

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTON D. MARSHALL,

Defendant-Appellant.

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UNPUBLISHED

December 23, 2003

No. 242774

Wayne Circuit Court

LC No. 01-003118-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to four to six years' imprisonment on the felonious assault conviction and a consecutive two-year term on the felony-firearm conviction. Defendant appeals as of right, challenging the trial court's refusal to instruct on cognate lesser included offenses and the sentence. We affirm.

On December 31, 2001, defendant and his friends got together, drank alcohol, and shot guns, apparently as part of their New Year's Eve celebration. The victim, Reuben Lucas, and defendant saw each other almost everyday, often played video games with each other, and occasionally drank alcohol and smoked marijuana together. They had known each other for five years. The victim chose not to spend time with defendant on December 31, 2001, however, because he knew defendant would be playing with guns.

On January 1, 2001, the victim went to the house where defendant resided with Theresa Roquemore and two other men. He was invited to the house by defendant and believed they were going to play video games. When the victim arrived, he exited his vehicle and approached the house. As he did, defendant opened the front door and pointed a shotgun at the victim. According to Roquemore, defendant moved the shotgun, following Lucas' movements as he walked. Defendant then discharged the shotgun, hitting the victim in the neck. The victim went into a coma after the shooting, was in the hospital for four months, lost one-half of his neck, and suffers from residual memory deficits and stammering.

Defendant testified that he did not intentionally shoot the victim. He testified that he believed the shotgun was empty. Defendant had pumped the gun several times without discharging any bullets. He then put the gun down and took a shower. After defendant finished his shower, the victim arrived outside of defendant's house. Defendant picked up the gun and

pointed it out the front door at the victim. He yelled to the victim, asking him to go buy beer. Defendant testified that, when he went to pull the gun away from the door, he “must have” pulled the trigger. He was drinking alcohol before the shooting. Roquemore testified that, as far as she knew, there was no preconceived plan to shoot the victim. She and defendant celebrated the victim’s birthday with him three days before the shooting. Roquemore also testified that, when defendant stuck the gun outside of the door, the men inside the house were laughing and did not appear angry. She believed that defendant did not know the gun was loaded.

According to defendant and Roquemore, everyone panicked after the shooting. Defendant dropped the shotgun, ran outside, saw the victim, realized he was in trouble, and ran away from the house. Roquemore was in shock. Defendant later returned to the house when the police arrived. Initially, he lied to the police and told them that the shot came from a black car. Defendant testified that he lied because he was drunk and paranoid. Subsequently, however, he informed the police that the shooting was accidental, and that he did not intend to hurt the victim.

At trial, defendant and Roquemore both testified that defendant and Lucas had no ongoing problems or conflicts at the time of the shooting. There was no simmering feud between them. While they admitted that they previously had a dispute with the victim over rent money that they were paying him, they claimed that the dispute was resolved before the shooting. The victim disagreed. While he admitted that he saw defendant almost everyday, he testified that defendant was not really a friend and that the dispute about rent money was ongoing at the time of the shooting.

Defendant was charged with assault with intent to commit murder, MCL 750.83. The jury was instructed on the crimes of assault with intent to commit murder, assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault. The jury convicted defendant of felonious assault. The record is somewhat confusing with respect to what misdemeanor instructions defendant actually requested below, and defendant’s appellate brief is confusing in regard to the instructions being challenged on appeal. Nonetheless, all the misdemeanors possibly at issue, MCL 752.861 (careless, reckless, or negligent use of a firearm), MCL 750.233 (intentionally aiming a firearm without malice), MCL 750.234 (intentionally aimed firearm discharged without malice and without injury), and MCL 750.235 (intentionally aimed firearm discharged without malice with injury), require the use of a firearm.

In *People v Cornell*, 466 Mich 335, 353-357; 646 NW2d 127 (2002), our Supreme Court held that a jury may only consider necessarily included lesser offenses, not cognate lesser offenses. A necessarily included offense is “one that must be committed as part of the greater offense; it would be ‘impossible to commit the greater offense without first having committed the lesser.’” *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003), quoting *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). “[I]f a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater.” *Alter*, *supra* at 199. A cognate lesser offense is one that has some common elements with, and is of the same nature as, the greater offense but also contains elements not found in the charged offense. *Cornell*, *supra* at 355. Assault with intent to commit murder, the crime of which defendant was charged, may be committed without commission of any of the misdemeanor offenses that defendant claims were applicable. The plain language of the requested lesser offenses require the use of a firearm. The use of a firearm is not an element of assault with intent to commit murder, MCL 750.83. *People v Lowery*, 258 Mich App 167, 173-174; \_\_\_ NW2d \_\_\_

(2003). Because the misdemeanor offenses at issue are not necessarily included offenses of assault with intent to commit murder, the trial court's failure to instruct the jury on those offenses is not error under *Cornell*.

Defendant next argues that the sentencing guidelines range for defendant's conviction of felonious assault is ten to twenty-eight months, and that the trial court improperly deviated from the guidelines based on its feeling about what the verdict should have been. Defendant maintains that the trial court was clearly unhappy with the fact that defendant was found guilty of felonious assault and not a greater charge. Defendant argues further that the trial court erred in basing the sentencing departure on an offense characteristic that is already taken into account in determining the appropriate sentence range.

The recommended minimum sentence range under the legislative sentencing guidelines was ten to twenty-eight months. Defendant was sentenced to a term of four to six years' imprisonment. MCL 769.34(3) provides:

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:

(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.

A departure from the sentencing guidelines is only allowed if there is a substantial and compelling reason for the departure. *People v Babcock*, 469 Mich 247, 255-257; 666 NW2d 231 (2003). A majority of the justices agreed that "substantial and compelling" must be construed to mean an objective and verifiable reason that keenly or irresistibly grabs a court's attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional cases. *Id.* at 257, 272. The *Babcock* Court stated:

"[T]he 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*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000)(*Babcock I*).]

An abuse of discretion occurs when the trial court chooses an outcome falling outside of the permissible principled range of outcomes. *Babcock, supra* at 274. In departing from the guidelines range in this case, the trial court's statements at sentencing indicate a clear intent to depart on the basis that defendant actually shot his friend, who suffered severe long-lasting injuries, and that the guidelines did not adequately account for the facts of the case. In *Lowery, supra* at 168, the defendant was convicted of felonious assault, and the trial court upwardly departed from the sentencing guidelines. This Court affirmed the upward departure, indicating that the trial court properly "expressed its reasoning for the departure by implying that the [offense] characteristics were given inadequate weight." *Id.* at 170. Because the trial court criticized the guideline recommendation and mentioned that the guidelines range was not appropriate, it met its obligation of explaining the particular departure at issue, which was double the highest end of the guidelines range. *Id.* at 170-171. This Court then stated:

We concur with the trial court that the fact that the victim was shot is a substantial and compelling reason to depart from the guidelines. Although offense variable (OV) 1 considers whether a firearm was discharged at or toward a human being and OV 3 considers whether a victim suffered bodily injury that required medical treatment, see MCL 777.31(1)(a), 777.33(d), neither variable considers someone actually being shot. Injury to a victim as a result of being shot is in fact a substantial and compelling reason to depart from the guidelines, and constituted a substantial and compelling reason for the trial court's [particular] departure in this case . . . *The degree of the injury and the nature of the shooting are significant factors.* . . . Therefore, the trial court did not abuse its discretion when it departed from the sentencing guidelines. [*Lowery, supra* at 171-172 (emphasis added).]

In this case, like in *Lowery*, the trial court articulated both the facts surrounding the shooting and the severity of the injuries caused by the shooting as its reasons for departure. It also indicated that the guidelines did not adequately contemplate the facts of the case. The trial court indicated that the offense characteristics did not account for the facts of the shooting or the severe and long-lasting nature of the injuries suffered. Thus, the trial court properly articulated substantial and compelling reasons for the particular departure; there was no abuse of discretion with respect to the decision to depart and the extent of the departure.<sup>1</sup> *Id.*

We note that the trial court also indicated its dissatisfaction with the jury's verdict and appeared to include this dissatisfaction as a reason for departure. Where a trial court articulates multiple "substantial and compelling" reasons for departure, this Court must determine whether the reasons given are substantial and compelling under the appropriate standards of review, and if some are not and should not have been considered, we must determine whether the trial court would have departed and would have departed to the same degree on the basis of the legitimate substantial and compelling reasons alone. *Babcock, supra* at 273. The trial court's belief that

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<sup>1</sup> We note that the victim's injuries in this case were far more severe than those suffered by the victim in *Lowery, supra*. The victim therein suffered injuries to his side, legs, and hands, which required an overnight hospitalization. *Id.* at 171 n 6.

the shooting could not have occurred as defendant testified and that the jury must have compromised is not an objective and verifiable reason to depart from the guidelines. Although the trial court's dissatisfaction with the jury's verdict and the trial court's own interpretation of the evidence were not objective and verifiable reasons to depart from the guidelines range, resentencing is not required. The trial court's "bottom line," as the court itself stated, related to the facts surrounding the shooting and the severity of the injuries suffered by the victim as a result of the shooting.<sup>2</sup> These reasons were, as previously noted, substantial and compelling, and we find that the trial court would have departed, and departed to the same degree, based on those factors alone.

Affirmed.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra

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<sup>2</sup> The trial court stated:

The bottom line is and what makes this case all the more tragic is that [it] was somebody that was your friend that you shot in the neck. He is going to have severe consequences for the rest of his life well beyond the time that you are going to spend in prison. When you get out of prison, he's still going to be suffering the after effects, and that's just the bottom line. I am going to sentence you above the guidelines, these guidelines cannot even address what happened here.