STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 2013
v	No. 302135 Wayne Circuit Court
JAMES ANTHONY TERRELL, Defendant-Appellant.	LC No. 10-006933-FC

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

A jury found defendant guilty of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, with respect to firearm assaults against three police officers during a shootout between the officers and defendant, which resulted in defendant being struck in the leg by a bullet. The jury acquitted defendant of the greater offense of assault with intent to commit murder, MCL 750.83. Defendant was also found guilty of one count of resisting and obstructing the police officers, MCL 750.81d(1), possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced, as a fourth habitual offender, MCL 769.12, to 30 to 50 years' imprisonment for the assault convictions, reflecting a substantial upward departure from the minimum sentence guidelines range, 5 to 15 years' imprisonment for the resisting and obstructing conviction, 2 to 5 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. On appeal, defendant contends that the prosecutor committed misconduct during closing and rebuttal arguments, that there were various sentencing errors, including the upward departure, and that there were errors related to a court order that directed the surgical extraction of the bullet from defendant's leg. We affirm defendant's convictions, but vacate defendant's sentences and remand for resentencing.

I. FACTUAL SUMMARY

The shootout occurred after a minivan carrying defendant and his friend, Devon Gary, pulled over to the side of the road while being followed by a marked police cruiser, although the cruiser's emergency lights and siren had not been activated. The police had been following the minivan based on suspicious behavior by its occupants and suspected drunk driving. A second police vehicle, unmarked, pulled up behind the marked police cruiser. Defendant was a passenger in the minivan and, according to police testimony, defendant leaped out of the

minivan's passenger-side sliding door and opened fire on police with an AK-47 assault rifle. The police officers returned fire, discharging their .40 caliber weapons 40 times based on the number of shell casings found at the scene. Gary, who was unarmed and had also exited the minivan, was shot dead and defendant was struck in the leg by a bullet, but he managed to escape.

Defendant first stopped briefly at a friend's house, then stayed a few days with his girlfriend, who helped treat the wound, and defendant eventually went down to Memphis, Tennessee, where he had friends and family, and where he sought medical assistance in a hospital emergency room for the bullet wound. A month later, defendant went to Des Moines, Iowa, where he had resided off and on in past years. He was arrested in Iowa. Defendant took the stand in his own defense and admitted that he was in the minivan with Gary, who went by the name Kano, but defendant denied displaying, pointing, or firing any weapon at the police before the police started shooting. An AK-47 was found a short distance from the scene of the shootout, but well beyond the spot that Kano fell dead. Five shell casings that were not discharged from the officers' guns were found at the scene, although the expert on ballistics could not definitively connect the casings to the AK-47. DNA evidence placed defendant in the minivan, and a video captured by the marked police cruiser's camera showed someone exiting the minivan's sliding door carrying a weapon.

The minivan involved in the incident belonged to a married couple. The husband had been at a gas pump filling the minivan's tank at a Marathon station a few hours before the shootout, while his wife was inside paying, when he was approached by two young males. The taller of the two men was wielding an AK-47 assault rifle. The husband bolted toward the gas station's entrance, yelling at the men to just take the vehicle. The rifleman then chased the husband in the direction of the gas station's front door. As the husband was entering the front door of the station in his attempt to escape the rifleman, his wife was exiting the station, and a female bystander, who had been waiting to catch a bus, was stationed near the Marathon's front door. At that moment, a gunshot was heard. The husband testified that he felt a bullet graze his jacket, and a bullet struck the female bystander, causing a minor injury. The wife escaped by running down the block. The two perpetrators then drove off in the minivan. Kano was identified by defendant's uncle as the gun-toting man seen in a video still captured by a gas station camera. The couple could not identify defendant in a lineup, nor at trial, as having participated in the crime. The bystander had also failed to identify defendant in a lineup and at the preliminary examination, although she claimed at trial that defendant, while not wielding a weapon, was the shorter man at the gas station who had been involved in the crime.[1] Defendant denied being at the Marathon station that night and claimed that Kano gave him a ride in the

[1] The bystander had seen both men earlier and had moved from a nearby bus stop to the gas station specifically because she found the men intimidating.

minivan shortly before the shootout occurred. Defendant was acquitted of all charges arising out of the events at the gas station, either by jury verdict or directed verdict.[2]

II. ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Defendant raises prosecutorial misconduct arguments in an appellate brief prepared by appointed counsel and in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Defendant cites 18 excerpts from the prosecutor's closing and rebuttal arguments as reflecting alleged instances of prosecutorial misconduct. There were no objections to any of the prosecutor's remarks that are being challenged on appeal. Accordingly, defendant must establish plain error affecting his substantial rights, which "requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even after these requirements are satisfied under the plain-error test, an appellate court must exercise its discretion in determining whether to reverse a verdict, with reversal only being warranted if the defendant is "actually innocent" or the error seriously affected the public reputation, fairness, or integrity of the judicial proceedings independent of the defendant's innocence. *Id.* at 763.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). When a prosecutor interjects issues broader than the defendant's guilt or innocence, a defendant's opportunity for a fair trial may be jeopardized. *Id.* at 63-64. We decide issues of prosecutorial misconduct on a case by case basis, examining the entire record and evaluating a prosecutor's remarks in context. *Id.* at 64. The appropriateness of a prosecutor's arguments depends on all the facts of the case. *Id.* "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id.*

We shall group some of the challenged remarks according to the underlying legal basis argued by defendant. The following comments are challenged on the grounds that the prosecutor was improperly expressing his personal opinion regarding defendant's credibility and guilt and improperly indicating that defendant was untruthful:

1. "So you heard from the last witness [defendant] and you heard lie after lie after lie."

2. "[Defendant] has the benefit of testifying last and fitting his testimony into what we already know the facts are."

[2] The jury acquitted defendant of assault with a dangerous weapon (felonious assault), MCL 750.82, with respect to the bystander and, also in regard to the bystander, the trial court directed verdicts in favor of defendant as to charges of assault with intent to commit murder and assault with intent to do great bodily harm. The jury acquitted defendant of carjacking, MCL 750.529a.

3. "And this ridiculous story that somehow you can get into a minivan with this object next to the driver's side."

4. "What did Shakespear[e] say, oh, what a tangled web we weave when we set out to deceive."

5. "You understand the witness that lied to you gets to testify last [defendant]. Gets to tailor the testimony consistent with what evidence has already been put in. So he knows that by DNA we got him in the van, he knows that by DNA we got him on the gun, and I've got to come up with this ridiculous I'm painted in the corner story. That somehow officers are out just executing people."

6. "All of that tinted glass from the sliding door is in an area consistent with that door being opened when those shots hit which makes the last witness [defendant] out to be not telling you the truth."

7. "I thought of [defendant's] testimony, and I can't remember who[] sang the song. It's a Motown song. . . . [T]he name and words that get repeated are, 'just my imagination.' 'Cause none of what he said was based on any fact. It's the squirming. . . . I've never been a lifeguard, but I'm told that if you're gasping for air as you're drowning, you will grasp at straws floating on the surface in the hope that they may provide some buoyancy to you to give you backup and get one more gulp of air and live a little while longer. . . . [T]here's no one that has more on the line than . . . [defendant]. And no more of a reason to lie to you . . . than . . . [defendant]."

8. "I don't believe this Hilltop baloney at all."

9. "[T]here's nothing gluing his feet to the ground at that point."

We initially note that a prosecutor "has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. Further, a prosecutor is permitted to use emotional language during closing argument, "and such argument is an important weapon in counsel's forensic arsenal." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) (internal quotation marks omitted). The prosecution is not permitted to express personal opinions of a defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). And a prosecutor may not suggest or imply that he or she has some special knowledge regarding the credibility of a witness or whether a witness is worthy of belief. *Id.* at 276; *Dobek*, 274 Mich App at 66; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor is allowed to "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *Id.*; see also *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012) (prosecutor may argue the issue of truthfulness on the basis of reasonable inferences arising from the evidence); *Dobek*, 274 Mich App at 66. Indeed, a prosecutor may vigorously argue that a defendant was lying, as long as "[t]he remarks were both related to and supported by the

evidence." *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973); see also *People v Caldwell*, 78 Mich App 690, 692; 261 NW2d 1 (1977) (when based upon the facts and evidence, "the prosecution may argue a case vigorously and even contend that the defendant is lying").

Here, while some of the prosecutor's remarks were emotional, vigorous, and certainly not bland, the comments that defendant was lying and not worthy of belief, when examined in context of the full closing argument and rebuttal, were ultimately based on the testimony and evidence presented at trial. Given the testimony of the prosecution's witnesses, the physical evidence, the DNA evidence, the video evidence, the reasonable inferences arising from the evidence, and the nature of defendant's own testimony that conflicted with the prosecutor's evidence, there was more than adequate record support for the prosecutor's contention that defendant was lying. The prosecutor did not indicate that he had some special knowledge that defendant was engaged in fabrications. Indeed, the prosecutor expressly told the jury that it must "decide credibility" and that the evidence supported the prosecutor's credibility arguments. We also find no error in the prosecutor's remarks concerning defendant's motive to lie and his opportunity to formulate a lie around the existing evidence by testifying last; these matters are self-evident and not based on the special knowledge of the prosecutor.

In a similar vein, the following comments are challenged on the grounds that the prosecutor was improperly vouching for the credibility of his witnesses and suggesting that he had personal or special knowledge that his witnesses were being truthful:

1. "And how is the black glass back there by the bumper, back there by the right rear passenger tire and curb line if in fact the officers weren't in fact truthful about [defendant] coming out of that sliding door?"

2. "You have to figure out we got the right guy or not from the believable testimony of all the people that testified, except the Defendant, we used. We know what happened."

3. "There's no reason why Ms. Cooke[[3]] would lie to us when we got those photos off her phone, no reason in the world."

4 "You have to be very understanding of . . . this principal that no one has a greater incentive to be accurate than victims. When you talk about credibility, you talk about interest and bias in testifying. . . . What interest does [Officer] Dennard have to have with somebody that didn't sho[o]t at him get convicted, that does him no good. Same applies to [Officer] Bastine."

[3] Cooke was defendant's girlfriend, and she testified that she treated his wound after the shooting and procured a Greyhound bus ticket to Memphis for him.

5. "You heard identification by Officer Bastine and Dennard as they're looking at [defendant] and he's pointing an AK 47 at them and shooting at them. That image of his features are riveted into their brain . . . ."

6. "So, ladies and gentlemen, we're not asking for anything free. We're asking for what the hard work of Officer Shea, the hard work of the people out in the lab dictate in terms of this evidence. And that, ladies and gentlemen, is conviction as charged as I've laid out."

A "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, 448 Mich at 276. However, "[a]lthough a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue and make reasonable inferences from the evidence to support a witness's truthfulness." *Cain*, 299 Mich App at 36; see also *Howard*, 226 Mich App at 548 (prosecutor may argue from the facts that a witness is credible). "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Here, when read in context, the challenged remarks were based on evidence in the record, or the reasonable inferences arising from said evidence. In fact, some of the quoted excerpts themselves provide the evidentiary context. The prosecutor argued that the witnesses were credible given the factual circumstances; he did not vouch for their credibility on the basis of some special knowledge. And the prosecutor's comments about the absence of a witness's motivation to lie were not predicated on any special knowledge of the prosecutor, but rather upon logic, common sense, and the record. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992) (prosecutor's remarks about common sense do not constitute prosecutorial misconduct).

Defendant also challenges the prosecutor's comment, "So [defendant] clearly intends to kill." The prosecutor had engaged in a detailed discussion of the shootout evidence leading up this statement and, when read in that context, the statement was based on the evidence and reasonable inferences arising from the evidence. *Dobek*, 274 Mich App at 66 ("A prosecutor may not make a factual statement to the jury that is not supported by the evidence, . . . but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case.").

Defendant additionally challenges the prosecutor's statement, "Believe that we've got a bridge to sell you, 'cause that's what counsel's trying to sell you through that argument, through that testimony." "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). The challenged remark came after a discussion and rebuke of defendant's version of events, and defense counsel had yet to make a closing argument. In that context, the remark was clearly directed at defendant himself, not counsel, and reflective of the prosecutor's continuing assault on the truthfulness of defendant's testimony, which was proper.

Finally, defendant asserts prosecutorial misconduct as to the comment, "The person that if he was telling the truth we'd be able to hear from." This was a reference to defendant's "lady friend,"[4] who he claimed was accompanying him on the night of the shootout. While "a prosecutor may not imply in closing argument that defendant must prove something . . . because such an argument tends to shift the burden of proof[,]" *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983), we do not view the challenged comment as suggesting defendant had to prove something. Rather, the prosecutor was merely indicating that the lady friend would likely have testified if there was any truth to defendant's testimony, as opposed to her taking the stand and committing perjury. The prosecutor's comment was more of an attack on defendant's credibility, which, again, constituted proper argument. And we note that the prosecutor himself informed the jury that defendant had no burden of proof.

Even were we to assume that some of the remarks were improper, the trial court instructed the jury that the statements and arguments by the attorneys were not evidence, and this instruction was sufficient to eliminate any prejudice that may have resulted. *Dobek*, 274 Mich App at 66 n 3. Additionally, and again assuming misconduct, the prosecutor's remarks were not so egregious that no curative instruction could have counteracted any prejudice; therefore, reversal is not warranted. *Id.* Moreover, in the context of plain-error analysis, we cannot conclude that defendant is actually innocent, nor that any presumed error seriously affected the public reputation, fairness, or integrity of the judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763.

B. SURGICAL EXTRACTION OF THE BULLET IN DEFENDANT'S LEG

Prior to trial, the prosecution filed a motion to obtain evidence, seeking an order that would allow for the surgical extraction of the bullet lodged in defendant's leg for purposes of identifying him through ballistics as a participant in the shootout. Defendant objected, arguing that any intrusion into his body would constitute a violation of his constitutional right to privacy and that the evidence was not necessary given the prosecutor's claim of DNA evidence placing defendant at the scene of the shootout. The trial court granted the motion, and the order provided in pertinent part as follows:

> [T]he Wayne County Prosecuting Attorney's Office . . . is hereby allowed to have surgically removed, the projectile from the defendant's left thigh, by James G. Tyburski, M.D., Professor of Surgery at the Detroit Medical Center, the Court having reviewed correspondence from Dr. Tyburski indicating that the defendant would only be subjected to a local anesthesia and require a[n] incision

[4] The lady friend was not defendant's girlfriend Cooke.

through the skin and soft tissue of only approximately 1.5 [inches].[5]

Defendant argues in his Standard 4 brief that trial counsel was ineffective for inadequately challenging the prosecutor's motion to obtain evidence, that the trial court erred in granting the motion, and that the prosecutor committed misconduct in relationship to the matter, including the commission of perjury and fraud.

The Fourth Amendment protects expectations of privacy, and a compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy of such magnitude that the intrusion may be found "unreasonable" even if the intrusion is likely to produce evidence of a criminal act. *Winston v Lee*, 470 US 753, 758-759; 105 S Ct 1611; 84 L Ed 2d 662 (1985). The Fourth Amendment does not forbid nor permit all such intrusions; rather, the proper function of the Fourth Amendment is to constrain against those intrusions that are not justified under the circumstances. *Id.* at 760. "The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." *Id.* The issue of whether "the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." *Id.* A crucial factor to consider "is the extent to which the procedure may threaten the safety or health of the individual," and, "[n]otwithstanding the existence of probable cause, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect." *Id.* at 761. "Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Id.* Against these individual interests, a court must weigh "the community's interest in

[5] The record indicates that multiple hearings were held on the matter and that the trial court was concerned with any potential danger to defendant's health relative to the surgical procedure. The record contains a letter from Dr. Tyburski, who was chief of surgery at Detroit Receiving Hospital, indicating that he conducted a physical examination of defendant on September 3, 2010. In the letter, Dr. Tyburski opined:

> There is no medical reason for removing the bullet, as it is causing no or minimal neurologic or local inflammatory symptoms. There is minimal risk of a significant infection from this foreign body. If the bullet was to be removed, with its relatively superficial location, it is likely it could be removed with administration of local anesthesia in the area around the bullet, including the periosteum of the bone, as it is partially impacted. It would require an incision through the skin and soft tissue of approximately 1.5 inches. The bullet would be extracted through this incision. The wound would then be best packed open, requiring some minimal local daily care.

fairly and accurately determining guilt or innocence[,]" which is an "interest . . . of great importance." *Id.* at 762.[6]

We find it unnecessary to determine whether the trial court erred in granting the motion to obtain evidence, whether counsel was ineffective in challenging the motion, or whether there was prosecutorial misconduct associated with the matter. Assuming error, ineffective assistance, and misconduct, the error was harmless beyond a reasonable doubt and there was no prejudice to defendant. MCL 769.26 (reversal for an error is not permitted unless the error resulted in a miscarriage of justice); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (reversal only required if it affirmatively appears that it is more probable than not that the error was outcome determinative); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (to establish ineffective assistance of counsel, deficient performance and prejudice must be shown). There was an abundance of evidence placing defendant at the shootout. Defendant himself testified to his presence at the scene and being struck by a bullet, and he makes no argument that had the motion to obtain evidence been denied, he would not have taken the stand in his own defense. The mere and undisputed existence of the bullet wound itself supported the prosecution's theory. Defendant's testimony, coupled with the DNA evidence, other physical evidence, the police eyewitness identifications, and Cooke's testimony, rendered any error in ordering the surgical extraction harmless beyond a reasonable doubt and non-prejudicial. This conclusion becomes indisputable when taking into consideration the testimony of the ballistics expert who opined that he could not tell whether the damaged bullet fragment extracted from defendant's leg actually matched any of the officers' weapons.

