STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2004
v	No. 223792 Genesee Circuit Court
CARL LEE ARNOLD, Defendant-Appellant.	LC No. 99-004694-FC ON REMAND

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Our Supreme Court has remanded this case to this Court by order dated October 3, 2003 (No. 121492) for reconsideration in light of *People v Babcock*, 469 Mich 247, 666 NW2d 231 (2003). In our prior opinion, *People v Arnold*, unpublished opinion of the Court of Appeals (#223792, dec'd April 2, 2002), we affirmed defendant's convictions and sentences as an habitual offender, MCL 769.10, for assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a person convicted of a felony, MCL 750.224f. We held that the trial court did not abuse its discretion by denying defendant's motion for new trial, that the trial court did not err by departing from the legislative sentence guidelines recommended minimum range of 34 to 84 months and imposing a sentence of ten to fifteen years' imprisonment for defendant's conviction of assault with intent to do great bodily harm, and that the sentence imposed did not violate the constitutional proscription against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16.

Because our Supreme Court in its October 3, 2003, order vacated our prior judgment but remanded for reconsideration in light of *Babcock, supra*, which only addressed the appropriate standard of review of a sentence under the legislative sentencing guidelines, we conclude that the Court did not intend to vacate this Court's prior judgment in its entirety and intended that we reconsider only that part of our prior opinion that addressed the sentence guidelines departure. Accordingly, we adopt and reaffirm our prior opinion regarding all non-guidelines issues. On reconsideration of the sentence guidelines issues in light of *Babcock, supra*, we again affirm defendant's sentences.

A trial court must state its reason for departing from the sentence guidelines on the record. MCL 769.34(3); *Babcock, supra* at 272 ¶ 4. Here, the trial court stated at sentencing:

> This sentence is also a departure from the guidelines, and the Court is departing because as I have indicated, it is one of the most vicious assaults I have ever heard of where the victim survived.

The trial court also explained on the guidelines departure form that it imposed a sentence outside the recommended range because: "This was the most vicious beating I have heard of where the victim survived."

In our prior opinion, we recognized that the trial court must have a substantial a substantial and compelling reason to depart from the guidelines, that such reason "should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Arnold, supra*, slip op 2, citing and quoting *People v Babcock*, 244 Mich App 64, 74, 76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The factor justifying a departure must also be objective and verifiable. See *Babcock, supra,* 469 Mich at 272 ¶¶ 1, 3; MCL 769.34(2), (3). We also concluded that, "although the guidelines accounted for physical injury to the victim and excessive brutality, the trial court did not err in finding that a departure from the guidelines was justified because the severity of the attack was given inadequate weight by the guidelines." *Arnold, supra*, slip op 2-3, citing MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). See *Babcock, supra,* 469 Mich at 272 ¶ 5. In that regard, we noted "[t]he undisputed, verifiable evidence showed that the victim required multiple surgeries on his head, was in the hospital for about a month, was unconscious for about two weeks after the attack, and has suffered numbness in his extremities, disfigurement, and some loss of his hearing and the loss of sight in his left eye." *Arnold, supra*, slip op 3. We further noted our agreement with the trial court's "assessment that the beating here was especially violent and brutal" because the "victim suffered severe complications, such as loss of hearing, sight, and memory, numbness in his extremities, and physical disfigurement." *Id.*

On reconsideration in light of *Babcock, supra,* 469 Mich 247, we remain convinced that our review of the trial court's sentence for assault with intent to commit great bodily harm was correct. But, we also recognize that our prior opinion should have explicitly recognized the varying standards of review we employed. See *Babcock, supra* at 264-265, 273 ¶¶ 10, 11. We now hold that the trial court did not clearly err in its factual finding that the beating in this case was especially vicious and brutal. *Id.* at 273 ¶¶ 10. We also hold as a matter of law that the viciousness and brutality of the assault committed in this case is objective and verifiable. *Id.* at 258 n 12, 273 ¶¶ 11. Moreover, it is clear from the record that the trial court concluded that by imposing a sentence above the recommended guidelines range because of the viciousness of the attack in this case, the sentence would be "a more proportionate criminal sentence than is available within the guidelines range." *Id.* at 272 ¶ 6. By finding that the guidelines did not adequately consider the brutality of the attack and the victim's injuries, and by noting in the departure form that "defendant has proved that he is a danger to the community" and "is indeed capable of extreme violence," it is patent that the trial court believed the sentence it imposed was more proportionate to the circumstances surrounding the offense and the offender then that within the recommended range. See *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990).

