

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TROY A. WASHINGTON,

Defendant-Appellee.

---

UNPUBLISHED

April 30, 2002

No. 235241

Wayne Circuit Court

LC No. 00-013624

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY A. WASHINGTON,

Defendant-Appellant.

---

No. 235593

Wayne Circuit Court

LC No. 00-013624

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In these consolidated appeals, the prosecution appeals as of right and defendant appeals by leave granted<sup>1</sup> from the trial court's judgment of sentence. Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and assault with a deadly weapon (felonious assault), MCL 750.82. Defendant was sentenced to three to fifteen years in prison for the assault with intent to murder conviction, one to four years in prison for the felonious assault conviction and two consecutive years in prison for the felony-firearm conviction. We affirm.

---

<sup>1</sup> Defendant filed his claim of appeal while a postjudgment motion was pending. This Court, rather than dismiss the claim as premature, treated it as a delayed application for leave to appeal, and granted the application.

Plaintiff argues that the trial court abused its discretion in departing downward from the statutory sentencing guidelines minimum sentence range for assault with intent to commit murder.<sup>2</sup> We disagree. The presentence investigation report indicates that the minimum sentence range for defendant's conviction on this charge was 126-210 months' imprisonment. Departures from the guidelines may involve questions of fact, of law, or mixed questions of fact and law. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58; 528 NW2d 176 (1994). The existence of a factor is a factual determination that is reviewed by this Court for clear error. *Id.* The determination that a particular factor is objective and verifiable is a question of law reviewed de novo. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence range is reviewed for an abuse of discretion. *Id.*

Under the sentencing guidelines, a court must impose a sentence within the appropriate range, but may depart from the recommended range if there are both substantial and compelling reasons to do so and the court states on the record the reasons for departure. MCL 769.34(2); *Babcock*, *supra* at 72. If this Court determines that the trial court's reasons for departure were objective and verifiable, it must then determine whether the trial court abused its discretion in finding the reasons to be substantial and compelling. *Id.* at 78. If this Court finds that substantial and compelling reasons for departure exist, the sentence must be affirmed as long as it otherwise comports with the law. *Id.* This Court, in *Babcock*, cited to *Fields*, *supra* at 58, stating:

From these definitions it is evident that the words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence. [*Babcock*, *supra* at 67.]

The trial court cited two reasons for departing downward from the sentencing guidelines: (1) a letter sent by the victim, and (2) letters sent by other community members. Although the letters submitted on defendant's behalf contained subjective opinions about defendant's character and propensity to commit crimes, they also contain objective and verifiable facts showing an overwhelming degree of positive support by the community, as well as an effort on defendant's part to positively contribute to the community. Because defendant's continued community involvement should be encouraged, it serves as a substantial and compelling reason to depart downward from the recommended minimum sentence range. Additionally, the victim's request that the trial court be lenient in sentencing is such an unusual event that it also constitutes a substantial and compelling reason to depart downward from the recommended minimum sentence range. Therefore, the trial court did not abuse its discretion in sentencing defendant below the guidelines range.

---

<sup>2</sup> In this case, the offense was committed on November 15, 2000. The statutory sentencing guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342, n 5; 604 NW2d 327 (2000).

Next, defendant argues that the trial court erred in denying his motion for a new trial based on a claim of ineffective assistance of counsel. We disagree. This Court reviews a trial court's denial of a motion for new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

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, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Counsel's performance must be measured against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that defense counsel's calling of an alibi witness at the preliminary examination was ineffective and caused a miscarriage of justice. Defendant argues that it was unreasonable to show the prosecution defendant's defense at the preliminary examination and that it caused the witness to be "stuck with" his unprepared testimony at trial. Although defense counsel testified at the *Ginther*<sup>3</sup> hearing that one of the reasons for calling the alibi witness at the preliminary examination was to protect defendant from a negative newspaper article, he also testified that it was part of his trial strategy. Defense counsel's decisions regarding what evidence to present and whether to call witnesses are matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1990). Failure of a sound trial strategy does not constitute ineffective assistance of counsel. *LaVearn, supra* at 216. Hence, the trial court did not err in denying defendant's motion for a new trial on this basis.

Defendant next argues that he was denied effective assistance of counsel when defense counsel failed to explain to defendant the legal ramifications of his case, causing defendant to make an uninformed decision to reject a plea to felonious assault, which carries a maximum four-year sentence and is probationable. However, the record does not show that defense counsel failed to adequately explain such matters to defendant. At the evidentiary hearing, defense counsel testified that while he did not discuss the sentencing guidelines with defendant, did not review the witness list with defendant or request lesser included offenses. Defense counsel did, however, discuss the plea offer with defendant. Defendant testified that he was not told and did not know the sentences associated with the offenses with which he was charged. However, defendant admitted that the judge told him when he was arraigned that there was a possibility of a life sentence. In regard to the information imparted at arraignment, defendant testified, "I believe he said life; that's all I heard." Because defendant's testimony at the *Ginther* hearing shows that he was adequately informed with respect to his rejection of the plea offer, the trial court did not err in denying defendant's motion for a new trial.

Defendant finally argues that defense counsel was ineffective for failing to request lesser included offenses of assault with intent to do great bodily harm less than murder and felonious assault. Defense counsel testified that the entire defense was based upon misidentification and

---

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

alibi defenses. Defense counsel's decision whether to request instructions on lesser included offenses falls within the purview of trial strategy, which should not be second-guessed on appeal. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). An all-or-nothing defense can be legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). We will not second guess counsel's decision on this matter. Therefore, again, the trial court did not err in denying defendant's motion for new trial.

Affirmed.

/s/ Kathleen Jansen  
/s/ Donald E. Holbrook, Jr.  
/s/ Richard Allen Griffin