

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN ROSS,

Defendant-Appellant.

UNPUBLISHED

May 24, 2002

No. 227964

St. Clair County

LC No. 99-002685-FH

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of three counts of felonious assault, MCL 750.82, and one count of assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent sentences of twenty-four to seventy-two months' imprisonment for the felonious assault convictions, and forty-seven months' to fifteen years' imprisonment for the assault with intent to do great bodily harm conviction. We affirm.

Defendant first contends that the trial court erred in allowing testimony regarding the plea of defendant's accomplice without sua sponte providing a cautionary instruction, and that the prosecutor committed misconduct in inquiring whether the accomplice had pleaded guilty to the offense. Because these claims were not preserved, our review is limited to plain, outcome determinative error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We find no such error.

When an accomplice testifies in a defendant accomplice's trial, and has been granted leniency in exchange for his testimony, the prosecutor must disclose the consideration given to the accomplice on the defendant's request. *People v Kincade*, 162 Mich App 80, 84; 412 NW2d 252 (1987). Here the accomplice's testimony was not helpful to the prosecution; his testimony differed sharply from the prosecution's other witnesses. If anything, the accomplice provided exculpatory evidence for defendant. Because the record indicates that the prosecution did not grant the accomplice leniency in exchange for testimony adverse to defendant, there was nothing to disclose to the jury, and no error occurred in failing to inquire into the consideration given to

the accomplice. *People v Crawl*, 401 Mich 1, 34-35; 257 NW2d 86 (1977); *Kincade, supra*. Further, there is no indication that defendant was unaware of the terms of the accomplice's plea.¹

Nor did the prosecutor commit misconduct in inquiring into the accomplice's plea. Generally, evidence of the conviction of an accomplice is inadmissible in the trial of a defendant accomplice; the admission of an accomplice's guilty plea as substantive evidence of a defendant's guilt is error requiring reversal. *Id.* at 84-85. However, the guilty plea of an accomplice is admissible for purposes of impeachment or rehabilitation of a witness. *People v Manning*, 434 Mich 1, 14; 450 NW2d 534 (1990). The prosecution may impeach its own witness, MRE 607. While the prosecutor asked the questions on direct, defendant did not object, and the questions were permissible impeachment in anticipation of the accomplice's testimony on cross examination, during which the accomplice gave testimony favorable to defendant and inconsistent with the statement made at his plea. *People v Dowdy*, 211 Mich App 562, 571-572; 536 NW2d 794 (1995).

Similarly, we find that the trial court was not obligated to sua sponte instruct the jury regarding the use of an accomplice's testimony. It *may* be error for a trial court to fail to give a sua sponte jury instruction regarding accomplice testimony *if* the issue is closely drawn. *People v McCoy*, 392 Mich 231, 237, 240; 220 NW2d 456 (1974). The present case does not fall under *McCoy* because it was not closely drawn and a finding of guilt did not rest on the accomplice's credibility.

Defendant next alleges that he received ineffective assistance of counsel. We disagree. Because no errors occurred, any objections would have been futile or frivolous, and thus there are no grounds to establish ineffective assistance of counsel. *People v Tullie*, 141 Mich App 156, 158-159; 366 NW2d 224 (1985); *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985). Defendant has failed to defeat the presumption that counsel's treatment was sound trial strategy. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Similarly, we find sufficient evidence in the record to support the trial court's flight instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). We also conclude that the prosecution presented sufficient evidence of each element of assault with intent to do great bodily harm, MCL 750.84, to allow a rational jury to find defendant guilty beyond a reasonable doubt. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993); *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986).

Defendant finally challenges the sentence imposed by the trial court. Trial courts must impose sentences within the limits set by the Legislature. *People v Hegwood*, 465 Mich 432, 437; 636 NW2d 127 (2001). There is no appellate review of sentences falling within the range

¹ The record shows that twice during trial defendant was offered, but declined, almost the same plea agreement his accomplice received, which undermines defendant's claim of error on appeal. Both during the presentation of the prosecution's case and at the close of proofs, defendant declined the prosecution's offer to plead no contest to one count of assault with intent to do great bodily harm, with a recommended maximum sentence of six months, in jail and dismissal of the habitual offender charge.

specified by the legislative guidelines absent scoring errors or inaccurate information. *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000) (*Babcock I*); MCL 769.34(10). Sentences falling outside the legislative guidelines require reversal and remand for resentencing unless substantial and compelling reasons exist for the departure. *People v Babcock*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 235518, issued March 19, 2002) (*Babcock II*), slip op p 2; *Babcock I, supra* at 74. In addition, the factors underlying the departure must be objective and verifiable. *Babcock II, supra*, at 2; *Babcock I, supra* at 75.

This Court reviews a trial court’s determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the legislative minimum sentence for an abuse of discretion. *Id.* at 76. The existence or nonexistence of a particular factor is a factual determination reviewed for clear error. *Id.* at 75-76. Whether the factors articulated by the trial court are objective and verifiable is reviewed de novo, as a matter of law. *Id.* at 76.

We find that the trial court articulated a substantial and compelling reason for a departure, defendant’s violent behavior—the violence with which defendant perpetrated the act. Although this is accounted for in MCL 777.33, the trial court expressly found that the statutory sentencing guidelines did not adequately address that factor.² A court may base a departure on an offense or offender characteristic already taken into account in the guidelines sentence range if the court finds from the facts that the characteristic has been given inadequate weight. MCL 769.34(3); *Babcock II, supra* at 2. The trial court had a valid legal reason to impose an upward departure.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White

² It should also be noted that defendant had seventeen prior misdemeanor convictions, only seven of which were taken into account in the calculation of the sentencing guidelines and that of the seventeen prior convictions four were for assaultive crimes, one was for the unlawful discharge of a firearm, and one was for fleeing and eluding.