

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE ALLEN-ANTHONY JENKINS,

Defendant-Appellant.

---

UNPUBLISHED

July 27, 2010

No. 290910

Wayne Circuit Court

LC No. 08-007836-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, felonious assault, MCL 750.82, intentional discharge of a firearm in a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.<sup>1</sup> Defendant was sentenced to 80 to 120 months' imprisonment for the assault with intent to commit great bodily harm conviction, two to four years' imprisonment for the felonious assault conviction, two to four years' imprisonment for the discharge of a firearm in a building conviction, and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions but remand for resentencing.

Defendant's first issue on appeal is that he was denied his right to a speedy trial by the eight-month delay between his arrest and the first day of trial. We disagree. The determination whether a defendant has been deprived of his constitutional right to a speedy trial is an issue of constitutional law subject to de novo review, but we review the trial court's factual findings for clear error. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

Both the United States and the Michigan Constitutions guarantee a defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. The right is also protected by statute and court rule. MCL 768.1; MCR 6.004(A). In determining whether a defendant has been denied his right to a speedy trial, the pertinent period commences on the date of the defendant's arrest. *Williams*, 475 Mich at 261. In determining whether a defendant has been denied his right

---

<sup>1</sup> Defendant was acquitted of two counts of assault with intent to commit murder, MCL 750.83.

to a speedy trial, a court must consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Williams*, 475 Mich at 261-262.

With regard to the length of delay, defendant was arrested on May 20, 2008, and the first day of trial occurred more than eight months later on January 27, 2009. If the delay is eighteen months or more, prejudice is presumed and the prosecutor has the burden to show that there was no injury. *Williams*, 475 Mich at 262. If the total delay was under eighteen months, the burden is on the defendant to prove that he suffered prejudice. *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). The length of delay in this case was under eighteen months so the burden is on defendant to prove he suffered prejudice.

When assessing the reasons for the delay, a court must examine whether each period of delay is attributable to the prosecutor or to the defendant. *Waclawski*, 286 Mich App at 666. Unexplained delays, scheduling delays and docket congestion are charged against the prosecutor, but scheduling and congestion delays inherent in the court system are assigned only minimal weight. *Waclawski*, 286 Mich App at 666. Defendant argues that the reasons for the delays are attributable to the prosecution because the court caused them. We agree. The only delay caused by defendant was an adjournment of the final pretrial conference from August 8, 2008, until August 15, 2008. This weeklong delay, however, did not affect the scheduling of the trial. Before the delay and after the delay, the trial was scheduled to begin on October 16, 2008. Moreover, there was no delay caused by defendant's retention of new counsel in July 2008. However, the trial court adjourned the trial on October 16, 2008, because it was in the midst of a murder trial. Defendant's trial was rescheduled for January 27, 2009, more than three months later. All of that delay, therefore, should be attributed to the prosecution. However, it should be assigned minimal weight because the delay is inherent in the court system.

A defendant's failure to timely assert his right to a speedy trial weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106-112; 503 NW2d 701 (1993). In this case, defendant raised the right to a speedy trial by asking the court to reconsider bond on November 14, 2008, given the length of defendant's pretrial incarceration. However, defendant did not completely argue a violation of his right to speedy trial argument and did not immediately file a written motion asserting a violation of the right when prompted to by the trial court. On the first day of trial, defendant filed a written motion for dismissal based on the violation of defendant's right to a speedy trial and made an oral motion before the trial court. The prosecution argues that defendant's failure to fully assert his right to a speedy trial between November 14, 2008, and January 27, 2009, weighs against finding a violation of that right. We disagree. Defense counsel made it clear to the trial court that the length of defendant's pretrial detention was longer than 180 days and bond should be reconsidered as a result, but defense counsel did not push the trial court after its motion to reconsider bond was denied. However, defendant did raise the issue again in a motion to dismiss on the first day of trial, but the motion was denied. Given that the right to a speedy trial is a fundamental constitutional right and there is a presumption against waiver, *Williams*, 475 Mich at 261, we conclude that defendant asserted the right in a timely manner.

Finally, two types of prejudice arise from delay in commencement of trial; prejudice to the defendant's person, and prejudice to the defense. *Williams*, 475 Mich at 264. Prejudice to the person arises when the defendant is incarcerated pending trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Prejudice to the defense is the more serious deprivation. *Williams*, 475 Mich at 262. A general claim of prejudice to the defense from fading witness memories and financial burdens is insufficient. *Gilmore*, 222 Mich App at 462.

In this case, defendant was incarcerated pending trial despite his motion to the trial court to reconsider bond. It appears that defendant suffered personal prejudice from his denial of a speedy trial because he was incarcerated pending trial. However, the Michigan Supreme Court has held that if a defendant does not suffer prejudice to his defense, he may be incarcerated for longer than 19 months and not suffer prejudice to his person. *Williams*, 475 Mich at 264. Moreover, defendant failed to assert any prejudice to his person in his motion before the trial court. In addition, at the time defendant was arrested in this case, he was on probation for a carrying a concealed weapon conviction and, therefore, may have been incarcerated anyway as a violation of his probation. Therefore, the prejudice to defendant's person does not require dismissal.

Defendant further argues that his defense was prejudiced by his inability to call George Vinson, one of complainant Judy Lynn Vinson's sons, as a witness to corroborate the testimony of defendant's mother, Peggy Mason, and by his inability to verify complaints filed before the incident by defendant's neighbors. Defendant, however, has not met his burden in demonstrating prejudice to his defense. He has not shown how the testimony of George Vinson would have altered the outcome in this case. Mason's testimony, that she was intoxicated and on the porch with George Vinson when the shootings occurred, did not help defendant in this case. It is not clear how further corroboration of Mason's testimony from George Vinson might have resulted in an acquittal. Moreover, defendant has not indicated why the delay in trial resulted in his inability to verify defendant's neighbor's complaints or how those complaints might have altered the outcome and the prejudice to his defense does not warrant dismissal.

Defendant's second issue on appeal is that the trial court erred in instructing the jury on the law applicable to flight. We will not address this issue because defense counsel waived it. Waiver is the intentional relinquishment or abandonment of a known right, while forfeiture is the failure to make the timely assertion of a right. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights. *Id.* at 679. In this case, defense counsel waived his challenge to the jury instructions by expressly indicating that he had no objections to the instructions at trial and that he was satisfied with the instructions.

Defendant further argues that defense counsel was ineffective for failing to object to the trial court's flight instruction. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). The appellate court reviews the trial court's factual findings for clear error and reviews its constitutional determinations de novo. *Id.* at 124. As defendant did not establish a testimonial record

regarding the ineffective assistance of counsel claim, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). However, a lawyer is not ineffective for failing to assert a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

Evidence of flight is generally admissible, although it is insufficient by itself to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term flight has been applied to "such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Coleman*, 210 Mich App at 4.

Defendant's objection to the flight instruction would have been futile. There was evidence presented at trial that defendant left the scene of the crime in a van. That is sufficient for a flight instruction. Therefore, the failure of defense counsel to object to the instruction was not deficient performance and defendant was not denied the effective assistance of counsel.

The next issue on appeal is that the trial court erred in refusing to give instructions on two lesser-included offenses, pointing a firearm without malice, MCL 750.233, and discharging a firearm without malice, MCL 750.234, because they were misdemeanors. We hold that the trial court erred in refusing to give the instructions solely on the basis that the charges were misdemeanors, but the error was harmless and the jury was properly instructed.

A preserved, nonconstitutional error, such as a trial court's refusal to give a requested lesser-included offense instruction, is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002). The error will be deemed harmless unless the instruction was clearly supported by substantial evidence. *Id.* at 365.

An instruction on a lesser-included offense is appropriate only if the lesser offense is a necessarily included lesser offense. MCL 768.32; *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). All the elements of a necessarily included lesser offense are contained within

those of the greater offense. *Id.* Thus, with a necessarily included offense, it is impossible to commit the greater without first having committed the lesser. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). An instruction on a necessarily included offense is proper if all the elements of the lesser offense are included in the greater offense and a rational view of the evidence would support the instruction. MCL 768.32; *Nickens*, 470 Mich at 626.

In this case, the trial court erred in refusing to give the jury instructions on the charges of intentionally aiming a firearm without malice and discharging a firearm without malice on the sole basis that they were misdemeanors. A requested instruction of a necessarily included offense, whether a felony or misdemeanor, is proper if the charged greater offense requires the trier of fact to find a disputed factual element which is not part of the necessarily included offense and a rational view of the evidence would support it. *Cornell*, 466 Mich at 357. Therefore, the judge erred in refusing to give the instruction on the sole basis that the requested charges were misdemeanors without analyzing whether they were necessarily included offenses and the evidence supported the instruction.

However, the error was harmless because a rational view of the evidence would not support instructing the jury on either intentional pointing or aiming of a firearm or intentional discharge of a firearm. The elements of intentional pointing or aiming of a firearm are: (1) a person who intentionally aims a firearm, (2) without malice, (3) at another. MCL 750.233. The elements of intentional discharge of a firearm are: (1) a person discharges a firearm, (2) without malice, (3) while it is aimed at another person, (4) without injuring the other person. MCL 750.324. The evidence in the record indicates that defendant acted with malice. Prior to the shooting, defendant attempted to drive Judy Lynn Vinson off the road. Later, defendant approached complainant's house with a gun, saw complainant, and proceeded to shoot, by one account, 30 bullets at her house, knowing she and her family were inside. Defendant acted with malice, and, therefore, there was no evidence to support instructing the jury on intentional pointing of a firearm without malice or intentional discharge of a firearm without malice. The trial court's error was harmless.

Defendant's next issue on appeal is that the trial court erroneously departed from the sentencing guidelines in sentencing defendant for his assault with intent to commit great bodily harm conviction. The reasons given by a trial court for departure from the sentencing guidelines range are reviewed for clear error while the conclusion that a reason is objective and verifiable is reviewed as a matter of law, and whether the reasons given are substantial and compelling enough to justify the departure and the amount of the departure are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A trial court abuses its discretion when the minimum sentence falls outside the range of principled outcomes. *Babcock*, 469 Mich at 265.

A court may depart from the statutory sentencing guidelines only if there is a substantial and compelling reason to do so and the court articulates the reason on the record. MCL 769.34(3); *Babcock*, 469 Mich at 261-262. To constitute a substantial and compelling reason justifying a departure from the statutory sentencing guidelines range, a reason must be objective and verifiable, must keenly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. MCL 769.34(3); *Babcock*, 469 Mich at 261 n 17.

The trial judge articulated the following reasons for sentencing defendant in excess of the guidelines:

I will exceed the guidelines for the following reasons: First, [d]efendant's embarrassing outburst in court at the time of the verdict and with the jury present. Second, [d]efendant's threats to the complainant in court at the time of the verdict. Third, the [d]efendant caused a high degree of danger to an entire neighborhood not just to the victim's premises and person, a danger not reflected in the guidelines. And fourth, [d]efendant's offense occurred the very day he was placed on HYTA for CCW indicating to the court that he is scofflaw.

The trial court did not indicate whether each of these reasons alone would justify departure from the guidelines or whether all were required. In addition, the trial court did not indicate why it was giving the sentence it imposed.

Defendant argues that the first two reasons given by the trial judge were based on the trial judge's subjective opinion, not an objective, verifiable reason. To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed. *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005). Whether a defendant was respectful before the trial court is a subjective judgment not external to the minds of those involved in the decisions and consequently is not objective and verifiable, and cannot justify a departure from the sentencing guidelines range. *People v Young*, 276 Mich App 446, 458; 740 NW2d 347 (2007). Defendant argued at sentencing:

When it comes to threats against [the complainant, Vinson], his comment was, why did you have to lie? And then he called her a derogatory name which was not a threat. It was a frustration with testimony, frustration with the situation he did not agree, of course, with the jury verdict. And again, he apologized for that.

On appeal, the prosecution stated, "[t]he exact words defendant said were not made part of the record, but the trial court judge and the prosecutor, who observed the outburst, believe what he said was threatening to the victim." It is impossible for this Court to determine whether defendant's outburst and alleged threat were objective and verifiable reasons for departing from the guidelines as the outburst and threat do not appear in the record and the incident is clearly viewed differently by defense counsel, the prosecution, and the trial court. Therefore, this Court may not rely on these reasons to uphold the trial court's departure from the guidelines.

Defendant argues that the third reason given by the trial court—the high degree of danger caused by the crime—was already addressed within offense variables (OVs) of the guidelines. We disagree. In imposing a sentence under the statutory guidelines, a trial court may depart from the guidelines range based upon an offense or offender characteristic that was already considered in calculating the range if the court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock*, 469 Mich at 258 n 12. Under the sentencing guidelines, the recommendation of a minimum sentence is based in part on the characteristics of the offense. The OVs consider whether a defendant used a weapon, whether a

defendant used the weapon lethally, how many victims were involved, and whether a defendant was the leader of the offense among other things. See MCL 777.31; MCL 777.32; MCL 777.39; MCL 777.44.

In this case, defendant was scored 25 points under OV 1 for discharging a firearm at someone, five points under OV 2 for possessing a firearm, five points under OV 3 for causing bodily injury to a victim, and ten points under OV 9 for placing two to nine people in danger of physical injury or death. As the trial court indicated, none of the offense variables considers the danger that defendant caused to others within the neighborhood. It is likely that more than nine people were in the area at the time of the shooting. Therefore, the potential danger to the community caused by defendant's actions amounts to a substantial and compelling reason to depart from the guidelines.

Defendant further argues that the trial court's final reason for departing from the guidelines—that defendant committed the crime on the same day he was placed on probation for another crime—was already considered in the guidelines. We agree. As noted above, a trial court may depart from the guidelines range based upon an offense or offender characteristic which was already considered in calculating the range if the court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock*, 469 Mich at 258 n 12. Under the sentencing guidelines, the recommendation of a minimum sentence is based in part on a defendant's criminal history by scoring prior record variables (PRVs) and applying them to the grid. *Young*, 276 Mich App at 454. The PRVs consider “the number of prior offenses committed by the defendant, the severity of the prior offenses, whether the prior offenses were juvenile adjudications, and whether the prior offenses were felonies or misdemeanors.” *Id.*, citing MCL 777.51, MCL 777.52, MCL 777.53, MCL 777.54, and MCL 777.55. Moreover, under MCL 777.56, the trial court should score a defendant's relationship with the criminal justice system at the time of the offense. *Young*, 276 Mich App at 454.

In this case, defendant was scored five points under PRV 2 for his prior felony conviction. He was scored ten points under PRV 6 for being on probation at the time of the offense. The trial court failed to indicate why the guidelines inadequately weighed defendant's prior conviction and the fact that defendant was on probation at the time of the offense. Therefore, defendant's prior conviction and probation status was not a substantial and compelling reason for departing from the guidelines.

In *Babcock*, the Supreme Court held that if “the Court of Appeals determines that some of [the] reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it 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.” *Babcock*, 469 Mich at 260. If the Court of Appeals is unable to determine the intent of the trial court, it must remand the case to the trial court for resentencing. *Id.* In this case, the trial court did not indicate whether each of the stated reasons alone would justify the departure. Therefore, this Court should remand the case to the trial court for resentencing.

In addition, any departure from the guidelines must be reviewed for proportionality. *People v Smith*, 482 Mich 292, 304-305; 754 NW2d 284 (2008). The sentence must be proportional to the defendant's conduct and criminal record, and a departure must be more

proportionate than a sentence within the guidelines range would have been. *Id.* at 305. Appellate review of a departure would be aided by explanations of the similarities between the defendant and his offense and other offenders and crimes which merit the same sentence under the guidelines. *Id.* at 309. In addition, the trial court should explain “why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Id.* at 311.

In this case, the trial court imposed a sentence of 80 to 120 months for the assault with intent to commit great bodily harm conviction. According to the guidelines, the sentencing range for defendant’s minimum sentence was 34 to 67 months. The actual sentence given is slightly greater than the range of possible minimum sentences available to non-habitual offenders on the Class D Offenses grid. MCL 777.65. The trial court articulated why it departed from the guidelines to sentence defendant but failed to explain the extent of the departure. Moreover, of the reasons given, we could only determine that the danger to the neighborhood was a substantial and compelling reason for the departure. We remand to the trial court for further articulation to support the extent of the departure from the sentencing guidelines.

Defendant’s final issue on appeal is that the trial court abused its discretion in scoring OV 4, OV 14 and OV 16 under the sentencing guidelines. A trial court’s decision regarding the points to assess in the sentencing guidelines calculations is reviewed for whether the court properly exercised its discretion and the record adequately supported the particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

With regard to OV 4, psychological injury, ten points must be assessed if serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a). The fact that treatment is not sought is not conclusive when scoring the variable. MCL 777.34(2); *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). Testimony that a victim was afraid during the offense is enough to score the ten points under OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

In this case, complainant testified at trial that it was traumatic to have someone shoot multiple times at the back of her house while she and her family were inside. Afterward, she appeared hysterical to the father of her children, Cedric Gibson, and distressed, shaky and upset to police officers Frank George and Allen Green. Defendant is correct that there is no evidence in the record that complainant ever sought psychological or psychiatric treatment and there is no victim statement from her in the Presentence Investigation Report. However, the threshold for proving psychological injury appears low for OV 4. Therefore, the trial court did not abuse its discretion in assessing defendant ten points for OV 4 for psychological harm to the victim.

With regard to OV 14, offender’s role, ten points may be assessed for a defendant’s role as leader of multiple offenders. MCL 777.44(1)(a). In determining whether the defendant was a leader, a court should consider the entire criminal episode. *Apgar*, 264 Mich App at 330. Defendant argues that there was no evidence at trial that either defendant or his friend was a leader. The evidence introduced at trial indicated that defendant did not commit the offense by himself, but acted with someone else who also carried a gun and shot at complainant’s house. That other person was not identified in the record. Defendant was the driver of a car that tried to drive complainant off the road prior to the incident and defendant was the one in conflict with



complainant's son. However, since the other person is not identified, it is difficult to determine what the other person's role was in the criminal activity and his relationship to defendant. Therefore, we conclude that the trial court abused its discretion in assessing defendant ten points for OV 14 as the leader to criminal acts.

Finally, OV 16, property damage, points are required to be assessed if property was obtained, damaged, lost or destroyed, in part based on the value of the destroyed property. MCL 777.46. OV 16 should only be scored with crimes against people if the crime was either home invasion or attempted home invasion. MCL 777.22(1). In this case, defendant's offense was assault with intent to commit great bodily harm, a crime against a person that is neither home invasion nor attempted home invasion. Therefore, the trial court erred in assessing defendant five points.

Instead of being assessed 75 points for the offense variables, defendant should have been assessed 60 points. Based on his class D offense and his PRV score of 35, if defendant was assessed 60 points, the guidelines would have recommended a minimum sentencing range of 29 to 57 months' imprisonment instead of 34 to 67 months' imprisonment. MCL 777.65.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ William C. Whitbeck