

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARIM DAVON AHMAD,

Defendant-Appellant.

UNPUBLISHED

October 14, 2010

No. 292940

Ingham Circuit Court

LC No. 08-001318-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 120 to 180 months on the assault with intent to do great bodily harm conviction and 30 to 72 months on felonious assault conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant's convictions arise from a domestic violence incident that occurred on October 27, 2008. The prosecution maintained that the victim had been strangled and had received numerous blows with a hammer during the attack. At trial, the victim denied that defendant had inflicted her injuries and instead identified a previously undisclosed third person as her attacker. Nevertheless, the prosecution introduced testimony from the officer who responded to the home that the victim had identified defendant as her attacker at that time. In addition, evidence related to four other domestic violence incidents involving the victim and defendant was introduced at trial pursuant to MCL 768.27b and MCL 768.27c.

Defendant argues that there was insufficient evidence presented to sustain his convictions. We disagree.

In reviewing a sufficiency of the evidence claim, we apply a de novo standard. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Due process prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In addition, the prosecution is not required to disprove all

innocent theories when a case is based on circumstantial evidence. *Id.* A reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins*, 245 Mich App at 457. All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The essential elements that must be established beyond a reasonable doubt to sustain a conviction for assault with intent to do great bodily harm less than murder are: “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The second element requires proof of specific intent, which can be inferred from the defendant’s conduct. *Id.* The essential elements that must be established beyond a reasonable doubt to sustain a conviction for felonious assault are: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of immediate battery.” *People v Chambers*, 277 Mich App 1, 8, 742 NW2d 610 (2007) (quotation omitted). Our Supreme Court has held that a hammer, as well as many other articles, constitutes a dangerous weapon “if used or carried for the purpose of assault.” *People v Vaines*, 310 Mich 500, 504-505; 17 NW2d 729 (1945).

Here, the responding officer testified below that the victim reported being strangled and struck with a hammer multiple times, including one blow to the head. In addition, medical testimony and photographs of injuries consistent with the complained of injuries were introduced at trial. Thus, this testimony was sufficient to establish each of the elements enumerated above. To the extent that defendant argues that this hearsay testimony does not constitute competent evidence, as discussed, *infra*, this testimony was admissible pursuant to MCL 768.27c. Taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented below and the reasonable inferences stemming from that evidence were more than sufficient to support defendant’s convictions. *Hawkins*, 245 Mich App at 457.

Defendant next challenges the constitutionality of MCL 768.27b, and specifically argues that the statute violates separation of powers principles. We disagree.

This Court, in *People v Schultz*, 278 Mich App 776; 754 NW2d 925 (2008), already addressed whether MCL 728.27b violates this constitutional separation of powers. The Court determined that the statute “reflects a ‘policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords.’” *Id.* at 779 (quoting *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007)). The *Schultz* Court held that MCL 768.27b was constitutional because it “is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process.” *Schultz*, 278 Mich App at 779. This Court and trial courts are bound by binding precedent established by the Supreme Court and this Court. MCR 7.215(C)(2); *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

Defendant also argues he was denied a fair trial by the admission of inadmissible hearsay evidence. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2006).

Defendant specifically takes issue with the testimony of multiple law enforcement officers concerning statements made by the victim at various times. Defendant's discussion of this issue fails to acknowledge, or even challenge the validity of, the statutory rule of evidence allowing for the introduction of certain hearsay statements related to domestic violence incidents. MCL 768.27c provides as follows:

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

MCL 768.27c gives further guidance on the determination of trustworthiness for purposes of this statute and states, as follows:

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

Here, the victim's statements to the responding officer that defendant had struck her multiple times with a hammer and had choked her were supported by photographs depicting the injuries and medical testimony that the injuries were consistent with the victim's complaints. Moreover, the officers' testimony concerning the prior domestic violence incidents were likewise

supported by photographic evidence. Thus, we conclude that the testimony of the law enforcement officers with regard to the victim's statements was admissible under the statute.

However, testimony by the victim's neighbor with regard to statements the victim had made to her about defendant hitting her in the head with the hammer or damaging the apartment door was not admissible under MCL 768.27c because the neighbor is not a "law enforcement officer." Defendant also makes a persuasive argument that these statements were not admissible under a hearsay exception. Even assuming that the trial court erroneously admitted the neighbor's testimony, any error was harmless beyond a reasonable doubt in light of the ample competent evidence to support defendant's convictions. MCL 769.27.

Defendant also challenges the introduction of testimony from a hospital nurse who testified that she ordered the emergency room into lock-down mode when the victim was brought in for treatment. Defendant specifically argues the evidence was purely inflammatory and not probative of defendant's guilt or innocence. We agree that the statement relating to ordering the lock-down was not admissible as a statement related to medical treatment under MRE 803(4). Nevertheless, as with the neighbor's testimony, defendant is not entitled to reversal because such error was harmless beyond a reasonable doubt.

Defendant next challenges the validity of his sentence. Defendant specifically argues that the trial court misscored offense variable (OV) 7, which resulted in a disproportionate sentence. We disagree.

An appellate court reviews a sentencing court's decision for an abuse of discretion, and must determine whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351. Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2000).

"A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). Scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotation omitted).

OV 7 requires the assessment of 50 points when a victim has been treated with sadism, torture, excessive brutality, or conduct designed to substantially increase fear or anxiety. MCL 777.37(1)(a). Defendant's conduct toward complainant, including biting and choking her, as well as inflicting numerous blows with a hammer to her head, back, and abdomen, constituted excessive brutality. Therefore, there was evidence to support the scoring decision. *Hornsby*, 251 Mich App at 468. Because the trial court's scoring decision was supported by the record, we reject defendant's concurrent argument that his sentence violates the rule of proportionality is without merit.

Defendant further challenges the validity of his sentence on the basis that the trial court improperly imposed a sentence that constituted an upward departure from the sentencing guidelines. We agree.

In reviewing a lower court's departure from the sentencing guidelines, an appellate court must apply three standards: clear error as to the lower court's determination that a sentencing factor exists; de novo as to whether a factor is objective and verifiable; and abuse of discretion as to whether the lower court's finding that an objective and verifiable factor amounts to a substantial and compelling basis for departure. *Babcock*, 469 Mich at 264-265.

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range determined by the points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). However, the sentencing guidelines scheme allows for departure from the recommended range, so long as the lower court can provide substantial and compelling reasons for the departure on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The substantial and compelling reasons that a lower court relies on to support a departure must be based on objective and verifiable factors that are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Even when a lower court provides substantial and compelling reasons to support a departure from the sentencing guidelines, the rule of proportionality must still be satisfied. *Babcock*, 469 Mich at 264. Finally, the lower court may not rely on factors that have already been accounted for in the sentencing guidelines to support a departure from the recommended minimum range unless the court finds that the factors have been given inadequate or disproportionate weight in the guidelines. MCL 769.34(3)(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

At the sentencing hearing, the trial court indicated that it based its departure on multiple factors, which will each be addressed in turn. In articulating its reasons for departure, the trial court referenced defendant's lack of remorse. However, lack of remorse is generally a subjective factor that cannot be used to justify a departure from the sentencing guidelines. See *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000). The trial court also found that defendant was unlikely to be successfully rehabilitated. A defendant's lack of potential for rehabilitation may constitute a basis for departure only if that determination is supported by objective and verifiable facts. See *Id.* at 6; see also *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008). Here, because there is no indication the trial court considered specific factors in determining that defendant was not amenable to rehabilitation, we cannot find that this determination as based on objective and verifiable facts. Finally, the trial court referenced the fact that the victim was pregnant at the time of the incident. While we cannot agree with defendant's contention that this fact was necessarily accounted for in the guidelines when he was assessed the maximum points for OV 10 (vulnerability of the victim), MCL 777.40, we nevertheless conclude that this matter must be remanded for resentencing because two of the factors relied upon by the trial court were not appropriate to justify a departure on the record presented. See *People v Havens*, 268 Mich App 15, 17-18; 706 NW2d 210 (2005) (noting that remand for resentencing is necessary when the stated reasons for departure are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid reasons).

Finally, defendant argues that he is entitled to resentencing before a different judge. This Court applies the following test in determining whether resentencing should occur before a different judge:

- (1) Whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed

views or findings determined to be erroneous or based on evidence that must be rejected,

(2) whether reassignment is advisable to preserve the appearance of justice, and

(3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotations omitted).]

Moreover, actual personal bias or prejudice against a party or party's attorney is necessary in order to warrant disqualification of a judge. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). We find nothing in the record to indicate that the trial court would have substantial difficulty in setting aside previously expressed views or findings determined to be erroneous. Therefore, resentencing before a different judge is not warranted.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad