STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2003
v	No. 242861 Washtenaw Circuit Court
JOHNNY RAY BROWN, Defendant-Appellant.	LC No. 01-000724-FH

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84, prisoner possessing a weapon, MCL 800.283(4), three counts of assaulting a prison employee, MCL 750.197c, and malicious destruction of personal property under $200, MCL 750.377(a)(1)(d). Defendant was sentenced to ten to fifteen years' imprisonment for the assault with intent to do great bodily harm conviction, five to seven and a half years' imprisonment for the prisoner possessing a weapon conviction, four to six years' imprisonment for each of the three counts of assaulting a prison employee, and ninety-three days' imprisonment for the malicious destruction of personal property under $200 conviction. All sentences were to run concurrently to each other, but consecutive to the life sentence defendant is presently serving on a separate offense.

On appeal defendant argues that his conviction must be vacated because he was incompetent to stand trial. Defendant also argues that he was denied a fair trial due to prejudice resulting from the presence of leg irons during trial and also ineffective assistance of counsel. Defendant finally argues that he is entitled to resentencing because the trial court erred when it upwardly departed from the guidelines. We affirm defendant's convictions and sentences because the record does not support defendant's challenges.

Defendant was an inmate at Huron Valley Correctional Center (HVCC), mental health division. On February 4, 2001 at approximately 1:40 a.m., defendant and two other inmates, Palmer and Strader were involved in an altercation with prison personnel. Defendant planned and then carried out the plan to cause a melee in the HVCC using metal towel bars in an attempt to be transferred out of the unit. During the incident defendant attacked three forensic security aids at the HVCC. Defendant admitted to striking one of the forensic security aids, William Taylor, with the metal towel bar fifteen times.

Defendant first argues that the trial court erred when it denied his requests for a forensic evaluation on the issue of his competence to stand trial. A criminal defendant is presumed competent to stand trial absent a showing that, because of his mental condition, he is incapable of understanding the nature of the proceedings against him or of assisting in his defense in a rational manner. MCL 330.2020(1); *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). Nonetheless, a defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his competency. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). The issue of incompetence can only be raised by evidence of incompetence. *People v Whyte*, 165 Mich App 409, 413; 418 NW2d 484 (1988). "Where such evidence was presented to the trial court, and no such hearing was held, appellate courts may order a new trial." *Id*. However, the decision regarding the existence of a bona fide doubt will only be reversed if the trial court abused its discretion. *Id.* at 412.

Defense counsel sought both a competency evaluation and a criminal responsibility evaluation at a hearing conducted prior to trial. The trial court granted defendant's motion for the psychiatric criminal responsibility evaluation. At the hearing on the motions, defense counsel stated he could not provide any specific evidence showing that defendant was not competent to assist in his defense or understand the proceedings. Upon hearing this, the trial court denied defendant's request for a competency evaluation. Clearly, defendant cited no evidence that demonstrated a bona fide doubt regarding his competency. *Harris, supra*, 185 Mich App 102. Because defendant introduced no evidence of incompetence before the trial court, the issue of incompetence could not properly have been raised, and the trial court did not abuse its discretion when it denied the competency evaluation. *Whyte, supra*, 165 Mich App 412-413. Likewise, contrary to defendant's related argument on appeal, we do not find defendant's trial counsel's handling of this issue deficient. Indeed, counsel requested both a competency evaluation and a criminal responsibility evaluation, and cannot now on appeal be held responsible for the lack of evidence of incompetence. We do not find defendant was denied the ineffective assistance of counsel in this regard.

Defendant next argues that he was denied a fair trial because he was severely prejudiced when his leg irons were removed from him in the presence of the jury. This Court reviews a trial court's decision to allow the restraint of a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Freedom from shackling is an essential component of a fair trial. *People v Williams*, 173 Mich App 312, 314; 433 NW2d 356 (1988). Therefore, a defendant should not be shackled during trial unless extraordinary circumstances demand it. *People v Jankowski*, 130 Mich App 143, 146; 342 NW2d 911 (1983). Extraordinary circumstances include preventing a defendant's escape, protecting courtroom observers from injury, and maintaining order during proceedings. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994); *Williams, supra*, at 314.

Here, the trial court stated prior to trial that defendant's handcuffs would be removed during trial, but his leg irons would remain on because the jury would not be able to see them due to the seating arrangement. Defense counsel did not object to the fact that defendant was restrained during trial and actually only asked the court to provide a curative instruction to the jury regarding the restraints. Because defendant did not object to restraints, this issue is not preserved for our review. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531-532; 560 NW2d 651 (1996). In any event, the record does not indicate that the jury actually ever saw

defendant's leg irons. The record does indicate that defendant's leg restraints were removed so defendant could take the stand in his own defense. In accordance with defense counsel's request, the trial court provided a curative instruction before the jury began to deliberate. Specifically, the trial court instructed them that the fact that defendant was in leg restraints was not to be considered evidence and that it must not affect the verdict in any way. And given the nature of two of the charges, prisoner possessing a weapon, MCL 800.283(4), and assault of a prison employee, MCL 750.197c, jurors would normally expect some restraint of a prisoner defendant.

Since we have no other evidence to the contrary, it appears that the jury was unable to actually see the restraints. In order to justify reversal based on the presence of restraints during trial, defendant must show that prejudice resulted. *Solomon, supra*, 220 Mich App 532; *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). Even if the jury did see the restraints, any prejudice was cured by the trial court's instruction. Thus we find that defendant has not shown he was prejudiced by being required to wear leg restraints during trial. *Id*.

Next, defendant contends that he was denied the effective assistance of counsel at trial. This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The right to counsel that the United States and Michigan Constitutions guarantee, U.S. Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 657 (1984); *People v Pubrat* 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance is presumed, and a defendant bears a heavy burden to prove to the contrary. *LeBlanc, supra*, 465 Mich 578.

Defendant states that he was denied the effective assistance of counsel at trial because his counsel did not seek a jury instruction for felonious assault, MCL 750.82. The decision to request a lesser offense instruction is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). After reviewing the record, we find that defendant has not overcome the presumption that trial counsel's failure to request an instruction on the lesser crime of felonious assault was sound trial strategy. Evidence was presented at trial that defendant planned to fashion weapons out of towel bars and then executed that plan. Defendant stated that he would do whatever he had to get out of the psychiatric facility. Defendant admitted at trial that he struck Taylor fifteen times with the metal bar. There was also testimony that after the incident defendant told an HVCC employee that he hoped one of the victims would die. Contrary to defendant's argument, the evidence adduced at trial does support an instruction on assault with intent to do great bodily harm, MCL 750.84, and defense counsel did not err when he did not request an instruction on felonious assault. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that his trial counsel was ineffective because he did not remove a juror who was previously employed at the HVCC. Counsel's decision relating to the selection of jurors is generally a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Defendant argues specifically that his counsel should have excused Juror Robinson because he had worked at HVCC before retiring, was annoyed because this was his

third time on a jury, and had recently had surgery. During voir dire, the trial court inquired about any possible bias on Juror Robinson's part. Juror Robinson stated that his previous employment would not affect his verdict. And, the trial court stated that arrangements would be made for any special accommodations necessitated by Juror Robinson's recent surgery. Last, because a juror seems "annoyed" is not cause for removal from a jury. Upon the existing record, we can find no obvious cause for Juror Robinson's removal. We will not evaluate trial counsel's decisions here with the benefit of hindsight. *Id.* Because defendant has failed to show prejudice and failed to overcome the presumption that defense counsel's method of jury selection was sound trial strategy, we find that defendant was not denied effective assistance of counsel.

In any event, taken individually or grouped together, defendant's assignment of errors has not established ineffective assistance of counsel. Defendant has not shown that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *Rodgers, supra*, 248 Mich App 714.

Finally, defendant argues that he is entitled to resentencing because the trial court did not articulate sufficient and compelling reasons to justify an upward departure. Specifically, defendant states that the trial court's reasons were not objective and verifiable, were already taken into account in the guidelines, and were not based on accurate information.

This Court reviews for clear error the trial court's determination of the existence of a sentencing factor. *People v Babcock (Babcock III)*, 469 Mich 247, 273; ___ NW2d ___ (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that the sentencing factor is objective and verifiable. *Babcock III, supra*. 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, the prosecution, and others involved in the case, and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

We review for an abuse of discretion the determination that the objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence. *Babcock III, supra,* at 274. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.*

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock III, supra*, at 272, see also 259 n 13. To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock III, supra,* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). A substantial and compelling reason "exists only in exceptional cases." *Babcock III, supra,* at 258, quoting *Fields, supra,* at 62, 67-68.

The record indicates that defendant's sentencing guidelines range on the felony convictions as a second habitual offender include thirty-eight to ninety-five months' imprisonment for the assault with intent to do great bodily harm conviction, twenty-two to forty-seven months' imprisonment for the prisoner possessing a weapon conviction, and fourteen to thirty-six months' imprisonment for each of the three counts of assaulting a prison employee.

The trial court adopted the prosecutor's sentencing memorandum on its Sentencing Information Report Departure Evaluation form and sentenced defendant exactly as requested by the prosecutor to 120 to 180 months' imprisonment for the assault with intent to do great bodily harm conviction, sixty to ninety months' imprisonment for the prisoner possessing a weapon conviction, and forty-eight to seventy-two months' imprisonment for each of the three counts of assaulting a prison employee.

The trial court, at sentencing, read directly from the prosecutor's sentencing memorandum to list the reasons for the upward departure. The trial court stated as follows:

> This is not the Defendant's first instance of severely assaulting the employees of his place of confinement.
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> The attack in this case was premeditated and perpetrated against unarmed forensic security aides, the very people from the Defendant is bound to take his orders. There is no, absolutely no justification for the attack. The most severe attack was against an aide who Defendant readily admits was a good guy with whom he had no previous problems but for the fact that the aide had prevented the Defendant from committing suicide.
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> The attack was made against the third shift even though it was the employees of the second shift that the Defendant stated were abusive in denying him medication. The Defendant was the leader of the offense and although the People have scored the Defendant at OV14 as the leader, that scoring fails to accurately account for the efforts of the Defendant, that he went through in order to perpetrate the offense. When he failed to recruit Mr. Strader he went forth and recruited Mr. Palmer. When Mr. Palmer was unable to remove his towel bar on his own, the Defendant removed the towel bar from [sic] Mr. Palmer. Defendant's plan had included taking hostages and raping the woman in order to gain media attention.
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> The Defendant's total rescore is well above the top score of 75. The Defendant's expressed no genuine remorse for his actions. While the Court cannot consider the Defendant's choice not to make a statement for the pre-sentence report or at sentencing, the Court can and should consider the fact that at the time of this offense the Defendant expressed that it [sic] his hope that the victim, William Taylor would die. His only arguable expression of remorse came after the incident [sic] was speaking with the officer in charge at which time Defendant stated that he had been praying for Mr. Taylor.
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> The severity of the injury suffered by Mr. Taylor and the Defendant's consistent efforts to keep other employees from coming to Mr. Taylor's assistance demonstrate his true intentions and lack of remorse.

In this case, the trial court departed upward on each of the five felony convictions, including convictions for three separate offenses, assault with intent to do great bodily harm, prisoner possessing a weapon, and assault of a prison employee. Our Supreme Court in *Babcock III, supra,* counsels that, "[a] trial court must articulate on the record a substantial and compelling

reason for its *particular* departure, and explain why this reason justifies *that* departure." *Babcock III, supra*, at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000). In retrospective application of *Babcock III, supra*, we note the trial court did not list particular reasons for each departure on the felony counts and did not explain the justifications for each guideline departure. This is error, however the trial court's recitation does facilitate our review of whether the factors relied upon by the trial court constitute substantial and compelling reasons to depart from mandated minimum sentences. We are compelled by the *Babcock III* Court to examine the sentencing record. In *Babcock III, supra*, our Supreme Court declares the following:

> [I]f the trial court departs from the guidelines range by twelve months and articulates reasons A, B, and C to justify this departure, and if the Court of Appeals determines that reasons A and B are not substantial and compelling reasons, but that C is, the Court of Appeals must determine whether the trial court would have departed from the guidelines range by twelve months on the basis of reason C alone. *Babcock III, supra*, at 261.

We are satisfied that the majority of the factors articulated by the trial court are objective and verifiable. *Daniel, supra*, 462 Mich 6-7; *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). The record supports the facts that defendant has previously assaulted corrections employees, meticulously planned the attack at the HVCC including recruiting other inmates to assist him with the plot, had an OV score well above the highest score, and expressed no genuine remorse for his actions and the injuries that resulted. These factors "keenly" and "irresistibly" grab our attention and they are of "considerable worth" in deciding the length of the sentence. *Babcock III, supra*, at 272. We note that whether the victim in the case was a "good guy" is a subjective factor and thus is not objective and verifiable, however, here, defendant admitted he had no previous issues with Taylor. After reviewing the record in this case and scrutinizing the sentencing transcript, we are certain the trial court would have departed from the guidelines range by the amount that it departed on each of the sentences on the basis of the objective and verifiable factors alone.

We affirm.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell