

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON KYLE MILLER,

Defendant-Appellant.

UNPUBLISHED

November 24, 2009

No. 285797

Midland Circuit Court

LC No. 07-003054-FH

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Defendant was convicted by a jury of assault with a dangerous weapon (felonious assault), MCL 750.82. He was sentenced to 17 months to 4 years in prison. Defendant now appeals by leave granted. We affirm.

Defendant stabbed Ryan Hackler in the leg one evening after he had been drinking with Hackler, Ronald Walters, and another acquaintance. Defendant testified that he stabbed Hackler outside on a patio in the presence of Walters. Walters testified similarly. Defendant also testified that beforehand, while inside a motel room when Walters was not present, Hackler tried to choke him with a towel. Defendant claimed that he stabbed Hackler in self-defense because of the earlier incident with the towel and because Hackler was verbally threatening defendant.

Defendant first argues that he was denied a fair trial because the prosecution failed to subpoena and produce Hackler, a *res gestae* witness. The prosecution intended to produce Hackler as a witness and had indicated to defendant and the trial court before trial that Hackler would appear despite the fact that he now resided in Florida. On the day of trial, however, Hackler failed to appear and the prosecutor stated that Hackler had changed his mind about coming back to Michigan and testifying at trial. Defendant argues that Hackler's testimony was vital to his defense of self-defense.

In *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004), this Court stated the following:

A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due

diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. CJI2d 5.12[.] [Citations omitted.]

We review for an abuse of discretion the trial court's determination of due diligence and the appropriateness of giving a “missing witness” instruction. *Eccles, supra* at 389.

Hackler was an endorsed witness. The prosecution recounted that it made several efforts to secure Hackler's appearance and was told only a few days before trial that he did not intend to come. However, the trial court noted that the prosecution did not serve a subpoena on Hackler in Florida, whether due to cost or time consumption, and thus the court decided that defendant was entitled to the missing witness instruction. The trial court instructed the jury as follows:

Ryan Hackler is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

Although defendant argues that he was deprived of a fair trial because of Hackler's failure to appear, the missing witness instruction allowed the jury to conclude that Hackler's testimony would have confirmed what defendant asserted had transpired inside the motel room and on the patio. Thus, the instruction served to ensure that defendant received a fair trial.¹

Defendant next argues that the statutory provision governing intermediate sanctions, MCL 769.34(4), limited his incarceration to a statutory maximum of 12 months in jail, and that the United States Supreme Court's decisions in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), therefore constitutionally precluded any upward departure based on judicial factfinding as opposed to a jury's determination of the facts. We review de novo constitutional questions and the interpretation and application of the statutory sentencing guidelines. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004); *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

While this Court previously agreed with the argument posed by defendant, *People v Uphaus*, 275 Mich App 158; 737 NW2d 519 (2007), the *Uphaus* opinion was later reversed on this issue, 480 Mich 939 (2007), and expressly rejected by our Supreme Court in *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007). The *Harper* Court held:

¹ We also note that defendant never requested an adjournment of the trial due to Hackler's absence. Additionally, we reject defendant's argument that reversal is necessary because the trial court gave the jurors the mistaken impression that the prosecutor was free of any fault relative to Hackler's failure to appear. Defendant received, to the detriment of the prosecution, the benefit of the missing witness instruction, which indicated that the prosecutor was responsible for procuring Hackler's presence at trial, thereby suggesting that the prosecution failed in meeting its responsibility. We fail to see how defendant was deprived of a fair trial simply because the court did not expressly and specifically lay blame on the prosecutor by way of additional statements or instructions to the jury.

Under Michigan law, the *maximum* portion of a defendant's indeterminate sentence is prescribed by MCL 769.8(1), which requires a sentencing judge to impose no less than the prescribed statutory maximum sentence as the maximum sentence for most felony convictions. Michigan's unique law requiring the imposition of an intermediate sanction upon fulfillment of the conditions of MCL 769.34(4)(a) does not alter the maximum sentence that is required upon conviction and authorized by either the jury verdict or the guilty plea. Rather, the conditional limit on incarceration contained in MCL 769.34(4)(a) is a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury verdict or the guilty plea, a circumstance that does not implicate *Blakely*. [*Harper, supra* at 603-604 (citations omitted; emphasis in original).]

Accordingly, defendant's argument here does not warrant relief.

Finally, defendant argues that the trial court's departure from the sentencing guidelines was not based on substantial and compelling reasons. A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and states on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). If the sentence constitutes a departure from the guidelines range, the trial court's articulation of the reasons for departure must be sufficient to permit effective appellate review. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). Factors cited in support of a departure must justify not only departure but also the extent of the particular departure made, must be objective and verifiable, must keenly or irresistibly grab the court's attention, and must be of considerable worth. *Id.* at 299-303. To be objective and verifiable, the factors must be actions or occurrences external to the mind of the judge and must be capable of being confirmed. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The court may draw inferences about the defendant's behavior from objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008) ("trial court drew reasonable conclusions about defendant's actual behavior to depart from the guidelines").

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination 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(s) constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion and the amount of the departure is also reviewed for an abuse of discretion. *Smith, supra* at 300; *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion occurs when the sentence imposed is not within the range of principled outcomes. *Smith, supra* at 300. In ascertaining whether the departure was proper, we must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock, supra* at 270.

The trial court departed from the sentencing guidelines by sentencing defendant to a minimum of 17 months in prison, as opposed to an intermediate sanction as set forth in MCL 769.31(b). If the trial court had followed the guidelines, it would have issued an intermediate sanction, such as a jail term of 12 months, because the minimum range of 2 to 17 months was less than 18 months. MCL 769.34(4)(a).

The trial court noted that until his divorce in April 2006, defendant had a good job as a machinist, lived in a nice home, and volunteered in the community. But after the divorce, his life, according to the trial court, began a swift downhill slide. He became homeless, and between April 2, 2006, and October 27, 2006, defendant committed five crimes, three of them within three days of each other. The crimes were disorderly conduct, OUIL, open intoxicant, assault and battery, and the present felonious assault offense. The court observed, "It's like a switch got flipped in your brain and all of a sudden this good guy is doing really bad stuff." The court noted that jail staff had to restrain defendant on multiple occasions since his conviction "because of what's [been] described as aggressive, violent, and non-compliant behavior." The trial court noted that defendant told one deputy "to watch her back," which the court stated could only be construed as a threat of physical harm. The court expressed that there was something wrong with defendant's decision-making process, that his behavior had become erratic, and that defendant was in need of psychiatric care. The trial court indicated that defendant could not conform his conduct to a level acceptable by society. The court decided to sentence defendant to the Department of Corrections (DOC), which the court believed had the necessary resources to help defendant with his mental health issues. The court observed, however, that even if the local community had the resources to give defendant the help he needed, a 12-month jail sentence would not be appropriate because defendant would be out in approximately five months in light of credit for time served and that would be "insufficient time for me to feel comfortable that you are not a threat to yourself or to the community."

On review of all of the trial court's statements at sentencing, the reasons given for departure can be summed up as (1) defendant was a threat to the safety of the community, as well as himself, and (2) he had psychiatric issues and needed treatment, which the DOC could provide defendant given its resources, and which resources the county was lacking. Underlying these conclusions were the trial court's observations that defendant often failed to grasp basic concepts throughout the proceedings no matter how thoroughly the concepts were explained to him, that defendant's recent history following his divorce included bizarre behavior and a rash of illegal activities, and that defendant behaved in a violent, aggressive, and noncompliant manner relative to his time in jail and interaction with jail personnel.

With respect to defendant's actions while in jail, the presentence investigation report (PSIR) indicates that defendant was placed in isolation because of continuing destructive behavior, that he was written up for violating administrative rules, for insolence, and for conduct that disrupted security, and that defendant "appears to be quite unbalanced and goes into verbal tirades on a regular basis." With respect to defendant's recent history, the PSIR reveals that defendant was convicted of four misdemeanors in 2006 and that he had an assault and battery conviction in 1992. The PSIR also reflects that defendant's ex-wife obtained a PPO against him, that defendant had previously threatened to shoot himself and his ex-wife, and that his ex-wife feared him because of his alcoholism and because he had pulled a knife and a gun on her on two separate occasions. However, the trial court, following an objection, did state that it would not consider the PPO and the incidents relative to defendant's ex-wife for purposes of departure.

In *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004), this Court stated that the "trial court's conclusion that defendant was a danger to himself and the public was not *itself* an objective and verifiable factor" for purposes of departing from the guidelines. (Emphasis added.) The *Solmonson* panel, however, further indicated that the court's conclusion

that the defendant was a danger to himself and the public was based on the defendant's extensive criminal history of drinking-and-driving convictions. *Id.* The Court held that the "defendant's extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court's legitimate concern for the protection of society," justified a prison sentence and supported the conclusion "that an intermediate sanction . . . would be less likely to further the traditional goals of sentencing than a prison sentence." *Id.* at 671-672.

Additionally, as noted above, "[t]he requirement that the trial court base its decision to depart on objective and verifiable facts – i.e., actions and occurrences external to the minds of those involved in the decision and capable of being confirmed – [does] not preclude the court from drawing inferences about defendant's behavior from objective evidence." *Petri, supra* at 422.

Here, the trial court's conclusions that defendant was a danger to the community and that he had psychiatric issues requiring treatment could not form a basis for departure, in and of themselves. The court, however, reasonably drew these conclusions from objective and verifiable factors that included defendant's behavior throughout the proceedings as observed by the trial court, his criminal activities following his divorce, and defendant's behavior in jail as observed by jail personnel. Defendant's erratic, destructive, hostile, criminal, and troublesome behavior in court, in public, and in jail provided substantial and compelling grounds for the trial court to depart from the guidelines and sentence defendant to prison. Objective evidence relative to defendant's behavior gave rise to "the trial court's legitimate concern for the protection of society[.]" *Solmonson, supra* at 671. There is no appellate claim by defendant that his actions in court, in public, and in jail did not occur as asserted, and thus the trial court did not clearly err with respect to its factual determinations. The trial court's ruling that substantial and compelling reasons supported a sentencing departure, along with the court's decision regarding the extent of the departure, do not fall outside a range of reasonable and principled outcomes; there was no abuse of discretion.²

² We do find somewhat problematic that part of the trial court's ruling that defendant needed to be sentenced to prison because a prison environment would provide the necessary psychiatric care that would not otherwise be available to defendant locally or in the county jail. To the extent that this is not a substantial and compelling reason for departure, resentencing remains unnecessary. In *Babock, supra* at 260-261, our Supreme Court stated:

[I]f the trial court articulates multiple reasons [for departure], 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

(continued...)

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra

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of Appeals must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure.

On examination of the record, although the trial court stated that it was sending defendant to prison because, in part, he need psychiatric assistance not available locally, the court also commented that, even if sufficient mental health treatment was available locally, it would nonetheless have sentenced defendant to prison because he was a danger to the public and himself. Therefore, the trial court would have similarly departed had it not considered the issue of available resources to treat inmates with psychiatric problems. It is evident that the trial court's overriding concern was the protection of the community and defendant himself given objective and verifiable factors showing that defendant indeed posed a danger.