

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 31, 2012

v

DANIEL WILLIAM TERRY,

Defendant-Appellant.

No. 299620
Wayne Circuit Court
LC No. 10-004306-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. We affirm in part, but remand for resentencing or explanation of why the sentence imposed was more proportionate than a sentence within the guidelines recommendation would have been with regard to defendant's felonious assault conviction.

On March 13, 2010, defendant shot Roosevelt Garner, Jr. in a CVS parking lot and then struck him in the head several times with the gun. Garner had driven Johnneisha Lloyd to the hospital in the early morning hours and then they stopped at the CVS to fill a prescription at about 4:00 a.m. Shortly thereafter, defendant, who had fathered a child with Lloyd, arrived at CVS and confronted Lloyd in the store, apparently angry that Garner was driving the vehicle defendant had provided for Lloyd. Then defendant left the store and approached Garner, who had been sitting in the vehicle in the parking lot. The evidence included that defendant, the holder of a concealed weapons permit, had a gun drawn and pointed at Garner as he approached him. After words were exchanged, defendant shot Garner in the stomach and then struck him in the head several times with the gun before leaving the scene.

Although charged with assault with intent to murder, MCL 750.83, and assault with intent to do great bodily harm, MCL 750.84, defendant was convicted of felonious assault, as well as felony-firearm. With regard to the felonious assault conviction, the recommended minimum sentence range was 0 to 17 months imprisonment; however, the trial court sentenced defendant to 32 to 48 months' imprisonment.

On appeal, defendant argues that the trial court did not articulate a substantial and compelling reason for its departure sentence. We disagree.

We review the trial court's determination of the existence or nonexistence of a factor for clear error, the determination that a factor is objective and verifiable as matter of law, and the determination that objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003) (citation omitted). A substantial and compelling reason is "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Id.* at 258 (internal quotation marks omitted), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). "Objective and verifiable" means "that the facts to be considered by the court 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." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

However, the sentence imposed must be proportionate to the defendant's conduct and criminal history. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id.* at 304.]

Here, before imposing its sentence, the trial court noted that factors existed in this case justifying a departure sentence. The trial court stated:

First of all, we start with the fact of how this all begins. We have . . . Ms. Lloyd saying that she had some kind of issue and needed to go to the hospital so she called [Garner] about midnight, picked him up in the car that there is some controversy about, as to whether or not the car is hers, his, but [defendant] has decided that because the car is in his name that he has full control of Ms. Lloyd and whoever else might be in or about that car. So he already starts with an issue regarding that.

He - - they go to the hospital. They are there for four hours, midnight to about four in the morning. They leave there and go to [CVS] and Mr. Garner is driving the vehicle that is supposed to be the justification for the approach of him. And low and behold, as soon as Ms. Lloyd gets out of the car, there is [defendant] at 4:00 in the morning.

Now, you know, I know he gave the story about going home and coming back and all that. This is just too much of a coincidence for anybody to believe, that he just happened to pop-up at that place at that time at 4:00 in the morning when Mr. Garner and Ms. Lloyd happened to be at that place.

He goes in, he confronts her, then he comes out.

And I believe Mr. Garner on this that [defendant] did, in fact, come out with his gun drawn, a gun that he has a lawful permit for, and he confronts him. And I think [defendant] himself admits that he did, for whatever reason, think that Mr.

Garner should not have been in that vehicle so he's going to go over and confront him and take the keys from the vehicle because of that. That is not a reason to go and confront somebody and I don't believe that he just approached him without the gun being displayed.

It just seems utterly stupid, to say the least, and that may not be the best word for it, that Mr. Garner knows he's carrying a gun, has a gun permit, and Mr. Garner is going to go for his gun and they get into a struggle with that.

I think that [defendant] had vile things in his mind and he was willing to go to the fullest extent to try to take care of that and confront Mr. Garner on this.

Surely the guidelines do not have that, but the fact that he pretty well, not necessarily stalked, but I think he planned this, he had the gun that he had the permit for that he used, these are things that the guidelines don't look at in these kinds of things. I think that justified going above the guidelines.

Accordingly, it appears from the record that the trial court justified its departure sentence based on the circumstances of the crime that were not considered in the scoring of the guidelines' variables. Those facts included that: (1) Garner was shot simply because defendant did not want him driving a vehicle defendant had provided for Lloyd's use, (2) it appeared that the confrontation was planned because it was very unlikely that defendant just happened to be at the same CVS as Lloyd and Garner at 4:00 in the morning, (3) defendant abused his privilege and lawful right to carry a concealed weapon, (4) defendant approached Garner in the parking lot with his gun drawn for the purpose of accomplishing his plan to confront Garner, and (5) then defendant shot Garner with the gun that he had a permit to carry.

In light of the record evidence, we disagree with defendant that the trial court failed to articulate a substantial and compelling reason for its departure sentence. The reasons set forth by the trial court were not clearly erroneous, were objective and verifiable, of considerable worth, and keenly grab this court's attention. That is, Garner had Lloyd's permission to drive the vehicle, the timing and location of the shooting indicate that defendant planned the confrontation and attack, and defendant was successful in accomplishing his plan because he abused his right to carry a gun, which he used to threaten and then shoot Garner in the abdomen.

However, the trial court did not articulate on the record why the sentence imposed was more proportionate than a sentence within the guidelines recommendation would have been. See *Smith*, 482 Mich at 304, 318; *Babcock*, 469 Mich at 260. That is, after setting forth its reasons to impose a departure sentence, the trial court immediately rendered its departure sentence without offering any explanation or justification, independent of those reasons, for the *particular* extent of departure. See *Smith*, 482 Mich at 303, 305-306. According to our Supreme Court in *Smith*, when rendering a departure sentence "the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.* at 304. And, the *Smith* Court held:

(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular

degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed. [*Id.* at 318.]

We disagree with our dissenting colleague that remand is not necessary because a reason for the extent of departure can be inferred from the record. The trial court never even addressed the issue of proportionality; thus, the record is clearly insufficient to allow for effective appellate review of this issue. See *id.* at 304. Substituting our own judgment about why the departure may be justified is inappropriate. See *id.* Accordingly, we remand this matter to the trial court for resentencing or explanation of why the sentence imposed was more proportionate than a sentence within the guidelines recommendation would have been with regard to defendant's felonious assault conviction.

Next, defendant argues in his Standard 4 brief that he was denied the effective assistance of counsel because trial counsel failed to conduct an adequate investigation, failed to interview and produce several witnesses, and failed to present several pieces of physical evidence. We disagree.

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). If the defendant fails to move for a new trial or evidentiary hearing, our review is limited to the record. *Id.* at 658-659. "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Id.* at 659. Defendant did not move for a new trial or for an evidentiary hearing; therefore, our review is limited to the record.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Sabin (On Second Remand)*, 242 Mich App at 659. "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *Grant*, 470 Mich at 486.

Further, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant first contends that trial counsel failed to interview and present several witnesses at trial, including individuals inside CVS, the police officer who interviewed Garner, other police officers, and individuals at the clubs defendant went to that night. Despite defendant's contentions that the testimony of these individuals could have benefited his case, either by corroborating defendant's testimony or refuting Garner's and Lloyd's testimony, "defendant has not provided this Court with affidavits indicating what the proposed testimony of [these individuals] would have been." See *Davis*, 248 Mich App at 667. Therefore, defendant has not shown that their testimony would have, in fact, corroborated his testimony or refuted Garner's and Lloyd's testimony. Moreover, contrary to defendant's assertion, the record does not indicate whether trial counsel in fact interviewed any of these witnesses and decided not to call them as a matter of trial strategy. Defendant argues that trial counsel was aware of all of these individuals prior to trial. Therefore, defendant has not overcome the presumption of sound trial strategy. See *Sabin (On Second Remand)*, 242 Mich App at 659. In addition, contrary to defendant's claim that trial counsel called no witnesses other than defendant, trial counsel did call Officer Frank George as a witness at trial.

Second, defendant contends that trial counsel failed to gather and introduce several police reports and statements made by Garner and Lloyd to the police. At trial, Lloyd testified that she found her keys in Garner's pocket. The record indicates that, in Lloyd's statement to the police, she told the police that defendant tried to take the key out of the car. Defense counsel elicited from Lloyd on cross-examination that she made this statement to the police. Moreover, the record indicates that trial counsel elicited from Lloyd that she testified at the preliminary examination that the keys were on the floor. The record does not indicate what else her statement contained that would have benefited defendant. Conversely, the record suggests that the statement may have contained information damaging to defendant. Thus, defendant has not overcome the presumption of sound trial strategy. See *id.*

With regard to the victim's statements to the police, the record indicates that Garner stated that it was his vehicle. The record also suggests that Garner spoke to other officers at the hospital. However, the record does not indicate what else was in Garner's statements. Therefore, defendant has not shown that these statements would have benefited his case and changed the outcome of the trial. See *id.*

Similarly, despite defendant's contentions that the police reports would have benefited his case, the record does not indicate what was in the reports. Thus, defendant has not shown that they would have, in fact, benefited his case. In addition, defendant states that trial counsel had these reports and statements available to him prior to trial. Thus, defendant has not overcome the presumption of sound trial strategy. See *id.*

Third, defendant contends that trial counsel failed to gather and play the surveillance tapes from CVS. Although there is evidence in the record that such tapes existed, there is no evidence that the tapes would have benefited defendant's case. Sergeant Jason Marzette testified that the video footage from inside the store showed Garner entering the store, holding his midsection, and his face was covered in blood. At trial, the prosecutor introduced a still photograph of Garner entering the store after he had been shot. In addition, Sergeant Marzette testified that the footage from outside CVS "really didn't capture the interaction between" defendant and Garner. Therefore, defendant has not shown that this tape would have made a

difference in the outcome of the trial. See *id.* Similarly, there is no indication in the record regarding whether trial counsel obtained the tapes and decided not to play them at trial as a matter of trial strategy.

Fourth, defendant contends that trial counsel failed to gather and play the recording of the 911 call he made after the incident. At the preliminary examination, trial counsel stated that defendant called 911. However, Sergeant Marzette testified that he requested all 911 tapes and dispatch recordings for the time period, and that he did not hear defendant's 911 call. Although Sergeant Marzette admitted in cross-examination that he did not have tapes of whether defendant called the Highland Park Police Department, because defendant has not shown that a recording of the 911 call existed, defendant has not shown that trial counsel's failure to acquire or play the tape was objectively unreasonable. See *Jordan*, 275 Mich App at 667.

Fifth, defendant contends that trial counsel failed to present evidence regarding the ownership of the car. Defendant does not indicate what that evidence would have been. In addition, even if defendant owned the car, there is no evidence that this would have affected the outcome of the trial. See *Sabin (On Second Remand)*, 242 Mich App at 659.

Finally, defendant contends that trial counsel should have examined the clothing worn by defendant and Garner at the time of the incident and acquired evidence from the doctor that examined Garner. According to defendant, this evidence could have shown how far apart defendant and Garner were. However, the statement by the prosecutor that defendant refers to was made during the preliminary examination, not in front of the jury. During his opening statement at trial, the prosecutor stated "relatively point-blank range, a matter of two to three feet." However, this statement is not inconsistent with defendant's testimony that the gun went off while he and Garner were struggling. Therefore, there is no reasonable probability that, had trial counsel introduced evidence regarding the distance between defendant and Garner, the outcome of the trial would have been different. See *Jordan*, 275 Mich App at 667. Accordingly, defendant's ineffective assistance of counsel claim is without merit.

We affirm defendant's convictions, but remand for resentencing or explanation of why the sentence imposed was more proportionate than a sentence within the guidelines recommendation would have been with regard to defendant's felonious assault conviction. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Mark J. Cavanagh