition that

defendant had a motive to solicit the murder of the victim, and not for the truth of the matter asserted, i.e., to show that defendant had, in fact, sexually assaulted the victim. Accordingly, defendant's claim that his inability to cross-examine the victim with respect to her allegations that defendant had sexually assaulted her violated his right to confront the witnesses against him fails. *Id*.

Defendant next argues that the trial court lacked a substantial and compelling reason to depart upward from his sentencing guidelines range. We disagree.

This Court reviews the existence of a particular factor for clear error, the determination that the factor is objective and verifiable de novo, the determination that the factors constituted substantial and compelling reasons for departure for an abuse of discretion, and the extent of the departure for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). An abuse of discretion occurs where "the minimum sentence imposed falls outside the range of principled outcomes." *Id*.

A trial court is required to impose a minimum sentence falling within the appropriate statutory sentencing guidelines range. MCL 769.34(2). "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is presumptively proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A trial court may deviate from the statutory sentencing guidelines, but may do so only if there is a "substantial and compelling reason" to depart from the guidelines range and the court states that reason on the record. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). To determine whether a reason is "substantial and compelling" the Court must look to the following factors set forth in *Babcock*: (1) the reason must be objective and verifiable; (2) the reason should keenly or irresistibly grab the attention of the reviewing court; (3) the reason must be of considerable worth in deciding the length of a sentence; and (4) the reason must be something that exists only in exceptional cases. *Babcock, supra* at 257-258. Moreover,

> in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportional criminal sentence than is available within the guidelines range [*Id*. at 264.]

The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*., quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Here, defendant's sentencing guidelines range, which takes into account defendant's status as a fourth habitual offender, MCL 769.12, is 225 months (18.75 years) to 750 months (62.5 years). Defendant's prior record variable (PRV) score is 70 points, which places defendant at PRV level E, and defendant's offense variable (OV) score is 125, which places defendant at OV Level VI. The trial court sentenced defendant to 99 years in prison, an upward departure of 36.5 years from the highest recommended minimum sentence under the guidelines.

On the record, the trial court articulated the following six reasons, which it stated were each independently substantial and compelling to warrant the upward departure: 1) "the offense variable scoring exceeds the maximum total points," 2) the psychological injury to the victim's family, 3) defendant's demonstrated inability to conform his conduct to the requirements of society, even while incarcerated, 4) defendant's "escalating criminal assaultive behavior, despite serving the maximum sentence in the Michigan Department of Corrections," 5) "defendant was in custody pending another capital case when he committed this offense," and 6) "defendant's conduct was directed at killing the victim of the other pending capital case in an effort to undermine the rule of law and obstruct justice."

The trial court did not clearly err when it determined that the victim's family suffered psychological injury, that defendant was in custody pending another capital case when he committed the instant offense and that the instant offense was intended to undermine the rule of law. Defendant does not argue that these determinations are not objective and verifiable. Instead, he argues that they were not substantial and compelling reasons for departure because they were already taken into account in determining the appropriate sentencing range. Pursuant to MCL 769.34(3)(b):

> a trial court may 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.' [*People v Young*, 276 Mich App 446, 450; 740 NW2d 347 (2007).]

To determine if a characteristic was given inadequate or disproportionate weight, the trial court should determine the number of points that were scored for that characteristic under the guidelines and "what effect, if any, those points had on the recommended minimum sentence range." *Id.* at 451.

In calculating the offense variable score, the trial court scored a total of 95 OV points for OV 4, 6, 9, and 25, placing him at OV level V. Because the victim's family suffered psychological injury requiring treatment, the trial court also assessed 15 points under OV 5, MCL 777.35(1)(a) ("Serious psychological injury requiring professional treatment occurred to a victim's family."). Furthermore, because defendant intended to undermine the administration of justice by soliciting the murder of the victim who planned to testify against him, the trial court assessed 15 points under OV 19, MCL 777.49(b) ("offender used force . . . against another person . . . to interfere with . . . the administration of justice."). Individually, the scores under OV 5 and OV 19 both would have increased the total OV score to 110 points and increased defendant's sentencing range from 171 to 570 months to 225 to 750 months. Thus, standing alone, there would be no evidence that the psychological injury to the victim's family and defendant's intent to undermine the administration of justice were given inadequate weight. However, together, the scores under OV 5 and OV 19 increased the total OV score to 125 points. As the trial court noted, an OV score of 125 points exceeds the 100-point score necessary to place defendant in OV Level VI. MCL 777.62. Under MCL 777.62, which sets forth the guidelines ranges for Class-A felonies, a defendant's OV level increases at 20-point increments. MCL 777.62. If MCL 777.62 provided for an OV "Level VII," which it does not, defendant's OV score of 125 would have qualified him for the hypothetical OV "Level VII." Thus, the trial

court's determination that, defendant's OV score was "off the grid," not given adequate weight, and therefore constituted a substantial and compelling reason for departure, was not an abuse of discretion. *Smith, supra* at 300; *Young, supra* at 451.

In calculating the prior record variable score, the trial court assessed 25 points under PRV 1, MCL 777.51(1)(c), because defendant had one prior high severity conviction. It also assessed 30 points under PRV 2, MCL 777.52(1)(a), because defendant had four or more prior low severity convictions. Between PRV 1 and 2, defendant was scored a total of 55 PRV points, placing him at PRV level E. Because defendant was in custody pending another capital case when he committed the instant offense, the trial court also assessed 15 points under PRV 6, MCL 777.56(1)(b) ("offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation"). Consistent with the trial court's determination, defendant's pending capital case did not have any effect on the sentence range. Between PRV 1, PRV 2, and PRV 6, defendant was scored a total of 70 PRV points and remained at PRV level E. *Young, supra* at 451. Thus, the trial court's determination that defendant's pending capital case was given inadequate weight and constituted a substantial and compelling reason for departure was not an abuse of discretion. *Smith, supra* at 300.

The trial court's determination regarding defendant's inability to conform his conduct to the requirements of society was not clear error. This reason is objective and verifiable. According to the Presentence Investigation Report (PSIR), defendant received over 150 citations for misconduct while in prison. Defendant's inability to conform keenly and irresistibly grabbed the trial court's attention and was of considerable worth when the trial court decided the length of the sentence. As the trial court noted, defendant's inability to conform, specifically the 150 citations for misconduct, were not accounted for in the guidelines range. In his brief, defendant does not argue that his inability to conform was an inadequate reason for departure. See *People v Thomas*, 263 Mich App 70, 79; 687 NW2d 598 (2004) (the defendant failed to argue that the sentencing guidelines accounted for his previous citations for misconduct while in prison). Thus, the trial court's determination that defendant's inability to conform was a substantial and compelling reason for departure was not an abuse of discretion. *Smith, supra* at 300.

Likewise, the trial court's determination regarding defendant's escalating criminal assaultive behavior was not clear error. This reason is objective and verifiable because defendant's PSIR contains a full and detailed description of defendant's previous contacts with the judicial system. Evidence of defendant's assaultive behavior was not limited to prior convictions, for which defendant served the maximum amount of prison time. It also included assault and battery of a prisoner and prison staff during his imprisonment. Defendant's escalating assaultive behavior keenly and irresistibly grabbed the trial court's attention and was of considerable worth when the trial court decided the length of the sentence. Again, in his brief, defendant does not argue that his escalating assaultive behavior was an inadequate reason for departure. Thus, the trial court's determination that defendant's escalating assaultive behavior was a substantial and compelling reason for departure was not an abuse of discretion. *Smith, supra* at 300; see *People v Horn*, 279 Mich App 31, 48; ___ NW2d ___ (2008) (the trial court's upward departure in light of the defendant's escalating acts of violence was not an abuse of discretion).

In summary, we conclude that the trial court articulated sufficient substantial and compelling reasons to justify a departure. Regardless, defendant argues that the trial court failed

to articulate any explanation for the extent of the departure. Defendant relies on *Smith, supra.* In that case, the defendant committed three first-degree criminal sexual conduct crimes involving a young child. *Smith, supra* at 296. For a person with the defendant's OV and PRV levels, the sentencing guidelines recommend a minimum sentence in the range of 9 to 15 years in prison, for each of the three crimes. *Id*. The trial court sentenced the defendant to 30 to 50 years in prison for the crimes. *Id*. at 298. The Supreme Court concluded that the trial court articulated substantial and compelling reasons to support upward departures of some extent. *Id.* at 295. However, the Supreme Court noted that a trial court is not only required to articulate substantial and compelling reasons for a departure, but must also justify "the *particular* departure made." *Id.* at 303-304 (emphasis in quotation). In justifying a particular departure, the Supreme Court recommended that trial courts could consider where the upward departing sentence would fall on the sentencing grid or compare the "defendant's characteristics and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence." *Id.* at 309-310. Such detailed considerations aid appellate review. *Id.* at 310. Because the trial court failed to provide any "explanation for the extent of the departure independent of the reasons given to impose a departure sentence," and it was "not readily apparent why such a substantial departure [was] warranted on the basis of those reasons," the Supreme Court vacated the sentences and remanded for the trial court to "articulate why this level of departure [was] warranted or resentence [the] defendant." *Id*. at 305-311.

In this case, the trial court articulated substantial and compelling reasons to justify a departure and suggested that the sentencing guidelines range was inadequate based on the offense and the offender. However, like the court in *Smith*, the trial court failed to explain why such a substantial 36.5-year departure was warranted. The trial court did not have the benefit of the Supreme Court's guidance in *Smith* at the time of sentencing and this Court cannot "cannot substitute its own judgment about why the departure was justified." *Smith, supra* at 305. Thus, we vacate defendant's sentence and remand for resentencing in accord with *Smith.*

In light of our conclusions above, this Court need not address defendant's remaining argument on appeal that the sentence of 99 to 155 years' imprisonment is disproportionate and violates his constitutional protections against cruel and unusual punishment.

We affirm defendant's conviction, vacate his sentence, and remand this matter to the trial court for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood