STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2012
v	No. 302683 Berrien Circuit Court
LARON ANTWAN WHITELOW, Defendant-Appellant.	LC No. 2010-016092-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault (assault with a dangerous weapon), MCL 750.82, and domestic violence 3rd offense, MCL 750.81(4). He was sentenced to concurrent terms of 20-48 months' imprisonment for the felonious assault conviction and 16-24 months for the domestic violence conviction. We affirm.

Defendant has a young child in common with Shanda Murphy. Their on-again off-again relationship was plagued with arguments and at least one incident of domestic violence in November 2009, for which was defendant was charged and convicted. After the couple broke up again in July 2010, defendant threatened Murphy several times over the telephone. On August 6, 2010, defendant called Murphy and threatened her again. A short time later, Murphy left her home and met a friend in the parking lot of an apartment complex. As Murphy stood outside the friend's car, speaking to her through the driver's side window, defendant drove into the parking lot and began yelling at Murphy. When Murphy ignored him, defendant accelerated his vehicle and drove toward Murphy, coming within inches of her and causing her to fall against her friend's car to avoid being hit by defendant's car. Defendant's instant convictions arise out of that incident.

On appeal, defendant first contends that he is entitled to resentencing where offense variables 10 and 13 were misscored. While we agree that OV 10 was misscored, defendant is not entitled to resentencing.

The interpretation of the statutory sentencing guidelines and legal questions presented by the application of guidelines are subject to de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). A sentencing court has discretion in determining the number of points to be scored, however, and this Court reviews the scoring to determine "whether the sentencing court properly exercised its discretion and whether the evidence adequately supported

a particular score." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). "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).

"Offense variable 10 is exploitation of a vulnerable victim." MCL 777.40(1). Defendant was assessed 10 points for offense variable (OV) 10. MCL 777.40 provides that 10 points are to be scored for OV 10 when "the offender exploited a victim's disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." The instructions state that the mere existence of a factor such as the existence of a domestic relationship, however, "does not automatically equate with victim vulnerability." MCL 777.40(2).

In assessing 10 points for OV 10, the sentencing judge found that defendant had called Murphy several times, threatening her, and then later pulled up next to her trying to hit her with his car. The sentencing judge also found that defendant and Murphy had a domestic relationship and had a child in common. While Murphy testified that the two were not in a relationship at the time of the incident, they had an admittedly on-again, off-again relationship spanning several years and the fact that they had a child in common may have been sufficient to meet the definition of a domestic relationship for purposes of scoring OV 10. In any event, not only would defendant and Murphy have to have a domestic relationship, but defendant would have had to exploit such a relationship in order to have been properly assessed 10 points for OV 10. We find that there was no exploitation.

MCL 777.40(3)(b) defines the term "exploit" to mean "to manipulate a victim for selfish or unethical purposes." The record establishes that on the morning of the incident, defendant had called Murphy, threatening her. Shortly thereafter, he saw her in a parking lot and yelled obscenities at her, then purposefully drove his car at her, narrowly missing her. Attempting to run into someone with an automobile can hardly be considered "exploitation" or "manipulation;" or can defendant's threats to Murphy beforehand. While the prosecutor directs us to Murphy's testimony concerning other, prior contacts between her and defendant to suggest that defendant was exploitive or manipulative, our Supreme Court has made it clear that, unless the statute clearly states otherwise, only conduct that relates to the offense being scored may be considered in assessing points. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). There is no indication in MCL 777.40 that behavior removed from and outside of the offense being scored is to be taken into account. On the record before us, OV 10 should have been scored at 0 points. We therefore conclude that the sentencing court clearly erred by determining that defendant exploited or manipulated the victim during his commission of the sentencing offense, and thus vacate the score of ten points for OV 10.

OV 13 concerns a "continuing pattern of criminal behavior." Defendant was scored 25 points for OV 13, which are assessed when the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). For purposes of determining the appropriate points under OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

In this matter, defendant was convicted of felonious assault and domestic violence, both of which are classified as crimes against a person. Defendant's presentence report, which was addressed at sentencing, also reflects a 2010 guilty plea for domestic violence, second offense. This would constitute the third of "3 or more crimes against a person" within a five-year period and thus justifies the assessment of 25 points against defendant for OV 13. The sentencing judge, in fact, referenced and relied upon the prior 2010 domestic violence conviction (in part) as the basis for assessing 25 points against defendant for OV 13 and defense counsel raised no objection to the same. There was thus no error in the scoring of OV 13.

With the correction of OV 10 from 10 points to zero points, defendant's total OV score on the felonious assault charge changes from 56 points to 46 points. He still remains at OV level III, however, and his minimum sentence guidelines range remains at 10 to 23 months even with this correction. Because the scoring error did not affect defendant's statutory sentencing guidelines range, resentencing is not mandatory. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Defendant next contends that he is entitled to resentencing where his sentence for domestic violence represents a departure from the guidelines and the departure is not supported by substantial and compelling reasons. We disagree.

A court must impose a minimum sentence within the appropriate guideline range unless a departure from that range is permitted. MCL 769.34(2). The court may depart from the guideline range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court may not base a departure on discriminatory reasons or on factors already considered by the guidelines unless those factors have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Substantial and compelling reasons for departure exist only in exceptional cases. *Babcock*, 469 Mich at 257-258.

> On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

MCL 769.34(4)(a) provides that if the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines is 18 months or less, the court shall impose an intermediate sanction unless the court states a substantial and compelling reason, on the record, to sentence the individual to the department of corrections. According to MCL 769.34(4)(a), an intermediate sanction "may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less."

The guideline range for defendant's domestic violence, third offense, conviction was 2-17 months, which is an intermediate sanction cell. The sentencing judge, however, sentenced

defendant to 16-24 months in prison for the offense. Recognizing that the sentence was an upward departure, the sentencing judge stated the following as the basis for its departure:

> [T]he sentencing guidelines do not adequately give sufficient weight to the fact that the defendant, A, was on probation for the same behavior for earlier—well, last year and was on probation from March of this year. Do not give sufficient weight to that. To the fact that it would also be a violation of your probation, which is, in and of itself, a substantial and compelling reason for a departure. For the fact that it's the same victim, same type of behavior, any one of those in and of itself is a substantial and compelling reason for departure.

The sentencing judge also indicated defendant had a significant history of assaultive behavior that appeared to be escalating and that the leniency shown to him by the trial court in placing him on probation had apparently been viewed by defendant as weakness on the part of the court. The sentencing judge noted that defendant had been given an opportunity to control himself and he still lost control, so it was time to pay the price.

The fact that probation was violated does not automatically constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Hendrick*, 472 Mich 555, 562-563; 697 NW2d 511 (2005). But, any probation violation "represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer." *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). As such, there is no reason that a defendant's post-probationary conduct cannot be considered when determining whether an upward departure is warranted. Here, not only did defendant violate his probation but, as the sentencing judge recognized, he was on probation for essentially the same assaultive type behavior against the exact same victim. Given the above, the sentencing judge did not abuse its discretion in finding substantial and compelling reasons to depart from the guidelines and the reasons given for the departure sufficiently justified the extent of the departure.

In his Standard 4 brief[1], defendant contends that he was denied the effective assistance of counsel due to defense counsel's failure to object in several instances. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's

[1] See Administrative Order No.2004–6.

performance was objectively unreasonable, (2) "it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error," *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), and (3) the result that did occur was fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and this Court will not substitute its judgment for that of counsel concerning matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant first asserts that counsel was ineffective for failing to object to the testimony of defendant's ex-girlfriend concerning defendant following her, calling her, and committing an act of domestic violence against her after they broke up. Defendant was convicted of the act of domestic violence in 2003. According to defendant, the testimony was irrelevant and served only to prejudice the jury against defendant from the start of trial.

MCL 768.27b provides:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
>
> (2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

The prosecutor provided the requisite notice under subsection (2) above. And, MCL 768.27b has been held to permit evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act. See *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010). Where, as here, defendant was charged with domestic violence, testimony from defendant's former girlfriend concerning an act of domestic violence and his actions leading up to the act was highly relevant to show defendant's tendency to assault Murphy as charged. It would thus have been futile for defense counsel to object to the admission of such testimony, and counsel is not ineffective for failing to raise meritless or futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant next claims that counsel was ineffective for failing to object to the sentencing judge's use of facts not proven at trial in imposing sentence. We disagree.

In this matter, defendant waived his right to have the judge who presided over his trial sentence him. When imposing sentence, the judge stated, "[B]ut for the fact that apparently she jumped up on the hood of the car to avoid getting run over, she would be dead, and then you wouldn't be standing here asking for some leniency to go to jail." Defendant is correct that Murphy made it abundantly clear at trial that she did not jump on the hood of the car when trying to avoid being hit by defendant. Instead, she testified that she fell up against the driver's side

door of her friend's car. However, there is no indication that this was, as defendant argues, the inaccurate picture upon which the sentencing judge based defendant's sentence.

The prosecutor pointed out to the sentencing judge that defendant was on probation for domestic violence concerning the same victim when the instant matter occurred. The prosecutor also pointed out that this was defendant's eighth assaultive charge and specifically his fourth domestic violence charge, and requested that defendant be sentenced to prison. When sentencing defendant to prison, the sentencing judge specifically noted defendant's history of violent behavior, noted that it had been escalating, and noted that defendant apparently saw the previous leniency shown to him by the court as weakness. Thus, there is no indication that the sentencing judge relied in part (or at all) on the misunderstanding that Murphy jumped on the hood of a car, rather than fell upon the door of it, when it imposed its sentence upon defendant. Defense counsel was not ineffective for failing to object to this misstatement because it is not reasonably probable that the results of the proceeding would have been different had counsel objected. *Frazier*, 478 Mich at 243.

Defendant next argues counsel was ineffective for failing to object to the sentencing judge's use of information contained in the presentence investigation report rather than evidence presented at trial when imposing sentence. According to defendant, the sentencing judge relied upon information in the report that defendant had called and threatened Murphy several times and told her he was going to kill her, which was not proven by a preponderance of the evidence at sentencing such that counsel should have objected to the same. However, defendant waived any objection to having the judge who presided over his trial sentence him. Defendant was well aware, then, that the sentencing judge would not have the benefit of the trial testimony before him in imposing sentence. To allow defendant's claim of error premised on reliance on information contained in the presentence investigation report rather than the trial testimony, then, would be to allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Moreover, Murphy did testify at trial that after she and defendant broke up in July of 2010 and prior to the instant incidents in August 2010, defendant made threatening phone calls to her. Murphy specified that he once told her he was going to blow up her house, and that he also said, "bitch, I'm going to kill you when I see you." The statement in the presentence investigation report and the sentencing judge's statement at sentencing were thus accurate and counsel was not ineffective for failing to raise a meritless objection. *Moorer*, 262 Mich App at 76.

Finally, defendant claims that counsel was ineffective for failing to object to inaccuracies in the presentence investigation report. Defendant lists a host of inaccuracies in the presentence investigation report, to wit: that his attorney's name was incorrect; that he is not eligible for SAI, that the victim had to jump on the hood of a car to avoid being hit by defendant's vehicle; that defendant had four children rather than three; that defendant and Murphy had an adult daughter together in addition to their toddler; that OV 4 was corrected from 10 points to zero points at sentencing; that defendant had past issues with alcohol and had previously smoked marijuana; that witnesses corroborated Murphy's story about what occurred in the parking lot, and; that defendant's birthplace was Minnesota, when it was, in fact, Michigan.

The record indicates that, at sentencing, defense counsel was asked, in the presence of defendant, whether he had reviewed the presentence report, sentencing information report, and basic information report with his client. Counsel responded that they had reviewed it. When asked if there were any additions or corrections to be made, counsel stated that they had arguments to make with respect to some of the offense variables. After the arguments concerning offense variables were addressed, defendant was asked if there was anything he wanted to say on his own behalf. Defendant did not say anything about any inaccuracies in the presentence investigation report, even though given the opportunity to do so.

Additionally, the vast majority of these asserted inaccuracies are insignificant and there is no indication in the record that the sentencing judge considered the challenged information when fashioning defendant's sentence. Finally, even assuming the report was inaccurate as described by defendant, he has not presented any evidence as to how the inaccuracies may have prejudiced him. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant has thus failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens