STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 249829 Wayne Circuit Court
CLIFFORD EUGENE BRYANT, Defendant-Appellant.	LC Nos. 03-001945-01 03-004666-01

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals of right from his jury trial conviction for assault with intent to cause great bodily harm, MCL 750.84 (Lower Court No. 03-001945-01). Defendant also appeals as of right from his jury trial convictions for two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, discharging a weapon in a building, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 227b (Lower Court No. 03-004666-01). He was sentenced to six years and eight months to ten years' imprisonment for each of the three assault with intent to do great bodily harm convictions, two years and eight months to four years' imprisonment for the felonious assault conviction, and two years and eight months to four years' imprisonment for the discharging a weapon in a building conviction, to run concurrently, and to a consecutive two years' imprisonment for the felony-firearm conviction.

The convictions resulting from Lower Court No. 03-004666-01 stem from an August 2001, incident in which defendant shot Lathell Woodruff, his girlfriend, three times, once in each leg, and the other in her arm. Defendant argued that it was in self defense because Woodruff had poured a mop bucket of water on him and cut him with a knife.

The convictions resulting from Lower Court No. 03-001945-01 stem from a January 25, 2003, incident from which there was testimony supporting that defendant beat Woodruff with "everything," including his fists, candlesticks, glass objects, a chair, chair legs, and a baseball bat. Defendant testified that he only hit Woodruff a couple times with his fist and she fell through a table.

Defendant first contends that the trial court denied him due process by admitting unfairly prejudicial photographs of Woodruff and her injuries. We disagree, as the trial court did not abuse its discretion in declining to exclude the challenged photographs.

We review for a clear abuse of discretion the trial court's decision to admit or exclude evidence. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Ackerman*, 257 Mich App 434, 437; 669 NW2d 818 (2003). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Prior to trial, defendant, anticipating the admission of the photographs, argued that the prejudicial affect of admitting the photographs would substantially outweigh the probative value of admitting them. Defendant argued that the photographs would inflame and distract the jury. The prosecution argued that the photographs were a fair depiction of what Woodruff looked like after the incident. The trial court found that the photographs were relevant to defendant's intent when the injuries were inflicted.

This Court stated the principles applicable to our review with regard to admissibility of evidence in *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), as follows:

> Generally, all relevant evidence is admissible at trial. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. [Citations omitted.]

Defendant does not challenge the relevancy of the photographs. The challenged photographs were clearly relevant to the extent of the injuries and how the injuries occurred, as defendant contended the injuries were caused by a fall and the prosecution's contention was that defendant beating Woodruff caused the injuries. Clearly, photographs of the injuries are relevant to whether the injuries occurred via falling or from a beating, as the types of wounds could make defendant's argument less probable than it would be without the evidence. Further, the extent of the injuries was relevant to defendant's intentions for purposes of the crime; i.e., whether he intended to murder or do great bodily harm. Thus, the challenged photographs were relevant.

Defendant argues that the photographs should not have been admitted because the probative value was substantially outweigh by the danger of unfair prejudice. As noted above, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403, *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). This Court has noted in the past that, by definition, all relevant evidence introduced against a defendant "is somewhat prejudicial to a defendant . . . ." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Therefore, the question is not simply whether the evidence prejudices defendant, but rather, whether the evidence is unfairly prejudicial. *Ackerman, supra* at 442. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.*, quoting *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (internal

quotations omitted). "The trial court is in the best position to gauge the effect of such testimony." *Id*., citing *Maygar, supra* at 416. The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the evidence. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant's claim of prejudice is based on the gruesome nature of the photographs, and that three of the five photographs depict Woodruff in a hospital bed and do not specifically depict the injuries. We conclude the trial court did not abuse its discretion by declining to exclude the photographs because the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Aldrich, supra* at 115.

The close up photographs of the head injuries, which could be classified as the most gruesome, were highly relevant to the extent of the head injuries. These photographs were highly relevant because they corroborated the testimony of Woodruff and other witnesses that the injuries occurred from defendant beating Woodruff with a baseball bat and other objects; contrary to defendant's contention that he only hit her with his fists and that the head injury occurred when she fell through a table. Photographs may properly be used to corroborate a witness' testimony and gruesomeness alone will not cause the exclusion of relevant evidence. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, remanded on other grounds 450 Mich 1212; 539 NW2d 504 (1995); *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). The trial court did not abuse its discretion in finding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

The three photographs that do not specifically depict the head injury, the photographs of Woodruff in the hospital bed, depict the bruising on the arms and hands; thus, are relevant to Woodruff's testimony that defendant was beating her all over. In addition, the photographs of Woodruff in the hospital bed are also the least gruesome and seemingly least prejudicial. Because the trial court is in the best position to contemporaneously assess whether the danger of unfair prejudice substantially outweighs the relevancy of evidence, the record here simply does not establish that the trial court abused its discretion finding the evidence relevant and not excluding the evidence under the balancing test of MRE 403. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Moreover, even if admitting the three photographs of Woodruff in the hospital bed was a close question, no abuse is demonstrated. "The trial court's decision on close evidentiary questions cannot 'by definition' be an abuse of discretion." *Layher, supra* at 761, quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).[1]

[1] Furthermore, even if the trial court did abuse its discretion in admitting the challenged photographs, reversal is not required because it does not affirmatively appear that it is more probable than not that any error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Defendant's second issue on appeal is that the trial court violated his due process rights by admitting evidence of a prior assault where the danger of unfair prejudice substantially outweighed the probative value. We disagree.

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *Crawford, supra* at 383. An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Rice (On Remand), supra* at 439. As to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, the determination is best left to the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *Magyar, supra* at 416.

MRE 404(b), governing admission of evidence of bad acts, provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994); *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004). The list of exceptions in MRE 404(b) is nonexclusive. *Sabin (After Remand), supra* at 56; *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990).

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet, supra* at 74; *Magyar, supra* at 414. The proffered evidence would be unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Ortiz, supra* at 306. Upon request, the trial court must provide a limiting instruction, *Knox, supra,* but in the absence of either a request or an objection, a trial court is under no duty to give such an instruction sua sponte, *Rice (On Remand), supra* at 444.

Prior to any testimony, defense counsel informed the trial court that it anticipated some mention of alleged conduct that happened before the offense at issue, and contended that the prejudicial impact would outweigh the probative value. The trial court indicated that if it was a part of a sequence of events it would not preclude it, but noted that defendant could bring it up

again.[2] Then during the trial the following colloquial occurred when the prosecution was questioning Woodruff:

> *Q*. When he jumped up what was going through your mind at that point?
>
> *A*. I felt that he was going to jump up and beat me because later on, earlier that month he beat the dog mess out of me where I couldn't go up and down the steps.
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> *Mr. Washington*: Excuse me, Judge, I'm just going to make a continuing objection to this response.
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> *The Court*: It shows what her state of mind was and the reason for it.
>
> *Mr. Beadle*: Sure does.
>
> *The Court*: So I'll overrule the objection.

Woodruff also indicated that this beating occurred a few weeks prior.

First, the evidence was admitted for a proper purpose because Woodruff's state of mind was relevant to explain why she cut defendant with a knife, which was relevant based on defendant's contention that he acted in self defense. Defendant contended that he was acting in self-defense because Woodruff threw mop water on him and cut him with a knife. Woodruff testified that she cut defendant with the knife because she was scared when he jumped up; Woodruff's state of mind, with regard to whether she had been beaten before, is relevant to her credibility and defendant's claim of self defense. The evidence was not admitted to show defendant's character was to harm Woodruff nor was it introduced to show conformity therewith. See MRE 404(b)(1). As noted, bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *VanderVliet, supra* at 64; *Houston, supra* at 468-469.

In the present case, the other acts evidence was to negate defendant's claim that he acted in self defense and to support the prosecution's contention that Woodruff's state of mind was that defendant was the aggressor. The testimony is relevant in that respect because defendant claimed that he did nothing and that Woodruff just attacked him and Woodruff claims that she stabbed defendant because he jumped up at her and she feared him. Additionally, the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. The testimony was limited, and defendant has failed to show that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion by admitting this evidence. The prosecutor's argument in support of

[2] The court may delay its ruling on the admissibility of bad acts evidence until the presentation of proofs, to enhance its ability to assess the pertinent considerations. *People v Katt*, 248 Mich App 282, 308; 639 NW2d 815 (2001).

admittance was not devoid of merit, thus, we cannot conclude, giving the required deference to the trial court, that admission of the evidence constituted an abuse of discretion.

Further, error in the admission of bad acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative; and defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Given the eyewitness accounts of the shooting and overwhelming evidence of defendant's guilt, the fact that defendant does not dispute that he shot Woodruff three times, the limited significance of the challenged testimony, defendant has failed to show that it is more probable than not that, assuming error, the error was outcome determinative. See *id*.; see also *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).[3] Moreover, any unfair prejudicial effect from the prosecutor's statements could have been cured with a timely instruction from the trial court; thus, no there is no error requiring reversal. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant's third issue on appeal is that his convictions and sentences for three assault counts arising out of the single incident involving one victim violated constitutional protections against double jeopardy. We agree.

A double jeopardy issue presents a significant constitutional question which will be considered on appeal regardless whether the defendant raised it before the trial court, *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), but to avoid forfeiture when not raised before the trial court the defendant must show that plain error occurred which affected substantial rights, and reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence, *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003).

Defendant was convicted for two counts of assault with intent to do great bodily and one count of felonious assault for the August 2001 incident in which he shot Woodruff three times. There was evidence to support that defendant asked Woodruff why she had cut him and then shot her in the leg, asked her again why she had cut him and shot her in the other leg, and then as Woodruff fled the house defendant shot her in the arm while she was in the yard. Defendant

[3] Defendant notes in his brief on appeal the prosecutor did not file a 404(b)(2) notice, but any error in this regardless was harmless because of the admissibility of the evidence, the fact that defendant was aware prior to trial as he raised the issue during voir dire, and the fact that defendant has not indicated on appeal or on the record how he would have responded differently if a notice was filed. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001). "The requirement under MRE 404(b)(2) that the prosecution provide notice of the general nature of the other acts evidence and rationale for admitting the evidence is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether the exclude the evidence under MRE 403." *Sabin (After Remand), supra* at 68.

contends that the three assault convictions and sentences for the three shootings violated his right against double jeopardy and against the intent of our Legislature.

In *People v Ford*, 262 Mich App 443, 447-450; 687 NW2d 119 (2004), this Court recently provided the following regarding double jeopardy and multiple punishments for one offense:

> Both the United States and Michigan Constitutions prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004). The Double Jeopardy Clause of the United States Constitution, Am V, provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The Clause applies to the states through the Fourteenth Amendment. *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). The Michigan Constitution provides: "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. This provision is "essentially identical" to its federal counterpart, *Nutt, supra* at 575, and was intended to be "construed consistently with the corresponding federal provision." *Id*. at 594.
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> Both federal and Michigan double jeopardy provisions afford three related protections: 1) against a second prosecution for the same offense after acquittal; 2) against a second prosecution for the same offense after conviction; and 3) against multiple punishments for the same offense. *Id*. at 574; *Pearce, supra*. The first two protections against successive prosecutions "involve the core values of the Double Jeopardy Clause, the common-law concepts of autrefois acquit and convict." *People v Robideau*, 419 Mich 458, 484; 355 NW2d 592 (1984). The purposes of double jeopardy protections against successive prosecutions for the same offense are to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. *People v Sturgis*, 427 Mich 392, 398-399; 397 NW2d 783 (1986). But the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. *Id*. at 399; [*People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003)]. "The Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature." *Robideau, supra* at 469, citing *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Accordingly, the Double Jeopardy Clause does not limit the Legislature's ability to define criminal offenses and establish punishments, *Sturgis, supra* at 400, and the "only interest of the defendant is in not having more punishment imposed than that intended by the Legislature," *Robideau, supra* at 485.
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> [U]nder both the federal and Michigan Double Jeopardy Clauses the test is the same: "in the context of multiple punishment at a *single* trial, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent." [*Sturgis, supra*] at 399.

First, we address whether the multiple convictions for assault with intent to do great bodily harm with regard to Lower Court No. 03-004666-01, violated defendant's double jeopardy protection against multiple punishments for the same offense. The dispositive question, with regard to the assault with intent to do great bodily harm convictions is whether the Legislature intended that two convictions might result under MCL 750.84; "under the circumstances presented in this case." *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983); see also *Barber, supra* at 293. This requires us to determine the appropriate "unit of prosecution" for assault with intent to do great bodily harm. See *id*. at 111-112.

In *Wakeford, supra* at 111-112, our Supreme Court indicated that the "primary purpose of the [armed robbery] statute is the protection of persons," thus, the unit of prosecution was the person or that defendant could be convicted and sentenced more the once under the armed robbery statute for each individual person that was victimized. In *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992), this Court evaluated the purpose of the assault with intent to do great bodily harm less than murder statute and held "the emphasis is on punishing crimes injurious to other people." Similar to armed robbery in *Wakeford, supra*, the appropriate unit of prosecution for assault with intent to do great bodily harm is the person; thus, with one person assaulted the two shots fired only supported one conviction because only one person was affected. See, generally, *Barber, supra* at 292-294; *People v Dowdy*, 148 Mich App 517, 520-521; 384 NW2d 820 (1986); *People v Feldscher*, 146 Mich App 49, 52; 380 NW2d 50 (1985).

Basically, the same analysis applies to multiple convictions under different statutes for the same offense; i.e., "[w]hether multiple punishments may be imposed under Michigan's Double Jeopardy Clause when different criminal statutes cover the same conduct is also determined by whether the Legislature intended to impose multiple punishments." *Ford, supra* at 449. Under the state constitution, legislative intent is determined by "traditional means . . . such as the subject, language, and history of the statutes." *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). Relevant factors to consider in determining legislative intent include, but are not limited to, whether each statute prohibits conduct violative of distinct social norms, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. *Id*.; *Ford, supra* at 450-451.

The prima facie case of assault with intent to do great bodily harm less than murder requires proof of "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) [a specific] intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "Felonious assault is defined as a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). We note that felonious assault is not a necessarily included offense of assault with intent to do great bodily harm because one can commit assault with intent to do great bodily harm without committing felonious assault because felonious assault requires the use of a dangerous weapon.

See *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).[4] But assault with intent to do great bodily harm and felonious assault do have similar elements, as both require an assault plus specific intent.

Further, the purpose of the assault statutes is to punish crimes against persons. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). Thus, with MCL 750.82, felonious assault, the primary purpose is the protection of the person, same as MCL 750.84, thus, MCL 750.82 should not be viewed as separate basis for multiple punishment for what would otherwise be considered the same offense. '"Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments.'" *Ford, supra* at 450, quoting *Robideau, supra* at 487-488. Clearly, the two statutes are to prohibit violations of the same societal norm, protection of persons from assaults, albeit in a somewhat different manner, thus, we conclude that the Legislature did not intend multiple punishments. But in *Lugo, supra*, this Court held there is no violation of double jeopardy protections if one crime is complete before the other takes place, even where the offenses share common elements or one constitutes a lesser offense of the other.

The prosecution contends that the incidents leading to the convictions were three separate and distinct incidents because defendant shot once then asked why Woodruff cut him and then shot again, and then shot her as she was fleeing. We disagree, as the incident was the continuing sequence and the incidents were not separate and distinct.

In *Lugo, supra*, this Court explained that the defendant's dual convictions of felonious assault and assault with intent to do great bodily harm were permissible, although they both arose from the same altercation between the defendant and a police officer, because each conviction was predicated on a separate and distinct act occurring one after the other during the altercation. *Id*. at 709. Similarly, this Court in *Colon, supra* at 62-63 citing *Lugo, supra*, stated that the defendant's convictions of assault with intent to murder and assault with intent to do great bodily harm less than murder did not violate double jeopardy protections when "the incidents composing these crimes were separate and distinct."

In the present case, during trial, the prosecution presented the crimes and portrayed the facts as a continuing sequence of events. See *People v Bulls*, 262 Mich App 618, 629; 687 NW2d 159 (2004). Like the prosecution in *Bulls, supra*, the prosecution in this case presented a "continuing enterprise," as there was no time period in between like in *Colon, supra*, or completing an assault with one weapon and then using another like in *Lugo, supra*. The prosecution presented the case as defendant shooting Woodruff in one leg, asking her why she

[4] We also note that the trial court was not even permitted to instruct the jury on felonious assault because the charge to the jury was assault with intent to commit murder, MCL 750.83, and felonious assault was improperly instructed as a lesser offense because it is a cognate lesser offense of assault with intent to commit murder. See *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). Defendant was charged with assault with intent to commit murder, and assault with intent to do great bodily harm is a lesser included offense of assault with intent to commit murder.

stabbed him, then shooting her in the other leg, then when she was trying to run away he attempted to shoot her in the head, but shot her in the arm. The case was presented as one continuing sequence and with the use of one weapon.[5]

For the above reasons, we find that the legislature did not intend for an offender to be convicted under both MCL 750.82 and MCL 750.84 or for multiple convictions under MCL 750.84, when the proofs at trial supported that only one person was assaulted and both statutes were violated during the same incident, with the same weapon, and without a distinct lapse of time. Defendant's right not to have more punishment imposed than the legislature intended has been violated. See *Ford, supra*. We vacate one of defendant's convictions for assault with intent to do great bodily harm and defendant's conviction for felonious assault.

Defendant's final issue on appeal is that the trial court improperly exceeded the minimum sentence range prescribed by the legislative sentencing guidelines. We agree because the trial court articulated reasons already accounted for in the offense variables without finding that the offense characteristic was given inadequate or disproportionate weight.

Generally, under the sentencing guidelines act, a court must impose a sentence within the appropriate sentence range. MCL 769.34(2), *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3), *Hegwood, supra* at 439. A court may not depart from a sentencing guidelines range based on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3), *People v Hendrick*, 261 Mich App 673, 682 NW2d (2004). Factors meriting departure must be objective and verifiable,[6] must "keenly" attract and "irresistibly" hold the court's attention, and must be of "considerable worth." *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). And, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 264.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion.

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[5] Conceivably, under the prosecution's view, several convictions could arise out of one criminal incident if defendant just kept shooting. See *Feldscher, supra* at 52.

[6] "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, 261 Mich App 624, 636 NW2d (2004).

Id. at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In terms of sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269.

The trial court exceeded the guidelines for each sentence except for the felony-firearm sentence. At the sentencing hearing, as a basis for the upward departure, the trial court provided that there was a pattern of conduct, the manner in which defendant assaulted Woodruff, and the fact that Woodruff will be deformed for life. The trial court also provided in its departure evaluation that its reasons for departure were that defendant had assaulted Woodruff with a baseball bat, shot her three times, if she had not moved her arm to block the bullet she would have been shot in the head, and that her arm is severely deformed from this shooting.

Defendant argues that some of the trial court's reasons for departure were already accounted for in the scoring, and therefore, cannot serve as a basis of departure. Seemingly, the trial court substantially relied on the fact that Woodruff's deformed arm as a basis for its departure. Defendant was assessed twenty-five points for Offense Variable (OV) 3**,** indicating that the victim sustained a life threatening or permanent incapacitating injury. MCL 777.33(1)(c). Apparently, OV 3 was scored at twenty-five points because Woodruff's arm was permanently disabled. A court may not base a departure on an offense characteristic or offender characteristic already taken into account unless the court finds, based on the facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b), *Hendrick, supra* at 682. Woodruff's permanently deformed arm was articulated by the trial court as a reason for departing and was a factor already considered in determining the guidelines range; the trial court did not find based on the facts in the record that the characteristic was given inadequate or disproportionate weight. It would have been proper if the trial court had merely recognized and articulated that twenty-five points was inadequate for OV 3 because not only was Woodruff's arm disabled, but it was also severely deformed. The trial court did not do this and, thus, we must remand for resentencing or rearticulation of substantial and compelling reasons for departure.

We note that the record reveals numerous factors that we would deem substantial and compelling reasons for departure, including the pattern of conduct, that defendant would have shot Woodruff in the head were it not for her raising her arm, and the extent and manner of the beating in January 2003. We also observe that the victim suffered significant injuries including the permanently disabled arm and that this factor along with others, such as exploitation of a domestic relationship (OV 10), may well have been given inadequate weight by the record variables, but it is for the trial court to make this determination. As *Babcock* makes clear, it is for the trial court to articulate substantial and compelling reasons for departure and, where necessary, to explain how the guidelines scoring failed to give adequate weight to certain variables. Indeed, despite ample support for departure, our Supreme Court explicitly ruled that we cannot affirm a sentence on the basis that, even though the trial court did not properly articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. *Babcock, supra* at 258-259. Here, we cannot determine "whether the trial court . . . would have departed to the same degree on the basis of the substantial and compelling

reasons alone," or would have found that Woodruff's disabled arm was not adequately accounted for in the scoring of OV 3. See *id*. at 260.[7]

Lastly, defendant requests that this Court order resentencing before a different judge. Here, there is no reason to expect that the original trial judge would have difficulty properly sentencing defendant on remand. We believe reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. See *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Consequently, there exists no reason to assign a different judge to conduct the resentencing.

We vacate one conviction and sentence for assault with intent to do great bodily harm and the conviction and sentence for felonious assault with regard to Lower Court No. 03-004666-01. The remainder of defendant's convictions are affirmed. We remand for resentencing or rearticulation of substantial and compelling reasons to support the upward departure for the remainder of the convictions. Further, on remand we direct the trial court to clarify the scoring for each offense and the proper sentencing guideline range because it is difficult to ascertain from the lower court record how the offenses were scored and what appropriate guidelines range was for the different offenses.[8]

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[7] Defendant also contends that he was deprived of his constitutional right to due process because the trial court's departure violates his right to jury trial as enunciated in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) and in *Blakely v Washington*, 542 US ; 124 S Ct 2531; 159 L Ed. 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), a majority of the Justices on the Michigan Supreme Court found that *Blakely*, which considered whether facts that increase the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to the jury, did not affect or impact Michigan's scoring system, which establishes the recommended minimum sentence. Accordingly, defendant's argument is rejected. Specifically, our Supreme Court stated that "the Michigan [statutory guideline sentencing] system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." *Id.* at 731 n 14.

[8] Clarification is required because the proper sentencing guidelines range and scoring for the offenses was unclear to this Court: (1) based on a clear mistake in the presentence investigation report, (2) the sentencing information reports are unclear and appear mixed up, and (3) with regard to an issue raised at sentencing. The presentence investigation report provides that the sentencing guidelines range was thirty-four to sixty seven months for Lower Court No. 03-001945-01 and fourteen to twenty-nine months for Lower Court No. 03-004666-01. As acknowledged in the prosecution's brief on appeal this was improper as fourteen to twenty-nine months is clearly not the proper sentencing guidelines range for the assault with intent to do great bodily harm conviction (one of defendant's convictions under Lower Court No. 03-004666-01). The sentencing information reports, which are in the files, are not even clear as to which conviction and file number they are related to, and it appears that only one sentencing information report was completed for assault with intent to do great bodily harm for both Lower Court No. 03-001945-01 and 03-004666-01, even though the scoring may be different. At sentencing defendant questioned the scoring of OV 1 at twenty-five points for the Lower Court No. 03-001945-01 assault with intent to do great bodily harm conviction because there was no discharge of a firearm. Although, the prosecution agreed with defendant on this scoring, the trial

(continued…)

We affirm in part, vacate in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

(…continued)

court, seemingly, did not address the issue and went on to sentence defendant.