

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DATRELL IVEY,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 241588

Wayne Circuit Court

LC No. 01-009669

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIUM.

Defendant was convicted, following a jury trial, of voluntary manslaughter, MCL 750.321, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 10 to 15 years' imprisonment on the manslaughter conviction, 18 months to 4 years' imprisonment on each of the assault convictions, and 2 years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. The sole issue on appeal is whether the trial court erred in sentencing defendant to a 10-year minimum prison term with respect to the manslaughter conviction, where the minimum sentencing guidelines range was 36 to 71 months' imprisonment. Defendant's conviction is affirmed, but we reverse and remand for resentencing because the trial court failed to articulate, on the record, substantial and compelling reasons for departure from the guidelines that are objective and verifiable.

I. FACTS – TRIAL TESTIMONY

This case arises out of the fatal shooting of Kenon Shaw outside defendant's residence following a physical altercation earlier in the evening involving defendant, his brother Thomas, Kenon's two brothers Jerome and Tyrone, and Kenon's cousin Billy at a local Wendy's Restaurant. The shooting was the culmination of ongoing "bad blood" between members of defendant's and Kenon's family.¹

¹ The trial and sentencing transcripts indicate that members of the two families engaged in disruptive behavior inside and directly outside the courtroom during the trial and sentencing, forcing the trial court to threaten the removal of family members during the trial, and forcing the

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Testimony by police officers who responded to the crime scene established that Kenon's body was found in the street in front of defendant's house; he was still alive and being comforted by Tyrone's girlfriend Shanetta. Unfortunately, Kenon died soon thereafter despite police efforts to save his life. The police found a broken ax handle in the street near Kenon's body. Police officers testified that defendant's house, where he lived with his parents and two brothers Thomas and Tommy, Jr., had a front porch, and the home was located a short distance from the street. Two bullet casings were discovered on the front porch, and two casings were found in defendant's living room. There was a gunshot strike mark on a front porch beam. The splintered beam was near the two bullet casings on the front porch, and an officer opined that the strike mark revealed that the bullet was going in the direction of the street. Police also found a live bullet resting in the living room. A work-related box cutter was discovered on Kenon. The pathologist testified that Kenon was struck by three bullets, including two to the chest, which caused Kenon's death. The pathologist opined that Kenon was not shot at close range.

Kenon's brother Tyrone testified that he, Kenon, Billy, and Shanetta drove to defendant's house because Kenon wanted to "talk" to defendant's brother Thomas about the earlier incident at the restaurant. The altercation at the restaurant resulted in the police arresting Kenon's brother Jerome on an outstanding warrant; Jerome was not at the scene of the subsequent shooting.² Kenon, who himself was not at Wendy's when that fight erupted, was upset and angry with Thomas over Jerome's arrest. According to Tyrone, who was at the shooting scene, defendant's family, including defendant but not Thomas, was on the front porch when Tyrone, Kenon, and the others arrived at defendant's home shortly before the shooting started. Tyrone maintained that Thomas was inside the home. Tyrone testified that when they drove up in front of defendant's house, Kenon exited the car and stood in front of the car, yelling for Thomas to come outside. Tyrone, Billy, and Shanetta exited the car and just stood nearby. Tyrone asserted that Kenon was carrying a stick but did not have a gun. He further stated that defendant's family, including defendant, ran into the family home as Kenon remained in front of his car, calling out for Thomas. At this point, defendant came back outside and started shooting in Kenon's direction, striking Kenon. Tyrone insisted that Kenon was standing in front of the car and in the street when defendant started shooting, and that Kenon had not approached defendant's house. Tyrone observed that defendant and his family quickly drove away from the scene in separate vehicles after the shooting while Kenon lay dying in the street.

Kenon's cousin, Billy, testified consistent with the testimony given by Tyrone; however, Billy maintained that Kenon was not carrying any stick at the crime scene. On cross-examination, Billy conceded that at the preliminary examination, he stated that Kenon was holding an aluminum stick. Billy testified that he heard three to four shots ring out, and that defendant was standing in the doorway of the house leading out to the porch as he discharged his weapon. He claimed that Kenon was not mad and simply wanted to talk to Thomas. Shanetta held and cared for Kenon after the shooting while Billy and Tyrone ran for assistance.

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court to take a recess and place certain family members in custody for contempt during sentencing.

² No one else was arrested at the restaurant.

Shanetta's testimony varied with that given by Tyrone and Billy, in that she indicated that when they first arrived at defendant's house in Kenon's vehicle, defendant and his mother had just pulled up to the house in front of them and were running to the home. Shanetta asserted that defendant ran into the house and then came out shooting. She maintained that defendant's family was on the porch when the shooting started. Shanetta acknowledged that Kenon was waving a stick, and that he was angry, hollering, and screaming. She insisted that neither she, Tyrone, Billy, nor Kenon, were carrying firearms. Shanetta testified, consistent with the testimony of Billy and Tyrone, that Kenon did not make any threats to Thomas or the Ivey family. She stated that Thomas and Kenon had been friends.

Defendant made a statement to police, claiming that he was on the front porch when he heard gunshots, and he then started screaming, "they are shooting." According to defendant, he ran inside the house, grabbed a .22 rifle, and started shooting while exiting the house. Defendant admitted that he did not actually see Kenon or the others with a gun, but he heard a gunshot. Defendant stated that he shot three times because he was scared.

Thomas testified that prior to the shooting, there had been run-ins between himself and Tyrone, in which Tyrone indicated, "snitches got popped." According to Thomas, the reference that snitches could get shot was made by Tyrone in a belief that Thomas had told Tyrone's landlord that Tyrone was selling narcotics out of a rental unit. Thomas denied ever telling the landlord that Tyrone was selling drugs.³ Thomas testified that after the Wendy's altercation but before the shooting, there was an incident in which Jerome's girlfriend pointed a shotgun at Thomas. Additionally, there was a prior incident in which Tyrone was holding a shotgun in Thomas' presence, although no direct threat was made by Tyrone.

Thomas claimed that just before the shooting, his mother and defendant pulled up to the family home with Kenon's car following close behind at a high rate of speed. Thomas testified that defendant ran into the house yelling that they are shooting at "us." Thomas heard two gunshots as defendant was running to the house, and he indicated that, while the sound of gunshots was common in the neighborhood, he was concerned because the shooting sounded like it was coming from the front of his house. He testified that Kenon exited his vehicle and started screaming and cussing, and that his mother, appearing confused as to what was going on, stood for a short time near her car before running into the family home. Thomas believed that Kenon wanted to fight, and he thought that Kenon had a gun. Thomas maintained that Kenon yelled at him that he was going to "beat his ass." Kenon had something in his hand according to Thomas; however, he could not say that Kenon had a gun, and Thomas told police that he did not see a firearm. He testified that defendant ran out of the house shooting in Kenon's direction, although at that point in time Thomas believed that the Ivey family was safely inside the family home.

Defendant's mother testified that Kenon's vehicle pulled up fast right beside her vehicle, and that defendant ran from her car to the house. She did not know what was going on, and she heard Kenon yell to Thomas to "bring his mother f***** ass outside cause he was going to kill

³ There was also unclear and scant evidence regarding a "lawsuit" between Jerome and an Ivey family relative that created further tension between the families.

him” Defendant’s mother further testified that Kenon was carrying a short little silver gun, and that Tyrone also had a gun. She asserted that someone shot in the direction of her home, striking a porch beam.

Defendant was charged with second-degree murder, MCL 750.317, felony-firearm, and two counts of assault with intent to commit murder, MCL 750.83. The jury convicted defendant on the lesser offenses of voluntary manslaughter and felonious assault, along with the felony-firearm conviction.

II. SENTENCING

The minimum sentencing guidelines range was 36 to 71 months’ imprisonment for manslaughter; however, the trial court departed upward by sentencing defendant to a 10 to 15 year prison term. The full extent of the trial court’s reasoning for departing from the guidelines was stated as follows:

I still think the appropriate thing for me to do based on the conviction in this case is to sentence Mr. Ivey to the maximum time that I can sentence him to as [it] relates to the manslaughter. That was always my intent. I kept an open mind as I listened to what everybody had to say, but that still remains my intent.

That is going to be a sentence above the guidelines because the guidelines do not adequately at all, in my view, encompass what happened in this case. Yes, I think the jury took into consideration everything that the lawyers said, as I started to say earlier and in reducing this from a murder in the second degree to a manslaughter conviction.

Yes, the deceased, some of his family members went over to the house. What happened after that was strictly within the purview of Mr. Ivey and he could have stopped it at any time and I did not believe, quite frankly, as I don’t think the jury did, the rendition of some of his witnesses.

Other than I must say his brother was . . . a pleasant surprise so it is for that reason and for those reasons I’m going to sentence Mr. Ivey as follows. On Count I, the manslaughter conviction, you’re to be committed to the Michigan Department of Corrections for no less than ten years and no more than fifteen years.

III. ANALYSIS

A. Appellate Arguments

On appeal, defendant argues that the trial court abused its discretion in sentencing him outside the guidelines. Defendant maintains that the trial court improperly treated him as if he had committed second-degree murder despite the jury’s verdict to the contrary. Defendant further argues that the sentence was excessively severe and violated the principle of proportionality. Defendant states that the reasons given for departure are already embodied in the guidelines under offense variable six (OV 6). We note that defendant fails to make any

reference to, or argument under, MCL 769.34, or any case law post-legislative sentencing guidelines despite the fact that the legislative guidelines control being that the crime was committed after January 1, 1999. See MCL 769.34(1) & (2).

The prosecutor argues that where there is record support that a greater offense has been committed by a defendant than that for which he was convicted, a sentencing court may take that into consideration as an aggravating factor. The prosecutor maintains that here, there was a preponderance of evidence supporting a finding of second-degree murder; therefore, the trial court did not err in departing upward from the guidelines.

B. MCL 769.34 and Departure from the Sentencing Guidelines

MCL 769.34(2) provides that for any felonies committed after January 1, 1999, the minimum sentence imposed by a court “shall be within the appropriate sentence range,” except as otherwise provided in § 34. MCL 769.34(3) further provides that “[a] court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” Finally, MCL 769.34(3)(b) provides that “[t]he 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.”

C. Standard of Review

With respect to this Court’s standard of review, our Supreme Court recently ruled in *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003), that the following “abuse of discretion” standard applies to sentencing decisions:

Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court’s extensive knowledge of the facts and that court’s direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11),⁴ honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however, the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective.

⁴ 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.”

D. Discussion and Conclusion

The trial court found that a departure was proper because defendant could have stopped from shooting the victim. Our Supreme Court, however, has clearly articulated that a substantial and compelling reason for departure must be *objective and verifiable*. *Babcock, supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). The phrase “objective and verifiable” means that the factors to be considered by the trial court in determining substantial and compelling reasons must be actions and occurrences which are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003); *People v Arcos*, 206 Mich App 374, 376; 522 NW2d 655 (1994); *People v Windall Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). According to *Random House Webster’s College Dictionary* (2001), “objective” means “not influenced by personal feelings or prejudice; unbiased[.]”

Taking into consideration these definitions, we conclude that the trial court’s reasoning that defendant could have stopped from shooting the victim is subject to dispute and not objective and verifiable. There was testimony that the victim was in a frenzy, voicing threats, and was carrying a weapon. Additionally, there was evidence that shots were fired near defendant’s home on the victim’s arrival to the home, and that defendant ran toward his house, yelling that he was being shot at. Therefore, the trial court’s reasoning is not objective and verifiable under the factual circumstances as presented through trial testimony. Rather, the conclusion reflected the trial court’s subjective interpretation of disputable and conflicting evidence and delved into defendant’s mens rea. We cannot say that the trial court’s reason for departure represented an action and occurrence external to the minds of the judge, defendant, and others, capable of being confirmed.

On remand, the trial court has the discretion to sentence defendant within the guidelines or to depart from the guidelines provided that the court enunciate substantial and compelling reasons on the record supporting the departure that are objective and verifiable, and which comply with the requirements of MCL 769.34.

We affirm defendant’s conviction, but reverse and remand for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ William B. Murphy

/s/ Janet T. Neff