STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2012
v	No. 304042 Wayne Circuit Court
MAURICE RANDALL, Defendant-Appellant.	LC No. 10-009515-FC

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree home invasion, MCL 750.110a(2), first-degree criminal sexual conduct, MCL 750.520b, assault with intent to do great bodily harm less than murder, MCL 750.84, second-degree home invasion, MCL 750.110a(3), and receiving and concealing stolen property valued less than $200, MCL 750.535(5). The trial court imposed concurrent sentences of 5 to 20 years' imprisonment for first-degree home invasion, 30 to 60 years' imprisonment for first-degree criminal sexual conduct, 5 to 20 years' imprisonment for assault with intent to do great bodily harm less than murder, 5 to 20 years' imprisonment for second-degree home invasion, and credit for time served for receiving and concealing stolen property valued less than $200. We affirm.

Defendant's convictions arose from a horrific series of events on August 12, 2010, which involved the rape and physical assault of a 90-year-old woman. The woman sustained multiple injuries and was hospitalized for four days as a result of the crimes.

Defendant first argues that the trial court failed to articulate substantial and compelling reasons to justify a sentencing departure[1] and that the court failed to justify the extent of the departure.

"The sentencing court may deviate from the [sentencing] guidelines range when the range is disproportionate to the seriousness of the crime and the defendant's prior record." *People v*

[1] The guidelines range was 171 to 285 months, and the court imposed a minimum term of 30 years.

Bennett, 241 Mich App 511, 516; 616 NW2d 703 (2000). In order to depart from the sentencing guidelines, a trial court must have "substantial and compelling reasons to do so, and state[] those reasons on the record." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reasons for departure must be objective and verifiable. *Id*. The phrase "objective and verifiable has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id*. "[T]he reasons justifying departure should keenly or irresistibly grab the [c]ourt's attention, and [the court] should recognize them as being of considerable worth in deciding the length of a sentence." *People v Cline*, 276 Mich App 634, 648; 741 NW2d 563 (2007) (internal citations and quotation marks omitted).

The existence of factors that a trial court uses to justify a departure is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). "[W]hether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion . . . ." *Id*. at 265. The extent of the departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the principled range of outcomes. *Babcock*, 469 Mich at 269.

Defendant argues that none of the factors that the trial court relied upon to justify the sentencing departure could keenly or irresistibly grab a court's attention. However, the factors the trial court relied upon do keenly or irresistibly grab a court's attention. *People v Claypool*, 470 Mich 715, 727; 684 NW2d 278 (2004). A factor that the court properly found to keenly or irresistibly grab the court's attention was that defendant's behavior escalated with startling speed, beginning with a home invasion of a vacant home and ending with the sexual assault of a 90-year-old woman. Eventually, defendant left the victim partially nude, trapped in her bedroom between a wall and a bed and unable to escape or seek medical attention. The court properly noted that the bedroom "could have been her tomb had her grandson not arrived." The trial court also properly found that defendant's discarding of physical evidence (a condom) and his behavior after being arrested, i.e., lying and trying to get a codefendant to lie and "act crazy" in order to interfere with the police investigation, were factors that keenly or irresistibly grabbed the court's attention. The various factors were "captivating" and "of considerable worth," *People v Daniel*, 462 Mich 1, 10; 609 NW2d 557 (2000) (internal citations and quotation marks omitted), and defendant's argument to the contrary is meritless.

Defendant appears to suggest that the trial court erred in relying on factors already taken into consideration in the sentencing guidelines. However, a court may base its departure on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range" as long as "the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight." *Abramski*, 257 Mich App at 74. Thus, the mere fact that a trial court's reasons for departure may overlap with factors accounted for in the sentencing guidelines is insufficient proof of a sentencing error. Moreover, defendant has failed to specifically indicate which factors were allegedly accounted for in the sentencing guidelines and has failed to otherwise elaborate upon his argument.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the

> basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (internal citation and quotation marks omitted).]

Defendant argues that the trial court improperly relied on defendant's lack of remorse. The Michigan Supreme Court, in *Daniel*, 462 Mich at 8-11, held that a defendant's expression of or failure to express remorse may not be considered in undertaking a sentencing departure. The trial court in this case, however, did not rely on defendant's *lack of an expression of remorse*. Instead, a close reading of the sentencing transcript and the written departure form reveals that the trial court was using the phrase "lack of remorse" essentially as a "subheading" that encompassed the objective instances of obstruction of justice during which defendant lied and attempted to get a codefendant, Thomas Hardy, to lie.[2]

Citing *Smith*, 482 Mich at 303-306, defendant argues that resentencing is required because the trial court failed to adequately explain the extent of the departure. However, the departure in this case differs from that in *Smith*, *id*. at 312, where "the connection between the reasons given for departure and the extent of the departure is so unclear." In *Smith*, *id*. at 311, the Court stated that it could not "discern why the trial judge selected a minimum sentence so far in excess of the recommended guidelines range." The trial court had sentenced the defendant in *Smith* to 30 years, "twice the highest minimum term [the] defendant could have received had the judge sentenced him within the guidelines recommendation." *Id*. at 298. Here, defendant's behavior was so egregious that "the connection between the reasons given for departure and the extent of the departure" is clear. See *id*. at 304, 312. The record adequately establishes that the sentence is proportionate. See *id*. at 304-305.

Defendant next argues that the trial court improperly scored OVs 3, 7, 9, and 10.

"This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions . . . are not clearly erroneous if there is *any* evidence in support of the decision." *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003) (internal citation and quotation marks omitted; emphasis added by *Witherspoon*).

The trial court scored OV 3, physical injury to a victim, at 35 points. According to MCL 777.33, OV 3 should be scored as follows:

> (a) A victim was killed……..100 points

[2] We find that the trial court used two other "subheadings": "destruction of evidence" and "[i]ncrease of [c]riminal [b]ehavior."

(b) A victim was killed[3]……...….50 points

(c) Life threatening or permanent incapacitating injury occurred to a victim……...25 points

(d) Bodily injury requiring medical treatment occurred to a victim……...10 points

(e) Bodily injury not requiring medical treatment occurred to a victim…...5 points

(f) No physical injury occurred to a victim……...0 points

The evidence reveals that the victim was raped and beaten. A nurse testified that the 90-year-old victim sustained "forty-seven physical injuries and five detailed genital injuries," including bruising and bleeding. Defendant also trapped the victim in her bedroom and she could not escape or seek medical attention for more than 12 hours. The victim testified that due to her injuries, she had to stay in the hospital for four days. At the sentencing hearing, the prosecutor indicated, without objection, that the victim had been in temporary critical condition upon arriving at the hospital. Thus, there was evidence on the record to support a finding of life-threatening injury, which justifies scoring OV 3 at 25 points. However, the trial court scored OV 3 at 35 points, and 35 points is not an option under MCL 777.33. Thus, defendant should have been assessed 25 points for OV 3, which brings his total OV score down to 110 points.

The trial court scored OV 7, aggravated physical abuse, at 50 points. According to MCL 777.37, OV 7 should be scored as follows:

(a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense…….……50 points

(b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense…….……..0 points

The court did not err in scoring OV 7 at 50 points. In *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005), a 50-point score under OV 7 was deemed appropriate where the defendant attacked the victim by choking her, cutting her, dragging her, and kicking her. In this case, defendant physically abused the victim to the extent that 47 bodily wounds and five genital wounds, including tearing and bleeding, were inflicted. The victim also had to spend four days in the hospital due to her injuries. This Court upheld a score of 50 points for OV 7 in *People v Kegler*, 268 Mich App 187, 190-191; 706 NW2d 744 (2005), where a codefendant strangled the victim and carried the victim's naked body outside, but the defendant removed the victim's clothes, admitted to wanting to humiliate the victim, came up with the idea of placing the victim in the trunk of a vehicle, and assisting in doing this act. In this case, defendant left the

[3] The scores for killing a victim differ depending on the type of crime. See MCL 777.33(2).

victim partially nude for more than 12 hours and she then experienced the added trauma of being discovered by her grandson. No error occurred in the scoring of OV 7.

The trial court scored OV 9, the number of victims, at 10 points. According to MCL 777.39, OV 9 should be scored as follows:

> (a) Multiple deaths occurred…….100 points
>
> (b) There were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss……..25 points
>
> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss……10 points
>
> (d) There were fewer than 2 victims who were placed in danger of physical injury or death, or fewer than 4 victims who were placed in danger of property loss…….0 points

Defendant and the prosecution agree that the victim was placed in physical danger because of defendant's actions. However, no other person was placed in physical danger because no one else "was present in the [pertinent area] or anywhere near the defendant when he broke into" either of the houses on August 12, 2010. *People v McGraw*, 484 Mich 120, 134; 771 NW2d 655 (2009). Also, there was no evidence that at least four victims were placed in danger of property loss. Thus, defendant and the prosecution are correct that OV 9 should have been scored at zero points.

Lastly, the trial court scored OV 10, exploitation of a vulnerable victim, at 15 points. According to MCL 777.40, OV 10 should be scored as follows:

> (a) Predatory Conduct was involved ……..…15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status……....10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious……...5 points
>
> (d) The offender did not exploit a victim's vulnerability……..0 points

Predatory conduct is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court did not clearly err in finding that there was predatory conduct. As this Court stated in *Witherspoon*, 257 Mich App at 336 (emphasis in original), "the *timing* of the assault (when no other persons were present) and its *location* (in the isolation and seclusion of the basement) are evidence of preoffense predatory conduct." Defendant sexually assaulted the victim when she was alone in her bed in the early hours of

August 12, 2010. Defendant preyed upon the victim's isolation. As noted in *People v Huston*, 489 Mich 451, 461; 802 NW2d 261 (2011) (emphasis in original), "[b]y its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially 'vulnerable' victims."[4] Lastly, even if defendant did not specifically target the victim before entering the house, this Court has held that predatory conduct occurs even when a defendant's preoffense conduct is directed at a random stranger, i.e., the first person the defendant encounters. *Id*. at 459-460.

Considering the scoring errors in OV 3 and OV 9, defendant's total OV score should have been 100 points, not 120 points. This change does not affect his overall OV level or his guidelines range. See MCL 777.62. Thus, resentencing is not required. *People v Jackson*, 291 Mich App 644, 649; 805 NW2d 463 (2011); *People v Phelps*, 288 Mich App 123, 135-136; 791 NW2d 732 (2010).

Next, defendant argues that the trial court erred in sentencing him in absentia. We disagree.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant made no mention in the lower court that sentencing him in absentia was improper. Thus, this issue is not preserved for appellate review. An unpreserved claim is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). An error affected substantial rights if it prejudiced the defendant, meaning it affected the outcome of the proceedings. *Id*. at 763.

"A defendant has a right to be present during the imposition of sentence, and at any stage of trial where substantial rights of the defendant might be adversely affected." *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993). Moreover, a "trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed." *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). "The defendant must merely be given an opportunity" to allocute, and the trial court "need not 'specifically' ask the defendant if he has anything to say on his own behalf before sentencing." *Id.*

A defendant may also waive his rights. A waiver is "the intentional relinquishment or abandonment of a known right." *People v Fackelman*, 489 Mich 515, 543; 802 NW2d 552 (2011) (internal citations and quotation marks omitted). A court may not presume a waiver from a silent record. *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005).

At sentencing, the court stated that defendant "has indicated—he has a right to be here, and he refuses to come out. And the Court is not going to put the cameras out, because they have a right to be here, also." After further discussion, the court gave defense counsel the opportunity to talk to defendant. Defense counsel did so, but defendant still refused to come to the

[4] We also note that defendant brought a condom with him, potential further evidence of preoffense predatory conduct.

courtroom. Defense counsel stated that he had spoken with defendant but that defendant had "declined the opportunity to appear, personally, and to elocute [sic]." Thus, the record reveals that defendant was repeatedly afforded the opportunity to be present at sentencing and to allocute, but that defendant refused. Defendant was also given the opportunity to consult with counsel before affirming his decision to not attend sentencing. It was not plain error to sentence defendant in absentia because defendant knowingly and voluntarily relinquished his pertinent rights at sentencing.

Lastly, defendant argues that he was denied due process of law when the prosecutor misled the jury about codefendant Thomas Hardy's plea agreement and motivations for testifying. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant offered no objection to any of the alleged instances of prosecutorial misconduct. Thus, this issue is not preserved for appellate review. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Moreover, reversal is warranted only if the plain error resulted in the conviction of an innocent defendant "or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of [the defendant's] innocence." *Thomas*, 260 Mich App at 454, quoting *Ackerman*, 257 Mich App at 449.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Brown*, 279 Mich App at 134. "[I]n order for prosecutorial misconduct to constitute constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *People v Blackmon*, 280 Mich App 253, 269; 761 NW2d 172 (2008) (emphasis omitted).

Defendant is correct that "[w]here an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial judge, if the fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel . . . ." *People v Bahoda*, 448 Mich 261, 279 n 28; 531 NW2d 659 (1995) (internal citation and quotation marks omitted); see also *People v Wilson*, 242 Mich App 350, 358-359; 619 NW2d 413 (2000). "Due to the undeniable relevance of evidence of a witness' motivation for testifying, the prosecutor must, *upon request of defense counsel*, disclose to the jury the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice [or coconspirator]." *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990) (emphasis added; internal citations and quotation marks omitted).

The prosecutor asked Hardy if any promises had been made to Hardy when he gave a statement to the police on November 23, 2010. Hardy replied, "no." There was nothing improper about this line of questioning. At a hearing on November 22, 2010, the prosecution stated "we're almost there" regarding a plea agreement with Hardy. Hence, no definite plea agreement seems to have actually been reached on November 22, 2010. There is also no

evidence that the prosecution had actually promised Hardy anything at that point in time. Thus, there is no evidence on the record that the prosecution was eliciting false testimony from Hardy.

At trial, the prosecution asked Hardy if he pleaded guilty to first-degree home invasion, how much prison time Hardy would serve, and Hardy's age. The prosecution did not ask any questions regarding Hardy's guilty plea in exchange for leniency and testifying against defendant. Nevertheless, this Court has stated that a prosecutor only has a duty to disclose information about plea agreements upon the request of defense counsel. *Mumford*, 183 Mich App at 152; see also *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). Because there is no evidence that defense counsel requested that any additional information be disclosed to the jury about Hardy's plea deal, there is no evidence of plain error.

Moreover, the "disclosure requirement may be considered satisfied where the jury [is] made well aware of [the] facts [about a codefendant's plea agreement] by means of . . . thorough and probing cross-examination by defense counsel." *Mumford*, 183 Mich App at 152-153 (internal citation quotation marks omitted; emphasis removed). On cross-examination, the jury heard that a criminal sexual conduct charge against Hardy was dropped, that Hardy agreed to testify for the prosecution in exchange for a lighter sentence, and that Hardy could have received a much greater sentence if he had not taken the plea deal. Defendant cites no case law to suggest that any more information about the plea agreement should have been introduced, especially when there was not a request for disclosure by defendant and defendant failed to preserve any objection to the alleged lack of disclosure.

Finally, nothing was improper in the prosecution's opening statement or closing argument. Prosecutors are generally "accorded great latitude regarding their arguments and conduct." *Bahoda*, 448 Mich at 282 (internal citations and quotation marks omitted). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor is free to argue the evidence and reasonable inferences arising from it. *People v Parker*, 288 Mich App 500, 510; 795 NW2d 596 (2010).

While the prosecutor emphasized that Hardy was serving time in prison and that Hardy had always maintained his innocence regarding the criminal sexual conduct charge, these statements were based on Hardy's testimony as well as the interrogating officer's testimony. Hence, these facts were introduced at trial, and, thus, the prosecution's statements were not improper. Likewise, nothing was improper about characterizing Hardy as someone who was coming forward to tell the truth. The prosecution's theory of the case was that it was defendant, not Hardy, who sexually assaulted the victim. A reasonable inference from this theory was that Hardy was telling the truth, and defendant and defendant's brother were not. There was no plain error.

Lastly, the trial court gave a jury instruction to ensure that any potential impropriety in the prosecution's statements did not affect the outcome of the trial. The court instructed the jury that "[t]he lawyers' statements [and] arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theory." Juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and nothing indicates

that the prosecutor's statements "seriously affected the fairness, integrity, or public reputation of judicial proceedings," *Ackerman*, 257 Mich App at 448-449.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder