STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2003
v	No. 242391 Wayne Circuit Court
TOYLYN T. HINES, Defendant-Appellant.	LC Nos. 00-013818; 00-013821-01

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of unarmed robbery, MCL 750.530. The trial court sentenced defendant to seven to fifteen years in prison for each offense. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant first contends that the trial court improperly joined, and refused to sever, his two separate armed robbery cases. We agree, but find this error harmless. This Court reviews de novo whether the joined offenses are related as a matter of law and subsequently eligible for joinder. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977).

This issue deals with MCR 6.120, which provides:

> (A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.
>
> (C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the

> ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

In this case, the charges are of the same or similar character, but they are not the same conduct. See *Tobey*, *supra* at 151-152. The charges are also not "connected" because one robbery was not committed to facilitate the other. *Id*. at 152; *People v Daughenbaugh*, 193 Mich App 506, 510; 484 NW2d 690 (1992). This only leaves acts constituting parts of a single scheme or plan. But this case does not fit that definition either. There needs to be a greater connection between the charged incidents than merely having the same parties. *Tobey*, *supra* at 151-152. As this Court has noted:

> the relationship among offenses (which can be physically and temporally remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. [*People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), quoting ABA Standards 13-1.2 commentary.]

Here, as in *Tobey*, there is no greater goal. This case simply deals with two separate robberies occurring in the same place. This is not sufficient to constitute "acts constituting parts of a single scheme or plan." *Tobey*, *supra*; *Daughenbaugh*, *supra* at 509-510; *McCune*, *supra* at 103-104.

Given the above analysis, the two robberies do not meet the standard for related events, and severance was mandatory pursuant to MCR 6.120(B). Thus, the lower court erred in granting joinder following defendant's objection. See MCR 6.120(B); *Tobey*, *supra* at 151-154. But this error was harmless. A preserved nonconstitutional error is not grounds for reversal unless "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (internal quotation marks omitted). "Stated another way, the analysis focuses on whether the error undermined reliability in the verdict." *Cornell*, *supra* at 364.

In this case, the lower court's error does not undermine the reliability of the verdicts. Substantial evidence existed to convict defendant of both robberies. Several eyewitnesses saw defendant in the store during both robberies. Several eyewitnesses saw him take the money during both robberies. In both robberies, people were actually in the office when defendant took the money from the safe. One of these eyewitnesses was defendant's neighbor. This witness was not only able to tell the police defendant's name, but was also able to tell them where he lived. Given that substantial evidence existed to convict defendant of each robbery, the error did not undermine the reliability of the verdicts. Therefore, the lower court's decision not to sever was harmless error. See *Cornell*, *supra* at 363-364.

Defendant next contends that defense counsel provided ineffective assistance by failing to properly file an alibi notice, failing to properly investigate the alibi, and failing to move for an adjournment to correct this error. We disagree. Defendant did not move for a *Ginther*[1] hearing nor did he move for a new trial based on ineffective assistance of counsel. This failure precludes appellate review unless the record contains sufficient detail to support defendant's claim. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Review is limited to mistakes apparent in the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

On the day after the prosecution rested, defense counsel informed the court that she had received a telephone call from defendant's employer. Defense counsel wished to add the employer as an alibi witness. The prosecution objected and refused to waive the alibi witness notice requirement. There is insufficient information in the record to know exactly what defendant's employer's testimony would include. From counsel's statements, it appears that the employer would have testified that defendant worked on the date of one of the robberies. But the record does not indicate if the employer was able to testify to the times that defendant worked. The record does not indicate if the employer could testify that he was with defendant at all that day. In fact, the only thing the record clearly indicates is that the employer provided paperwork potentially showing that defendant worked on the date of one of the robberies. The record does not indicate that the employer's testimony would have been favorable to defendant or that the testimony would have changed the outcome of the trial. Therefore, based on the record, defendant was not denied the effective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant also contends that counsel was ineffective for failing to investigate his alibi. The record does not indicate what counsel investigated or failed to investigate. Although counsel apparently did not speak to the employer regarding this alibi, this does not mean that counsel failed to entirely investigate the alibi. Given that the record does not include what counsel investigated or what potential witnesses counsel interviewed regarding this alibi, defendant is not entitled to relief. See *McCrady*, *supra*.

Defendant further contends that counsel was ineffective for failing to request an adjournment to allow the prosecution more time to interview and prepare for the employer's potential testimony. MCL 768.20(1) requires that defendant file an alibi notice no less than ten days before trial. Defense counsel could not properly file an alibi notice regardless of whether the court granted a motion to adjourn. The prosecution still could have objected to and refused to waive the notice requirement after the adjournment. Therefore, a motion to adjourn would have been futile. It is not ineffective assistance to refuse to make a futile motion. *People v Sabin (On Sec Rem)*, 242 Mich App 656, 660; 620 NW2d 19 (2000). Further, as noted above, there is no indication that the employer's testimony would have changed the outcome of the case.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Therefore, defendant was not denied the effective assistance of counsel. See *Stanaway*, *supra*; *Avant*, *supra*; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Next, defendant contends that the lower court improperly departed from the sentencing guidelines. We agree. The Supreme Court articulated the standard of review for this issue in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), stating:

> the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Id*. at 264-265, quoting *People v Babcock I*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).]

The lower court calculated defendant's guidelines range as twenty-nine to fifty-seven months. The trial court departed from this range and sentenced defendant to seven (eighty-four months) to fifteen years in prison for each offense. A trial court may depart from the sentence range established under the sentencing guidelines set forth in MCL 777.1 *et seq*., if the court has substantial and compelling reasons to do so. The court must state, on the record, the reasons for departure. MCL 769.34(3); *Babcock*, *supra* at 256-257. Substantial and compelling reasons for departure only exist in extraordinary cases. Only those factors that are objective and verifiable may be used to judge if the substantial and compelling reasons exist. The reasons used to justify departure should "keenly" or "irresistibly" grab the attention of the reviewing court. These reasons should appear to this Court to be of "considerable worth" in deciding the length of sentence. *Id*. at 257-258, quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995).

The first reason for departure articulated by the court was apparently defendant's criminal record. The lower court stated: "Number one, although you had no prior record, that just means I'm not going to exceed them as much as I had originally planned." This statement is less than clear and seems to state that defendant's criminal record is both a reason for departure and a reason not to depart. If the court did rely on defendant's past criminal record for departure, this is inappropriate. The prior record variables already deal with a defendant's criminal record and his relationship to the criminal justice system. See MCL 777.50 through MCL 777.57. The lower court did not find on the record that the prior record variables gave inadequate or disproportionate weight to this characteristic. Therefore, it was inappropriate to base departure on defendant's criminal record. See MCL 769.34(3)(b); *Babcock, supra* at 272.

The next reason articulated by the court for departure was the "dangerousness" of the offense. The court stated:

> This is a situation where you, on two occasions, decided to rob a restaurant and from all appearances you were not armed in the classic sense of being armed. There was no weapon that was produced, but nonetheless, this is something I consider to be a very dangerous offense, entering into an establishment to rob it.

Only those factors that are objective and verifiable may be used to judge if the substantial and compelling reasons exist for departure. *Babcock, supra* at 256-257. This Court has defined "objective and verifiable" to mean that the facts the lower court considered must be actions or occurrences that are external to the minds of the judge, defendant, and other individuals involved in making the decision. And they must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The labeling of an offense as dangerous is subjective. This determination is not external to the mind of the trial judge. It is an internal evaluation not capable of external proof. Therefore, it is not objective and verifiable and cannot be used as a substantial and compelling reason for departure from the sentencing guidelines. See *Babcock, supra* at 256-258; *Abramski, supra*.

This departure seems at least partially based on defendant's use of a weapon. Offense Variable (OV) 1 deals with aggravated use of a weapon. MCL 777.31. The trial court did not find on the record that this variable was given inadequate or disproportionate weight. Therefore, it is inappropriate to base departure on this characteristic. See MCL 769.34(3)(b); *Babcock, supra* at 272. Further, the dangerousness of defendant's robberies does not "keenly" or "irresistibly" grab our attention. There was nothing in the line of "dangerousness" that would distinguish these robberies from any other. Thus, the trial court's characterization is not a substantial and compelling reason for departure from the sentencing guidelines. See *Babcock, supra* at 257-258.

The next reason articulated by the court for departure was the family nature of the restaurant robbed by defendant. Arguably, OV 9, which deals with the number of victims, MCL 777.39, already addresses this issue. In determining the points scored under this variable, the court is instructed to count each person who was placed in danger of injury or loss of life as a victim. MCL 777.39(2)(a). The trial court did not make a finding that OV 9 was given inadequate or disproportionate weight. Thus, it is inappropriate to base departure on this characteristic. See MCL 769.34(3)(b); *Babcock, supra* at 272.

Further, the "family nature" of a restaurant is not objective and verifiable. Judging something as "family oriented" is a subjective determination that would change depending on the party considering the facts. It is not a factor that is capable of external proof. Given that the fact is not objective, it is not substantial and compelling and cannot be used as a ground for departure. See *Babcock, supra* at 256-258; *Abramski, supra*.

Finally, the "family nature" of a McDonald's does not "keenly" or "irresistibly" grab our attention. McDonald's is no more family oriented than the typical department store or discount store, such as a K-Mart or a Wal-Mart. Due the great number of these types of establishments, allowing departure every time a robbery or larceny is committed at a department store or at a restaurant would totally ignore the purpose of the statutory guidelines and would be contrary to the Legislature's intent that substantial and compelling reasons for departure only exist in extraordinary cases. *Babcock, supra* at 257. The court's reason for departure does not appear to be of "considerable worth" in deciding the length of sentence. *Id*. at 257-258. Therefore, it is not a substantial and compelling ground for departure. See *id*.

The final reason articulated by the lower court for departure seems to be that the court determined that the guideline range insufficiently punished defendant. The court stated:

> It's important to look at, when you're sentencing somebody, not just the fact that you should be deterred from doing this kind of action in the past - - in the future [sic], but also there should be some measure of punishment.

The offense variables and prior record variables already consider the proportionality of a sentence and if that sentence sufficiently punishes a defendant. *Babcock, supra* at 263-264. The lower court did not find, on the record, that inadequate or disproportionate weight was given to this consideration by the guidelines. Therefore, it was inappropriate to base departure on the need for punishment. See MCL 769.34(3)(b); *Babcock, supra* at 272.

Further, defendant's need for punishment does not "keenly" or "irresistibly" grab our attention. There is nothing in the facts of this case to indicate that defendant needs or deserves greater punishment than the average robber; therefore, this is not a substantial and compelling reason for departure from the sentencing guidelines. See *Babcock, supra* at 257-258. This is not an extraordinary case warranting departure from the carefully created sentencing guidelines. See *id*. at 258.

In sum, the trial court improperly departed from the sentencing guidelines and defendant is entitled to resentencing. Because the sentencing judge is no longer on the circuit court bench, resentencing before another trial judge is required.

We affirm defendant's convictions, vacate his sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

I concur in result only.

/s/ Peter D. O'Connell