

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 30, 2011

v

JOSHUA JAMES ARCHEY,

Defendant-Appellant.

No. 296757
Bay Circuit Court
LC No. 09-010143-FC

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84,¹ assault with a dangerous weapon (felonious assault), MCL 750.82, and interfering with electronic communications causing injury or death, MCL 750.540(5)(b). The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 24 to 50 years, 10 to 15 years, and 10 to 15 years, respectively. We affirm.

I

According to the prosecution's theory of the case, on February 13, 2009, at approximately 10:30 p.m., defendant struck the victim, Zachary Jones, repeatedly with a baseball bat on the head, body, and legs, and caused Jones to suffer severe injuries. A prosecution witness, Jenny Beson, who was with Jones at the time of the assault and witnessed its immediate aftermath, testified that she was walking from defendant's home to a bar across the street to obtain assistance for Jones's truck when she heard Jones yell. She returned to find Jones lying on the ground, with defendant standing over him. Defendant was holding a baseball bat. Beson covered Jones with her body and told defendant to stop. She then tried to call 911, but defendant took her cellular telephone and, according to Beson, told her that she was going to watch Jones die. She managed to obtain Jones's telephone and called the police as defendant fled.

¹ Defendant was acquitted of the greater charge of assault with intent to commit murder.

II

Defendant raises two concurrent claims of error concerning the trial court's jury instructions with regard to felonious assault. He maintains that, given the plain language of MCL 750.82,² the trial court erred when it failed to instruct the jury that, in order to find him guilty of felonious assault, it had to determine that he did not intend to murder or inflict great bodily harm on the victim. He also argues that trial counsel made a serious error by failing to request such an instruction. Because defendant failed to preserve a challenge to the trial court's jury instructions, defendant must establish plain error affecting his substantial rights in order to obtain relief. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Carines*, 460 Mich at 763. With respect to defendant's claim of ineffective assistance of counsel, defendant acknowledges that he failed to move for a new trial on the basis of ineffective assistance of counsel and failed to request a *Ginther*³ hearing. Thus, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995); *People v Jones*, 419 Mich 577, 579; 358 NW2d 837 (1984). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to determine whether there was error requiring this Court to reverse. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and

² MCL 750.82(1) provides, in pertinent part:

[A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both. [Emphasis added.]

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

according to prevailing professional norms.” *Id.*, quoting *Solmonson*, 261 Mich App at 663. “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*, quoting *Solmonson*, 261 Mich App at 663-664. Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The elements of assault with intent to commit great bodily harm less than murder are “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis removed). 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).

To the extent defendant argues that he could not properly be convicted of both assault with intent to commit great bodily harm and felonious assault, we note that the Michigan Supreme Court has held that convictions for both offenses arising out of one assault did not violate double jeopardy. *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007),

To the extent defendant argues that the trial court should have sua sponte instructed the jury on the intent element contained in MCL 750.82, we find that defendant is not entitled to relief. In light of *Strawther*, and in light of the Supreme Court’s previous decision that “negative elements” such as that concerning state of mind in MCL 750.82 need not be proven beyond a reasonable doubt by the prosecution, see, generally, *People v Doss*, 406 Mich 90, 98-99; 276 NW2d 9 (1979), the trial court’s error, if any, in providing the standard criminal jury instruction on felonious assault, CJI2d 17.9, was not “clear or obvious” so as to afford defendant relief. See *Carines*, 460 Mich at 763.

In addition, defendant cannot prevail on his concurrent ineffective assistance of counsel claim. In order to reach the conclusion that the trial court’s jury instructions were erroneous, one has to adopt what is essentially a novel legal theory, i.e., that while pursuant to *Strawther* it does not violate double jeopardy for a jury to convict a defendant of both felonious assault and assault with intent to commit great bodily harm, the jury should still not convict a defendant of felonious assault if it finds he has the particular intent necessary to convict him of assault with intent to commit great bodily harm. Trial counsel does not provide ineffective assistance in failing to make a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

III

Defendant next challenges the trial court’s scoring of 50 points for offense variable (OV) 7 under the sentencing guidelines. When scoring the guidelines, “[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular

score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Any interpretation of the sentencing statutes when considering the application of the sentencing guidelines presents a question of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Under MCL 777.37(1)(b), the trial court is to score OV 7 at 50 points if the court finds evidence of, among other things, “excessive brutality.” In arguing that the actions here did not amount to excessive brutality, defendant attempts to distinguish the facts at issue from those in *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993), abrogated in part on other grounds by *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). In *Hernandez*, the Court reviewed “excessive brutality” with respect to OV 2 of the judicial sentencing guidelines. *Id.* at 5-6. The plaintiff in that case pleaded guilty to a charge of assault with intent to commit murder after he attacked the victim with a baseball bat, knocking him to the ground, and then continued to hit the victim until the bat broke. *Id.* at 3-4. The Court held that “[t]here clearly [was] evidence supporting the judge’s initial scoring of fifty points for excessive brutality.” *Id.* at 21.

We find the facts in the instant case substantially similar to those in *Hernandez*. While defendant argues that the circumstances are different because the current assault occurred in a short period of time, the evidence presented supports a finding that defendant struck Jones many times, not only the three he admitted to. Along with testimony concerning Jones’s head wound, one of Jones’s treating physicians testified that Jones had facial abrasions, a laceration on his right leg, and bruises on his abdomen and “backside” that appeared consistent with blows from a baseball bat. He also had “multiple bruises on both sides of the chest and back and head and leg” that involved blunt force trauma. The physician testified that the head injury appeared consistent with a blow from a baseball bat, as did the blows to the abdomen and back, and thought that the other “major” injuries also looked to have been caused by the same blunt instrument. A paramedic who treated Jones also testified, describing, among other injuries, bruising along the whole right side of Jones’s torso.

In addition, not only did the prosecution provide evidence that defendant struck Jones repeatedly, another treating physician opined that Jones’s injuries were consistent with Jones having been struck either while his head was at “some lower position” or while he lay on the ground. This testimony is consistent with a statement made in a letter to the court by Jones’s mother, who recited Jones’s repeated assertions to her through gestures and basic speech that defendant struck him in the legs, abdomen, upper chest, and back before striking him in the head. Thus, the evidence supports a finding that defendant struck Jones in the head when he was already incapacitated from the previous blows.

Moreover, Beson testified that defendant was about to strike the obviously defenseless and bleeding Jones when she came upon the scene and was only deterred by Beson’s act of throwing herself over Jones to protect him.

Under the circumstances, we conclude that the trial court did not abuse its discretion when it decided to score 50 points for OV 7.

IV

Defendant next argues that the trial court erred when it scored five points for OV 10 on the ground that defendant exploited Jones either because Jones was intoxicated or because he was rendered unconscious at some point during the attack. MCL 777.40 provides, in pertinent part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious . . . 5 points

* * *

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

* * *

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

In deciding whether a score of 15 points for OV 10 was appropriate in *Cannon* (for predatory conduct under MCL 777.40(1)(a)), our Supreme Court held that to score OV 10 at 15 points there had to be exploitive conduct directed at a vulnerable victim. *Cannon*, 481 Mich at 156-159. Regarding vulnerability, the *Cannon* Court stated:

Thus, we conclude that points should be assessed under OV 10 only when it is readily apparent that a victim was “vulnerable,” i.e., was susceptible to injury, physical restraint, persuasion, or temptation. Factors to be considered in deciding whether a victim was vulnerable include (1) the victim’s physical disability, (2) the victim’s mental disability, (3) the victim’s youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable. [*Id.* at 158-159.]

Examining the instant case in light of *Cannon*, we find that one of the trial court's reasons for scoring OV 10 at five points, i.e., because Jones may have lost consciousness during the attack, was erroneous. Indeed, no evidence was presented to suggest that Jones was unconscious or semi-conscious before the attack. Instead, to the extent he was rendered unconscious from the blow to the head, it was due to a circumstance of the attack, not due to a particular susceptibility of Jones.

However, with regard to intoxication, evidence was introduced from which a reasonable person could find that Jones was intoxicated and that it was evident to defendant. Defendant and Jones had been drinking together. Further, evidence was introduced about the amount of alcohol Jones and the others drank while together. Perhaps the strongest evidence, however, was the blood test Jones was given at the hospital that showed he had a blood alcohol level of .08. Defendant's expert witness calculated that this would mean that Jones would have had to have consumed approximately nine drinks in the three hours before the assault. Given the effect of this amount of alcohol on, among other things, coordination, the trial court's inference that defendant would have been able to know that Jones was intoxicated was reasonable. Also, given Beson's testimony that defendant struck Jones without provocation rather than in self-defense, the trial court could have reasonably found that defendant deliberately chose a time when Jones was at least somewhat more vulnerable due to his intoxication to carry out the assault. Defendant has not shown that the trial court abused its discretion in finding that defendant exploited Jones's intoxication and in scoring five points for OV 10.

V

Defendant next argues that the trial court erred when it sentenced defendant to a 288-month minimum sentence for his conviction of assault with intent to commit great bodily harm, when 152 months was the upper limit for the minimum sentence range as scored. When we review a departure from the sentencing guidelines, the existence of a particular departure factor is a factual determination reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo, the determination that the factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, this Court defers to the trial court's knowledge of the facts and familiarity with the offender. *Babcock*, 469 Mich at 270. An abuse of discretion occurs when the trial court chooses an outcome falling outside the "principled range of outcomes." *Id.* at 269.

A court may depart from the sentencing guidelines if it has substantial and compelling reasons to do so and states the reasons for departure on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines based on an offense or offender characteristic already considered in scoring the guidelines unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth in determining a sentence. *Babcock*, 469 Mich at 257-258. To be objective and verifiable, factors must be actions or occurrences external to the mind and must be capable of being

confirmed. *Abramski*, 257 Mich App at 74. This Court reviews a departure from the guidelines to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock*, 469 Mich at 263 n 20, 264; *People v Smith*, 482 Mich 292, 299-300, 318-319; 754 NW2d 284 (2008). "The departure from the guidelines recommendation must contribute to a more proportionate criminal sentence than is available within the guidelines range." *Smith*, 482 Mich at 305 (internal quotation marks and citation omitted).

The trial court provided a number of reasons for its decision to depart from the guidelines. Defendant first argues that the trial court erred when it found that departure was warranted in part because the scoring of 25 points under OV 3 for a permanent, incapacitating injury was inadequate under the circumstances. MCL 777.33(1)(c) provides that 25 points are to be scored for OV 3 when "[l]ife threatening or permanent incapacitating injury occurred to a victim." The trial court found that this scoring, as well as the 10 points scored under OV 4 for psychological injury, was inadequate under the circumstances. As for OV 3, the court noted that this score would apply where, for example, there was a permanent injury to a victim's legs or hands so that he could not work. In comparison, however, the victim in the instant case was so totally incapacitated mentally and physically that he could no longer be left alone and could do "practically nothing." The trial court's reasoning was sound, and we will not disturb it.

Defendant next argues that the trial court improperly found that the act of taking the telephone away from Beson was not otherwise reflected in the guidelines scoring because this led to the scoring of 10 points for prior record variable (PRV) 7 (concurrent felony convictions), due to defendant's concurrent conviction for interfering with electronic communications. While it is true that defendant received PRV points for the phone-related action, the trial court analyzed this issue in light of its earlier decision that defendant could not be scored points for this action under OV 19 (interference with the administration of justice or the rendering of emergency services, see MCL 777.49), pursuant to *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). The trial court was incorrect about whether OV 19 could be scored for actions that occurred after the completion of the assault, see *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010), although it had no way of knowing that at the time. Nevertheless, given the trial court's finding that the phone-related action could not be taken into account in scoring OV 19, the trial court correctly decided that it could instead form a basis for guideline departure. See, e.g., *McGraw*, 484 Mich at 129-130 n 31. Defendant's argument is without merit.

Similarly, defendant's assertion that neither his flight nor his actions in throwing away the bat could be considered as proper reasons to depart is unpersuasive. As with the fact that defendant took Beson's cellular telephone, the trial court viewed each of these actions as attempts to interfere with the administration of justice that occurred after the assault and were thus not able to be scored under OV 19. In addition, the trial court found defendant's actions out of the ordinary in that they also involved threats to the safety of others—the officer who had to retrieve the bat in a frozen river, and defendant's child and the mother of defendant's child, whom defendant involved in the flight. Contrary to defendant's assertion, the trial court did not abuse its discretion in finding these to be valid reasons to depart from the guidelines.

Defendant also argues that the fact that he was drinking while he was on parole should not keenly attract this Court's attention. As noted by the trial court, defendant was not only

drinking on parole, but had only been paroled 18 days before the offense, was on a tether, and had already determined how to avoid having his tether alarm go off when he went across the street to drink at the bar near his home. This tends to keenly grab our attention, was not already taken into account by the guidelines, and was a justifiable reason on which to base a sentence departure.

Defendant also challenges using the psychological injuries to Jones's family as a rationale for departure. He asserts that because the Legislature only allows the scoring of OV 5 (psychological injury to victim's family) for murder, attempted murder, or assault with intent to murder, see MCL 777.22 and MCL 777.35, it was inappropriate to use the injuries as a factor here. However, defendant presents no authority for the proposal that the trial court would be unable to use the facts here as a basis for guideline *departure* when they cannot be used to score OV 5. The situation is an objective and verifiable factor that keenly grabs one's attention. In addition, the trial court's discussion of this finding was intertwined with its discussion concerning the "practical effect" that defendant's actions have had on Jones's family, in that they are now Jones's caregivers for life. To the extent this consideration played into the court's decision, it would not be subject to scoring under OV 5 and would be objective, verifiable, and compelling.

Defendant argues that while the trial court also based its decision on defendant's prior chances to reform, this should not keenly grab this Court's attention. However, that defendant has been placed on probation seven times, was placed in jail 13 times, and has had numerous other chances at rehabilitation are facts that are objective and verifiable, are not accounted for in the guidelines, and, contrary to defendant's assertion, tend to grab ones' attention keenly.

Defendant also argues that the trial court's rationale behind the extent of its departure from the guidelines is flawed. He notes that the *Smith* Court used, as a method of deciding whether the extent of a departure was justified, a comparison in the sentencing grid of a defendant's actual sentence to the recommended guidelines sentence. *Smith*, 482 Mich at 306. The *Smith* Court assigned the defendant's actual sentence, which was above the guidelines scoring range (C-IV cell) for his offense but within the grid, to what it would represent as a score in the grid. *Id.* at 306-307. Finding that the trial court's score would place the defendant in the E-VI, F-V or F-VI cells of the grid, the *Smith* Court noted that to receive that sentence the guidelines would had to have been scored with 20 to 40 extra OV points and with 30 to 45 additional PRV points. *Id.* at 307. The Court then used this comparison as one reason for finding that the defendant was entitled to resentencing. *Id.* at 307-308.

Here, defendant argues that because his offense was a class D offense, the trial court erred by analyzing defendant's sentence using the C category. The trial court looked to the C category because defendant's points were greater than those necessary to reach the top grid for a class D offense. The class D offense chart has top PRV and OV scores of 75+ points, MCL 777.65, and defendant was scored at 82 PRV points and 126 OV points. The trial court found that defendant's point score, if analyzed for a C class offense (also with top PRV and OV scores of 75+ points, MCL 777.64), would result in a maximum minimum of 228 months, given defendant's status as an habitual offender. The court then found that this minimum sentence, too, would be inadequate given the factors it had recited, and stated that it would add five years to that, to result in a 24-year minimum sentence. Defendant argues that, under *Smith*, the trial

court should have instead “expanded” the class D chart, extrapolated what defendant would have received under such a chart, and arrived at a lower appropriate minimum sentence. However, *Smith* expressly provided that, even in a case where a defendant’s initial score falls within the grid, “a trial court that is contemplating a departure is not *required* to consider where a defendant’s sentence falls in the sentencing range grid.” *Smith*, 482 Mich at 309 (emphasis in original). The Court merely noted that it can be helpful. *Id.* Given the nonbinding nature of the *Smith* Court’s procedure and given defendant’s scores here, we cannot find a basis for reversal with regard to the trial court’s analysis. Moreover, given the circumstances surrounding the offense and the offender, we find no abuse of discretion concerning the extent of the sentencing departure.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O’Connell
/s/ Patrick M. Meter