C. DEFENDANT'S SENTENCES

Defendant argues in both of his appellate briefs that the trial court abused its discretion in departing from the minimum sentence range under the guidelines, as well as in relationship to the extent of the departure, where there was an absence of substantial and compelling reasons justifying the court's ruling. In his Standard 4 brief, defendant additionally argues that the trial court erred in treating him as a fourth habitual offender, MCL 769.12, given that, as to the convictions relied on by the prosecution, a 2009 marijuana possession conviction in Iowa was actually a misdemeanor and another drug conviction from 2008 was listed twice. Defendant bootstraps a claim of ineffective assistance of counsel for trial counsel's failure to bring these facts to the attention of the trial court at sentencing.

We first address the arguments concerning the habitual offender enhancement. MCL 769.12(1) provides that "[i]f a person has been convicted of any combination of 3 or more felonies . . ., whether the convictions occurred in this state or would have been for felonies . . . in this state if obtained in this state, and that person commits a subsequent felony within this state,

[6] The *Winston* Court, in balancing the factors, held unconstitutional Virginia's efforts to compel the respondent, who was charged with attempted armed robbery, "to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest." *Winston*, 470 US at 755.

the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter."[7] MCL 769.13(5) provides:

> The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following: (a) A copy of a judgment of conviction[;] (b) A transcript of a prior trial or a plea-taking or sentencing proceeding[;] (c) A copy of a court register of actions[;] (d) Information contained in a presentence report[;] (e) A statement of the defendant.

The defendant generally has "the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid." MCL 769.13(6). "Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately[,]" regardless of whether those convictions arose out of the same incident. *People v Gardner*, 482 Mich 41, 44, 68; 753 NW2d 78 (2008) (overruling precedent which had provided that multiple felonies arising from the same criminal incident or transaction could only count as a single felony under habitual offender laws). Interpretation of the habitual offender statutes is reviewed de novo on appeal. *Id.* at 46. Because defendant failed to challenge the habitual offender enhancement at or prior to sentencing, we review the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. For purposes of the ineffective assistance claim, defendant must establish deficient performance and prejudice. *Carbin*, 463 Mich at 599-600.

In the second amended felony information, under the title of habitual offender – fourth offense notice, the following is provided:

> Take notice that the defendant was *twice* previously convicted of a felony . . . in that on or about 08/19/2008, he . . . was convicted of the offense of possession of cocaine in violation of [MCL 333.7403(2)(a)(*v*)(less than 25 grams)] in the Third Circuit Court . . . .
>
> And on or about 08/19/2008, he . . . was convicted of the offense of possession of cocaine in violation of [MCL 333.7403(2)(a)(*v*)(less than 25 grams)] in the Third Circuit Court . . . .

[7] "[T]he prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." MCL 769.13(1). "A notice of intent to seek an enhanced sentence . . . shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." MCL 769.13(2). "A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence . . . may challenge the accuracy . . . of 1 or more of the prior convictions listed in the notice by filing a written motion with the court[.]" MCL 769.13(4).

> And on or about 07/22/2009, he . . . was convicted of the offense of possession of a controlled substance in violation of Iowa State [law] . . . .
>
> Therefore, defendant is subject to the penalties provided by MCL 769.12 [fourth habitual offenders]. [Emphasis added.]

As reflected in the introductory language of the notice, it refers to only *two* previous felony convictions and then proceeds to twice list what appears to be the same cocaine possession conviction from August 19, 2008, before noting the Iowa drug conviction.[8] The presentence investigation report (PSIR) indicates that on August 19, 2008, defendant allegedly committed the offense of possession of less than 25 grams of a controlled substance and that he eventually pleaded guilty to the crime and was convicted on December 1, 2008. That is the only conviction listed in the PSIR which references the date of August 19, 2008. This is clearly the crime alluded to in the habitual notice, but there is no indication whatsoever that two felony convictions arose from the matter. The PSIR states that defendant was convicted by plea of attempted delivery of a controlled substance under 50 grams in 2006 and convicted by plea of possession of a controlled substance under 25 grams in January 2008. But neither of these convictions is listed in the habitual enhancement notice. We note that, at the sentencing hearing, defense counsel voiced agreement that a score of 30 points was accurate with respect to prior record variable (PRV) 2, MCL 777.52(1)(a), which provides for a score of 30 points when "[t]he offender has *4 or more prior low severity felony* convictions." (Emphasis added.) Even if this concession were viewed as a waiver of part of defendant's appellate arguments on the habitual offender enhancement, defendant has also couched his arguments in terms of ineffective assistance of counsel.

It would appear that the first two felonies listed in the habitual offender notice actually pertain to a single felony. A change from fourth habitual to third habitual status would alter the guidelines range under MCL 777.21(3)(b)(50% increase in top end of range for third habitual) and (c)(100% increase in top end of range for fourth habitual). Generally speaking, an alteration of the guidelines range requires resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). And in *People v Kimble*, 470 Mich 305, 312-313; 684 NW2d 669 (2004), our Supreme Court observed that a sentencing error resulting in a sentence that is in excess of the guidelines range constitutes plain error affecting substantial rights that seriously affects the fairness, integrity, and public reputation of judicial proceedings. While here the trial court departed from the guidelines, a lower guidelines range might very well have impacted the extent of the departure. Given that we are ultimately required to remand for resentencing on the basis of the upward departure, as explained below, we also remand for the court to examine and resolve whether the first two listed felonies in the habitual offender notice actually relate to a single felony. If so, defendant's habitual offender status and the guidelines range shall be adjusted accordingly.

[8] The original information contained a notice of third habitual enhancement, referencing two cocaine possession convictions on August 19, 2008, with no Iowa conviction being listed.

With respect to the Iowa conviction, while the conviction was not addressed at sentencing in connection with defendant's habitual offender status, it was discussed in the context of PRV 1, MCL 777.51, which concerns prior high severity felony convictions. The prosecutor argued that PRV 1 should be scored at 25 points for one prior high severity felony conviction, MCL 777.51(1)(c), based on the Iowa conviction. The PSIR indicates that defendant was convicted of possession of a controlled substance on October 1, 2009, in Iowa, and that he was sentenced to 180 days in jail and a year of probation. The PSIR does not provide any details. At sentencing, the prosecutor referred to a report from Iowa ostensibly showing that defendant was convicted under Iowa Code (IC) 124.401 "paren five." The report itself is not in the record. The prosecutor argued to the trial court that "paren five" of IC 124.401 concerns a drug offense involving more than 10 grams of a mixture of a detectable amount of LSD, imposing a penalty of no more than 50 years' imprisonment and a fine of not more than $1 million; therefore, the offense qualified as a high severity felony conviction. The trial court stated that the PSIR only spoke of possession, appearing to fall under subsection 2 of IC 124.401. Defense counsel then informed the trial court that the conviction was for possession of marijuana and that subsection 2 of IC 124.401 spoke of "an awesome amount of kilos." The trial court then ruled that PRV 1 was to be scored at zero points and moved on to PRV 2. On appeal, defendant claims that he pled guilty to simple possession of marijuana in Iowa, a misdemeanor.

We have examined IC 124.401, and IC 124.401.1.a.(5) addresses a crime involving the manufacture, delivery, or possession with the intent to deliver "[m]ore than ten grams of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)," which is punishable "by confinement for no more than fifty years and a fine of not more than one million dollars." This is apparently the provision cited by the prosecutor. Again, defendant was only sentenced to 180 days in jail and 1 year probation, and he claims that the offense involved simple *marijuana possession*. And the PSIR itself only references a crime of possession. It does not appear likely that defendant was convicted of the crime claimed by the prosecution. The punishment limits of 50 years and a fine of $1 million also apply to marijuana under IC 124.401.1.a.(6), but it requires the manufacture, delivery, or possession with the intent to deliver "[m]ore than one thousand kilograms[.]" IC 124.401.5, which may have been the provision actually being referenced as "paren five" in the report mentioned by the prosecutor, provides that mere possession of marijuana is punishable "by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense." Defendant claims that this is the provision that he was convicted under in Iowa, which appears much closer to the truth than a conviction for manufacturing, delivering, or possessing with intent to deliver LSD, a fifty-year felony. The manner in which the subsections in IC 124.401 are structured and identified clearly played a role in the confusion. We also emphasize that MCL 769.12(1) requires, when examining convictions outside of Michigan, a determination whether the act at issue would constitute a felony under Michigan law. Thus, whether Iowa identifies a crime as a misdemeanor or felony is ultimately not controlling.

Because of the confusion on the Iowa conviction and the fact that we are already going to remand this case for resentencing, we remand for a clear determination whether the conviction in Iowa was for an act that would constitute a felony in Michigan. If not, defendant's habitual offender status and guidelines range shall be adjusted accordingly.

We now turn to the sentencing departure issue. The guidelines range was 38 to 152 months (3 years, 2 months to 12 years, 8 months) on the assault convictions, and the minimum sentence imposed by the trial court on those convictions was 360 months (30 years), more than doubling the top end of the guidelines range. At the sentencing hearing, the trial court stated:

> Mr. Terrell, when sentencing people who have been convicted of very serious felonies in this courtroom, I wonder to myself as to what was going through this person's mind when they picked up a weapon and discharged it at someone else. Even if they wanted to just scare somebody, the potential of the person who would be on the receiving end of that bullet could be catastrophic. Not only to that particular individual, but also be detrimental and catastrophic to the family of the individual that would be at the receiving end of that bullet.
>
> Your conduct on the day this incident occurred was absolutely reprehensible and could very well had resulted in the destruction of numerous families, not just the, the killing of men who have devoted themselves to enforcement of the laws of this state.
>
> And it's true that you are a young man, 21 years of age. I cannot even recall as to when I was 21 years of age. But you certainly are beyond the age of reason that you can in fact know the difference between right and wrong. And when you wound up pulling out that assault rifle and firing it in the direction of these police officers, you knew full well at that particular time that you could have taken their lives.
>
> As you just indicated to me on the record is that if you were guilty of anything, you were guilty of assault with intent to murder, and I believe that. That's what I believe.[9]
>
> Now, this jury took compassion upon you undoubtedly. I have no idea as to what the reason for it was to finding you guilty of the less serious offense of assault with intent to do great bodily harm less than murder, but that was in their province; that was within their authority.
>
> It is also, however, within my province taking into consideration the totality of the circumstances with which the Court is confronted. The presentence investigation in regard to this case, your previous criminal behavior, the highly assaultive nature of this offense, the total lack of remorse on your part, the inability of, in my opinion, of you to be rehabilitated, I have to seriously take into consideration in regard to your sentencing. And because of that, for your violation of [the felony-firearm statute] . . . it is the sentence of this Court that you be

[9] Defendant stated that if he actually had done what the prosecution claimed, the convictions should have been for assault with intent to commit murder. However, defendant still maintained that he did not shoot at the police.

> remanded to the Michigan Department of Corrections for a period of two years which is mandated by the statute.

The trial court then proceeded to impose the 30 to 50 year prison terms for the assault convictions, along with the other sentences. The trial court correlated the prefatory remarks quoted above with all of the sentences, not just the sentences for the assault convictions. Indeed, the trial court did not even use the term "departure" while imposing the assault sentences. However, in a sentence departure evaluation form, the trial court wrote, "The court exceeds guidelines based on the [defendant's] lack of remorse [and] in this court's opinion [he] lacks the ability to be rehabilitated."[10]

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, __ Mich __; __ NW2d __, issued July 29, 2013 (Docket Nos 144327 and 144979), slip op at 6 (citation omitted). An abuse of discretion standard applies when an appellate court reviews a determination that there existed substantial and compelling reasons to depart from the guidelines. *Id.*, slip op at 6 n 17. Whether the extent of the departure is supported by substantial and compelling reasons is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.* The existence or nonexistence of a particular factor relative to a sentencing departure constitutes a factual determination that is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003); see also *Smith*, 482 Mich at 300. Reasons given in support of a departure must be objective and verifiable, and "[t]he conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Id.*; see also *Babcock*, 469 Mich at 264. Matters of law are subject to de novo review. *Hardy*, slip op at 7.

The analytical framework with respect to sentencing departures was set forth in *Smith*, 482 Mich at 299-300, wherein the Court explained:

> Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. In determining whether a

[10] Given the lack of clarity regarding the upward departure in the trial court's remarks at sentencing, we shall rely on the court's comments in the departure evaluation form. When imposing a sentence that departs from the guidelines, MCL 769.34(3) simply requires that a "court state[] on the record the reasons for departure." Sentencing courts were previously mandated to use sentence departure evaluation forms by court rule, but the requirement was eliminated in 2005 by amendment of MCR 6.425(D). *People v Keith*, 480 Mich 1035; 743 NW2d 563 (2008).

> sufficient basis exists to justify a departure, the principle of proportionality defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history.
>
> The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." [MCL 769.34(3)(b).]
>
> . . .
>
> Under MCL 769.34(7), the court must advise a defendant that he or she may seek appellate review of a sentence that is more severe than the guidelines recommendation. There is no preservation requirement for review of such a sentence. [Citations, internal quotation marks, and ellipses omitted.]

"Facts are objective and verifiable when they are actions or occurrences external to the mind and are capable of being confirmed." *People v Portellos*, 298 Mich App 431, 453; 827 NW2d 725 (2012). Remorse is not an appropriate factor to take into consideration in making a departure decision. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000) (noting that an expression of remorse, while being an objective action capable of confirmation, is nonetheless subjective in nature, with the true intent lodged solely within the defendant's mind).[11] We also note that a sentence cannot be based on a defendant's refusal to admit guilt. *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006). Accordingly, the trial court's departure decision based on a lack of remorse was in error.

Objective and verifiable factors that go into determining a defendant's rehabilitative potential can be considered in evaluating whether substantial and compelling reasons exist for a departure. *Daniel*, 462 Mich at 7 n 8. In *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008), this Court stated:

> Although a trial court's "belief" that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, *People v Solmonson*, 261 Mich App 657; 683 NW2d 761 (2004), objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure. *Id.* at 671-672. Similarly, in *People v Geno*, 261 Mich App 624, 636-637; 683 NW2d 687 (2004), this Court affirmed the trial court's upward departure from the guidelines range on the basis of the defendant's propensity to commit future sex crimes against children. The

[11] By analogy, a failure to express remorse, while also being capable of confirmation on review of a record, is not necessarily indicative of an absence of remorse in the mind of a defendant.

> Court implicitly agreed that a mere mention of "future risk" would not constitute an objective and verifiable reason justifying an upward departure. *Id.* at 636. However, in reasoning that is equally applicable to the instant case, the Court determined that the trial court's decision was not based on a subjective perception of future risk, but on concrete factors that established a firm probability of future offenses, namely, the defendant's past criminal history, his past failures at rehabilitation, and his admission that he was sexually attracted to children. *Id.*; see, also, *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).
>
> The teaching of *Solmonson*, *Geno*, and *Armstrong* is that specific characteristics of an offense and an offender that strongly presage future criminal acts may justify an upward departure from the recommended sentencing range if they are objective and verifiable, and if they are not already adequately contemplated by the guidelines. Although a trial court's mere opinion or speculation about a defendant's general criminal propensity is not, in itself, an objective and verifiable factor, objective and verifiable factors underlying that conclusion or judgment are not categorically excluded as proper reasons for an upward departure. These factors include a history of recidivism, and obsessive or uncontrollable urges to commit certain offenses.

Here, although the trial court expressed in the departure form, as well as at sentencing, that defendant was not capable of being rehabilitated, the court did not list objective and verifiable factors underlying this belief. We do note that defendant has a fairly extensive criminal history, although nothing of a violent nature, and, according to the PSIR, defendant has violated probation on several occasions. However, even assuming defendant lacks rehabilitative capacity based on underlying objective and verifiable criteria, this alone would not justify an upward departure of more than double the top end of the guidelines range.

[T]he statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Smith*, 482 Mich at 303. The statutory language requiring a substantial and compelling reason for a departure requires the sentencing court to not only justify a departure, but the extent of a particular departure. *Id.* at 304. In departing from the guidelines, the trial court must provide elaboration sufficient to allow for effective appellate review. *Id.* "[A]n appellate court cannot conclude that a particular substantial and compelling reason for departure existed when the trial court failed to articulate that reason." *Id.* If it is unclear why a court made a particular departure, the appellate court is not permitted to substitute its own judgment about why the departure was justified. *Id.* "A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.* In imposing a sentence that departs from the guidelines, the trial court "must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.*

Here, the trial court failed to satisfy the articulation requirements enunciated in *Smith*. And the reasons provided by the trial court in the departure form in support of the departure did not support the particular departure imposed in this case. We are not holding that the trial court cannot impose an upward departure from the guidelines range; rather, we are merely holding that

any departure must be consistent with the law as expressed in *Smith* and this opinion, with the reasons adequately and properly articulated.

III. CONCLUSION

We affirm all of defendant's convictions. However, because of the issues regarding defendant's habitual offender status that need resolution and because of the errors associated with the sentencing departure, we vacate defendant's sentences and remand for resentencing.

Affirmed in regard to the convictions, vacated with respect to the sentences, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Christopher M. Murray