

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS STEPHAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

November 30, 2004

No. 249427

Muskegon Circuit Court

LC No. 02-047933-FH

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to cause great bodily harm, MCL 750.84, for which he was sentenced as a fourth habitual offender, MCL 769.12 to fifteen to thirty-five years' imprisonment. We affirm.

Defendant first contends that defense counsel was ineffective for failing to request a jury instruction on the lesser-included offense of simple assault. "To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). The decision whether to request a lesser offense instruction is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). On this record, defendant has not overcome the presumption that the decision was sound trial strategy.¹ Defendant also argues that the trial court erred when it failed to give the simple assault instruction of its own accord. But a trial court has no sua sponte duty to instruct a jury on lesser-included offenses. *People v Reese*, 242 Mich App 626, 630 n 2, 619 NW2d 708 (2000).

Defendant also contends that the trial court erred in scoring the offense variables in the sentencing guidelines and that the errors substantially increased the sentencing guidelines range.²

¹ Because defendant never moved for a new trial, or an evidentiary hearing on this issue, we must limit our review of defense counsel's representation to mistakes apparent from the lower court record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

² Because defendant committed the assault in September 2002, the legislative sentencing (continued...)

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We review a trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supports a score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant first argues that the trial court erred in scoring five points for offense variable ("OV") 12. But even assuming the trial court erred, the OV level remains the same after deducting the five points. The sentencing grid provided in MCL 777.65 indicates that 75 points or more assigned to offense variables results in an OV level "VI." Defendant's original total OV was 100 points, and would only have been reduced to 95 points by the scoring error. "[I]f on appeal it appears that the guidelines were incorrectly scored but that the correct score would not change the guidelines recommended range, remand for resentencing is not required." *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Defendant also argues that the trial court erred in assigning OV 7 a score of fifty points. Because defendant did not preserve this issue, we review it for plain error affecting defendant's substantial rights. MCR 6.429(C); *People v McDaniel*, 256 Mich App 165, 171; 662 NW2d 101 (2003); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2003).

The record supports the scoring of fifty points for OV 7. Fifty points may be scored for OV 7 where the victim "was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1). Under MCL 777.37(3), sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification."

The victim was beaten severely and exposed to extreme or prolonged pain or humiliation. Dr. Randy Bisping, who performed surgery on the victim's broken jaw, testified that the fracture she sustained was so severe that, in order to repair it, he had to cut open her neck to access the jaw. The victim still bears a scar from the surgical procedure. The victim testified that she has to take medication for the continuing pain and has never regained full use of her memory and faculties. There was also evidence that defendant intended to produce such suffering. Although defendant testified that he did not intend to seriously injure the victim, he also testified that he punched her twice causing her to fall to the ground bleeding; her face looked "crushed" and she was "gasping for air." The extent of the victim's injuries also supports the conclusion that the suffering was intentional. Because there is evidence to support the trial court's scoring of OV 7, defendant has failed to establish plain error. Defense counsel was not ineffective for failing to make a futile objection to this scoring. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next contends that the trial court erred in departing upward from the sentencing guidelines because it lacked substantial and compelling reasons. We review the existence or nonexistence of a factor for clear error. We review the determination that a factor is

(...continued)

guidelines apply. MCL 769.34(2); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

objective and verifiable as a matter of law. We review for an abuse of discretion the determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the sentencing guidelines. *People v Babcock*, (*Babcock I*), 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

A trial court may only depart from the guidelines if it articulates substantial and compelling reasons to do so. MCL 769.34(3); *Babcock I*, *supra* at 72. The court's reasons for its upward departure must be objective and verifiable. *Id.* at 78. The phrase "objective and verifiable" means that the facts the court considers must be actions or occurrences that are "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Abramski*, *supra* at 74.

The trial court, in departing from the guidelines range, opined as follows:

I think [the upward departure] is justified under these circumstances for a couple of reasons.

One is the behavior with your son I think isn't scored by the guidelines, and that was severe in my judgment.

Number two is the woman who you theoretically love, you left her in a position where by your own testimony she was in pretty severe distress when you left her.

Number three, you've shown a complete lack of any remorse really. I think your apology today, which I let you express directly to the victim, is probably a bit of progress. But your comments here today, it's certainly your right to appeal, they're an outline for your appellate argument. Your letter to me essentially blames everybody else for this problem.

And number four, there's a pattern here of violence against women which I think isn't scored by the guidelines and justifies this lengthy sentence.

We agree that defendant's lack of remorse is not an "objective and verifiable" factor that the sentencing court was permitted to consider as a substantial and compelling reason for departure. *People v Daniel*, 462 Mich 1, 6-8; 609 NW2d 557 (2000). Nevertheless, the trial court identified several other reasons for its upward departure. Because defendant's disciplining his son with a belt, and his subsequent beating of the victim when she attempted to intervene are actions and events that are "external to the minds of the judge, defendant, and others involved in making the decision" and are "capable of being confirmed," *Abramski*, *supra* at 75, the circumstances surrounding the offense constitute objective and verifiable factors that the trial court was permitted to consider. The trial court was also permitted to consider defendant's lengthy history of assaults on women. Although the guidelines already took into account defendant's prior criminal record, it did not account for the objective and verifiable fact that defendant has engaged in a pattern of assaultive behavior toward the victim and other women that has become increasingly severe.

If a trial court articulates multiple “substantial and compelling” reasons for a departure from the guidelines, and this Court determines that only some of the reasons are substantial and compelling, this Court must determine whether the trial court would still have departed from the guidelines to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3); *People v Babcock (Babcock III)*, 469 Mich 247, 260-261; 666 NW2d 231 (2003). The trial court’s statements reveal that any failure on defendant’s part to express remorse was incidental to the other stated reasons for departure. The other articulated reasons focused on defendant’s violent behavior and pattern of physically assaulting women. It is evident from this record that the trial court would have departed to the same degree on the basis of the remaining factors that were objective and verifiable and substantial and compelling.

In a supplemental brief, defendant raises two additional issues. Defendant first argues that he was denied his right to due process and equal protection when the trial court granted the prosecutor’s challenge for cause. We review for abuse of discretion a trial court’s rulings on challenges for cause based on bias. *People v Williams*, 241 Mich App 519; 616 NW2d 710 (2000). MCR 2.511(D)(3), (4) and (5) provide in pertinent part that a prospective juror may be excused for cause for demonstrating a bias for or against a party, showing a state of mind that will prevent the juror from rendering a just verdict, or having opinions that would improperly influence the juror’s verdict. This Court defers to the trial court’s superior ability to assess a prospective juror’s demeanor to determine whether the person would be impartial. *Williams, supra*.

In this case, the prospective juror refused to answer the prosecutor’s question about whether any of her relatives had been “locked up.” After the trial court probed the question, the prospective juror indicated that she felt as though she was on trial. She also indicated that she was concerned about the racial composition of the jury. Additionally, the court deputy reported to the trial court that he had witnessed a momentary “flirtation” between the prospective juror and defendant. On this record, we conclude that the trial court did not abuse its discretion by excusing the prospective juror for cause.

Defendant also argues that *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 403 (2004), applies to the sentencing in this case. We disagree. The Michigan Supreme Court noted in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) that *Blakely* does not affect Michigan’s sentencing system.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood