

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY TERRY HAMILTON,

Defendant-Appellant.

UNPUBLISHED

June 14, 2002

No. 231965

Oakland Circuit Court

LC No. 00-172565-FH

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a third habitual offender, MCL 769.12, to 12 ½ to 20 years' imprisonment. We affirm defendant's conviction but vacate his sentence and remand for resentencing.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Defendant was charged with assaulting his girlfriend in her apartment that she had shared with defendant. The victim was brutally beaten on or about February 28, 2000, and she sustained multiple trauma, including a closed head injury with multiple intracranial contusions and a large subdural hematoma. The victim required brain surgery, and she initially was not expected to live; however, after a lengthy hospital stay she recovered. The victim's injuries have left her unable to live independently. During the course of the victim's medical treatment, the treating doctor learned that the victim was an IV drug user and a heavy drinker. Defendant did not challenge the claim that the victim was beaten and suffered serious injuries, but defendant denied being the perpetrator.

At the first preliminary examination, the case was dismissed by the district court on the basis that there was a lack of probable cause that defendant was the perpetrator. Shortly thereafter, the prosecutor reinstated the charges against defendant. At the second preliminary examination, defendant was bound over for trial after the prosecutor presented new evidence of defendant's guilt. The new evidence came in the form of testimony from defendant's cellmate, who testified that defendant admitted assaulting the victim. At the preliminary examination, the cellmate admitted to drug use and to having an extensive criminal history.

Defendant claimed he discovered the victim's near lifeless body after letting himself into her apartment with his keys. Defendant asserted to an officer that he used to live at the apartment but had recently moved out because he was having frequent arguments with the victim. Defendant stated that they remained friends after he moved out, and that he would often stop at the apartment to give her cigarettes and pick up his mail. After defendant called 911, he allowed a police officer into the apartment, which was in disarray and, according to the officer, it appeared as though a fight had taken place. To enter the victim's apartment, it was necessary to go through two secured doors and one unsecured door. There were no signs of forced entry.

Paramedics found the victim on the bedroom floor with a dresser on her head, and she was unconscious but breathing. The victim had bruises on her arms, legs, and face, and she was dehydrated. Paramedics suspected that the injuries had been inflicted one or two days earlier. Defendant claimed that he and the victim had not fought on the day of the crime, and defendant was unaware of any individuals who would have reason to assault the victim.

The officer who responded to defendant's 911 call testified that defendant did not have any visible bruises or blood, nor did he appear to have been in a fight. According to the officer, defendant was cooperative, and defendant explained that he had gone to the victim's apartment to give her cigarettes and pick up his mail when he discovered her body.

A neighbor in the apartment building testified that on the day the victim was found, or possibly the day before, she heard the victim arguing with a male. The neighbor testified that the male voice was one she had heard arguing with the victim in the past, but she could not say definitively that the voice was defendant's. The neighbor did not see defendant in the apartment building on the day the victim was found or the day before. An acquaintance of the victim and defendant testified that defendant had moved out of the building but continued to visit the victim, and that he had never seen the victim with any other male besides defendant.

Defendant sought to present the testimony of a friend of the victim who was supposedly prepared to testify that the victim had contacted her around the time of the crime, and the victim stated that she felt threatened by a male that she had met in a bar located in the apartment complex. The trial court ruled that defendant could present the evidence, but the prosecutor could then pursue questioning of the victim regarding her fear of defendant around the time of the assault. Defendant declined to pursue the questioning of the victim's friend regarding the matter according to defendant's appellate brief. The victim's friend was assisting the victim in alcohol abuse rehabilitation, but according to the friend, the victim was still abusing alcohol at the time of the offense. The friend did testify that the victim had once felt threatened by a woman who told the victim that she would have her boyfriend beat her up because the victim had touched her car. The friend also testified that the victim had shown her an unsigned letter threatening the victim. The friend did acknowledge that she was aware of problems between defendant and the victim.

The victim was able to testify, and she stated that her and defendant had been friends and lovers for about four years. The victim further testified that defendant had lived with her and had keys, and that three keys were needed to get through various doors before entry into the apartment unit. The victim stated that after she awoke in the hospital, her first thought was wondering why defendant assaulted her. However, she had no recollection of the assault and how she was injured, but the victim did recall her last memory was defendant coming into the

apartment. The victim testified that she had no other boyfriends and no enemies. The victim denied meeting a man in the apartment bar and bringing him to her apartment. The victim testified that she and defendant were still a couple at the time of the assault, and that defendant would stop at her apartment on almost a daily basis, bringing her a newspaper and cigarettes. She testified that the couple frequently argued about defendant's work and his personal life. The victim asserted that defendant was a terrible liar, and that she wondered whether he was seeing another woman.

The victim also testified that she did not recall arguing with defendant on the day of the assault. The victim, who admitted being a problem drinker earlier in her life, stated that she never drank at the apartment bar, and she had no recollection of contacting her friend on the day of the assault to talk about being afraid of anyone.

An employee at the bar testified that the victim came by often for coffee, but she did not recall the victim being at the bar around the time of the offense. Another bar employee testified that the victim would, at times, come to the bar to drink, and on occasion she was already drunk when she arrived at the bar.

Defendant's cellmate testified that defendant stated that he had beaten up his girlfriend when he was high on drugs. A detective had approached the cellmate to inquire about any statements made by defendant. The cellmate testified that he did not ask for anything, nor was he promised anything, for his testimony. However, the cellmate admitted that he expected some consideration, and that the detective who had approached him sent a letter to the cellmate's sentencing judge and also met with the judge and the cellmate's attorney, and he was sentenced to a one-year minimum as opposed to the two-year minimum as recommended by probation officials.¹ The cellmate testified that the detective stated that he would assist him after the cellmate had already stated that defendant confessed to the crime.

The detective who approached the cellmate testified that he was the live-in manager of the apartment complex where the crime occurred, and he knew both defendant and the victim. The detective testified that after the district court initially dismissed the action, the prosecutor suggested that he talk to defendant's cellmates. The detective also testified that he interviewed the victim at the hospital on March 13, 2000, and she shook her head indicating that defendant had not assaulted her. The victim asserts no recollection of the interview. On March 29, 2000, the victim physically indicated to the detective that defendant had assaulted her.

The jury convicted defendant, and he was sentenced to a minimum term that was three years above the legislative guidelines.

¹ The evidence is unclear regarding the detective's recommendation and the cellmate's actual sentence because the detective testified that the cellmate subsequently sought a sentence that would put him in prison because county jail time was "dead time." The cellmate was in prison at the time he testified at defendant's trial.

II. ANALYSIS

A

Defendant first argues that the trial court erred in its ruling concerning the testimony of the victim's friend regarding an alleged phone call from the victim that she felt threatened by another male whom she had met in the apartment bar. Defendant claims that the trial court erred in ruling that the testimony could be introduced, but only if the prosecutor could then introduce evidence that the victim was generally fearful of defendant around the time of the assault. Defendant asserts that the trial court's actions deprived him of his right to present evidence in his defense.

This Court reviews decisions regarding the admission of evidence for an abuse of discretion; however, where those decisions involve preliminary questions of law, e.g., application of a rule of evidence, review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Despite the fact that the evidence is clearly relevant and admissible pursuant to MRE 401-403, defendant's argument lacks merit.

On cross-examination of the victim, defense counsel specifically asked if she recalled calling her friend on the day in question to tell her that she was afraid of someone other than defendant. The victim responded that she may have spoken with her friend on that day, but she simply could not recall; however, the victim definitively stated that the only person she was afraid of was defendant. Defendant therefore elicited the very testimony that supposedly prevented him from pursuing the questioning of the victim's friend; i.e., that she was fearful of defendant. More importantly, the friend subsequently testified as part of defendant's case as follows on direct examination:

Q. The, the threat that occurred, was that individual, did [the victim] indicate to you if that was somebody from the bar, that she was afraid of somebody from the bar, if you recall?

A. I don't recall.

Therefore, contrary to defendant's argument, counsel did question the friend about the victim being threatened by someone in the bar other than defendant. Accordingly, there was no abuse of discretion.

B

Defendant next argues that his counsel was ineffective for failing to question the cellmate about his drug addiction history, which, had the inquiry been made, would have allowed for a cautionary instruction regarding addict informers, CJI2d 5.7. Defendant argues that the cellmate's testimony was crucial to the prosecution; therefore, it was vital that counsel fully impeach the credibility of the cellmate. Defendant cites a portion of the transcript of the preliminary examination in which the cellmate admitted to heroin and cocaine use.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich

436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted a two-pronged test for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to establish that defendant's right to effective assistance of counsel was violated and that this violation is sufficient to justify reversal of an otherwise valid conviction, defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) the representation so prejudiced the defendant as to deprive him of a fair trial. *Pickens, supra* at 302-303. To demonstrate prejudice, the defendant must show that, but for counsel's error, the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Defendant's argument lacks merit. We first note that defense counsel did in fact question the cellmate at trial as to whether he used illegal drugs. However, the cellmate denied using drugs, and defense counsel did not attempt to impeach the cellmate with his preliminary examination testimony. Regardless, on cross-examination, the cellmate admitted that he sold drugs, that he had juvenile convictions, that he went to prison for possession with intent to deliver cocaine, that he had convictions for larceny, receiving and concealing stolen goods, unlawful use of a credit card, retail fraud, and armed robbery, and that he received consideration for his testimony.

In light of defense counsel's aggressive cross-examination, which clearly showed that the cellmate was of questionable character, we cannot say that counsel's representation fell below an objective standard of reasonableness by the failure to follow up on the negative responses concerning drug use. Moreover, for the same reason, we cannot conclude that but for counsel's failure to reference the preliminary examination testimony, the result of the proceedings would have been different.

As to the addict-informer instruction, even if the preliminary examination testimony established that the cellmate was a drug addict in the past, defendant cites no evidence that the cellmate was using drugs at the time of the jailhouse confession. In *People v Griffin*, 235 Mich App 27, 40-41; 597 NW2d 176 (1999), this Court, rejecting a challenge to the trial court's refusal to give the addict-informer instruction, stated that "[a]lthough this evidence may raise some suspicions concerning the informant's drug habits over the recent past, it falls short of clearly indicating that he was an addict *at the time in question*." Emphasis added. Accordingly, the instruction was not applicable here even had the preliminary examination evidence been elicited. Moreover, the trial court instructed the jury as follows regarding their consideration of witness testimony in general:

Does the witness have any bias, prejudice or personal interest in how this case is decided. Have there been any promises, threats, suggestions or other influences that affected how the witness testified.

Based on the testimony actually elicited by defense counsel on cross-examination of the cellmate, the above instruction clearly made the jury cognizant of the need to at least question the credibility of the cellmate.

C

Defendant finally argues that the trial court erred in sentencing him outside the statutory guidelines without substantial and compelling reasons to do so as required by MCL 769.34. The statutory guidelines called for a minimum sentence of 38 to 114 months, and the trial court sentenced defendant to a minimum term of 150 months. The court stated the following reasons for its departure from the guidelines:

The Court is departing upward because of the seriousness of the offense[, and] [b]ecause of the brutality with which this assault was accomplished.

This could have easily, was moments away from being a death and the victim now lives in an adult living arrangement. She no longer has any independence because of your assault of her.

Defendant specifically argues that the trial court's departure was error because the reasons cited by the court were already considered in the scoring variables, without a finding that those variables were not accorded adequate weight, and because the court's nebulous representation that the seriousness of the offense warranted an upward departure was neither objective, nor verifiable. The prosecutor argues that the brutality of the assault and the severe resultant injuries are objective and verifiable and constitute substantial and compelling reasons to depart from the guidelines.

Under the legislative sentencing guidelines, which are applicable here, courts are required, in most instances, to impose a minimum sentence within the appropriate sentence range pursuant to MCL 769.34(2).² *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). MCL 769.34(3) provides the following exception:

A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

² MCL 769.34(2) provides, in part, as follows:

Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

The *Babcock* panel noted that MCL 769.34(11)³ requires this Court to reverse and remand where there are not substantial and compelling reasons for a departure from the guidelines. *Babcock*, *supra* at 73-74. In defining what constituted "substantial and compelling reasons," this Court applied the language from *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), wherein our Supreme Court defined identical language found in the controlled substances act. *Babcock*, *supra* at 74-75. The *Babcock* panel, relying on *Fields*, *supra* at 67-68, stated that substantial and compelling reasons only exist in exceptional cases, and that the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock*, *supra* at 75. The factors relied on by a trial court in determining whether there substantial and compelling reasons for departure must be objective and verifiable. *Id.*

The existence of a particular factor is a factual determination for the sentencing court to determine and is reviewed for clear error. *Id.* at 75-76. Whether a particular factor is objective and verifiable is reviewed as a matter of law. *Id.* at 76. A trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the guidelines is reviewed for an abuse of discretion. *Id.*

Here, we first note that the factors considered by the trial court, the brutality of the assault and the severe injuries, are objective and verifiable, finding support in the record. We must next consider whether the factors are already accounted for in the scoring variables. Offense variable three (OV 3) provides for a score of twenty-five points, which the variable was scored at in the present case, where a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Offense variable seven (OV 7) provides for a score of fifty points, which the variable was scored at in the present case, where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). Therefore, the severity of the injury and the brutality of the assault are already accounted for in OV 3 and OV 7, respectively. The trial court did not discuss whether OV 3 and OV 7 were given inadequate or disproportionate weight. MCL 769.34(3)(b). Accordingly, we vacate defendant's sentence and remand for resentencing, at which time the trial court can sentence defendant within the guideline range or depart from the

³ MCL 769.34(11) provides that "[i]f, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

range if proper substantial and compelling reasons are given as required by the language of MCL 769.34.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ William B. Murphy

/s/ Christopher M. Murray