Having concluded that the trial court did not clearly err in its factual findings and did not err as a matter of law by finding that the brutality of the offense was objective and verifiable, we must now determine whether the sentence actually imposed is lawful. "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." *Babcock, supra,* 469 Mich at 264-265, quoting and approving *Babcock, supra,* 244 Mich App at 76, quoting *Fields, supra* at 77-78. But the abuse of discretion standard we must apply is not the one set forth in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). According to our Supreme Court, "while the Legislature intended to accord deference to the trial court's departure from the sentencing-guidelines range, it did not intend this determination to be entitled to *Spalding's* extremely high level of deference." *Babcock, supra,* 469 Mich at 266. Rather, because of the "trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case" and thus, "the appellate court must accord this determination some degree of deference." *Id*. at 268-269. The standard appellate courts are to employ "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id*. at 269. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id*., at 274 ¶ 12.

We conclude, in light of the "trial court's familiarity with the facts and its experience in sentencing," and in light of defendant's status as an habitual offender,[1] and the trial court's obvious concern for the protection of society,[2] that a maximum sentence permitted by law is within the "permissible principled range of outcomes." *Babcock, supra,* 469 Mich at 269, 274 ¶ 12. The statutory maximum penalty for assault with intent to do great bodily harm is ten years' imprisonment, MCL 750.84, but increases to fifteen years' imprisonment by MCL 769.10. But the minimum sentence a trial court imposed as part of an indeterminate sentence may not exceed two-thirds of the maximum sentence. MCL 769.10(2), 34(2)(b); *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972). Because the minimum sentence the trial court imposed here did not exceed two-thirds of the maximum and because the sentence was among the principled outcomes of this case, we conclude that trial court did not abuse its discretion by imposing a sentence of ten years to fifteen yeas' imprisonment.

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[1] See *People v Hansford (After Remand),* 454 Mich 320, 326; 562 NW2d 460 (1997), where our Supreme Court held, when considering a sentence under the judicial guidelines, "that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society."

[2] The traditional objectives of imposing sentence include: disciplining the offender; the protection of society; reformation of the offender; deterrence of others; and retribution. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999).

One final aspect of our prior opinion remains to be addressed. We wrote that we "need not reach defendant[']s] claims regarding the other two reasons for departure because the trial court's first stated reason justified its upward departure from the guidelines." *Arnold, supra,* slip op at 3. When a trial court provides multiple substantial and compelling reasons for departure from the guidelines range, our Supreme Court has instructed that:

> Because the trial court must articulate on the record a substantial and compelling reason to justify the particular departure, if the trial court articulates multiple reasons, and the Court of Appeals determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court's intentions. That is, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. If the Court of Appeals is unable to determine whether the trial court would have departed to the same degree on the basis of the substantial and compelling reasons, or determines that the trial court would not have departed to the same degree on the basis of the substantial and compelling reasons, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure. [*Babcock, supra,* 469 Mich at 260-261 (footnotes omitted).]

On further review, we conclude that the trial court did not articulate multiple substantial and compelling reasons for departure from the guidelines range. The trial court stated on the record that the viciousness of the assault was the reason for its departure and in the guidelines departure form the trial court also noted that "defendant has proved that he is a danger to the community" and "is indeed capable of extreme violence." These comments do not appear to be objective and verifiable, they are the trial court's subjective assessment of defendant. In our view, the trial court's additional comments in the departure form explained why the court believed the viciousness of the assault, the single substantial and compelling, objective and verifiable reason, justified departure from the guidelines recommended sentence range. Even if the trial court viewed its additional comments as multiple substantial and compelling reasons for departure, it is clear from the record that "the trial court would have departed and would have departed to the same degree on the basis of the [single] substantial and compelling reason[] alone." *Babcock, supra,* 469 Mich at 260.

Accordingly, we again affirm defendant's convictions and sentences.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey