

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYRUS WEEMS,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 239660

Wayne Circuit Court

LC No. 01-006261-01

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for assault with intent to murder, MCL 750.83, two counts of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant asserts that there was no substantial and compelling reason to sentence him outside the 126 to 210 month sentencing guidelines range, and that the extent of the departure shows that his 25 to 50 year sentence is disproportionate.

A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3). A departure may be based on a characteristic already taken into account in determining the appropriate range if the court finds from the record that the characteristic has been given inadequate weight. MCL 769.34(3)(b). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.*, 265.

Substantial and compelling reasons exist only in exceptional cases and reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.*, 257.

The trial court stated the following as its basis for upwardly departing: 1) the fact that one individual was shot in the back while trying to leave, 2) the fact that another individual was shot

while just standing there, and 3) the fact that defendant shot another victim twice, and the second time the victim was on the ground. The factors stated by the trial court are objective and verifiable, and valid reasons for departure. See *id.*, 258-260. The fact that a victim was shot is a substantial and compelling reason to depart from the guidelines range, as neither OV 1 nor OV 3 considers that particular fact. *People v Lowery*, 258 Mich App 167, 171; ___ NW2d ___ (2003). The degree of the injury and the nature of the shooting are significant factors, and may constitute substantial and compelling reasons for departure for a particular case. *Id.* If there is a substantial and compelling reason for the departure, the extent of the departure is reviewed for abuse of discretion. *Id.*, 172.

Here, the degree of the injury and the nature of the shootings are substantial and compelling reasons that justify the extent of the departure. The trial court rejected defendant's claim of self defense, and found that his use of a firearm was unjustified. The guidelines do not account for the circumstances of the shooting or the nature of the injuries received. Defendant shot one victim in the face, then shot him two more times as he lay on the ground. Defendant shot another victim that was standing nearby, who subsequently spent three or four weeks in the hospital. The third victim was shot in the back. Following *Lowery, supra*, these are substantial and compelling reasons that justify a departure. These circumstances also establish that the trial court did not abuse its discretion by the extent of its departure. *Id.* In addition, the sentence is proportionate to the seriousness of the crime and the circumstances surrounding the offense and the offender. See *Babcock, supra* at 263-264.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen