

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PARKER MATTHEW AYERS,

Defendant-Appellant.

---

UNPUBLISHED

January 29, 2013

No. 309733

Grand Traverse Circuit Court

LC No. 11-011329-FC

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of one count each of breaking and entering a building with intent to commit a felony, MCL 750.110a, possession of a firearm by a felon, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts each of assault with a dangerous weapon, MCL 750.82, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 180 to 600 months for breaking and entering, possession of a firearm by a felon, and each count of assault with intent to do great bodily harm, and to 120 to 180 months for each count of assault with a dangerous weapon, to be served consecutively to 2 years for felony-firearm. We affirm.

This case stems from the attempted robbery of a pharmacy. Defendant and a female companion hatched the plan to rob the pharmacy: they planned to steal prescription drugs from the pharmacy. In furtherance of this plan, defendant and his companion stole two firearms from the home of the woman's parents while they were sleeping. Defendant had previously stolen a gun from his father. They then drove to the pharmacy, and defendant drove his vehicle through the pharmacy's front door. Shortly thereafter, the police arrived, and a confrontation occurred. Grand Traverse County Sheriff's Deputy Christopher Weber testified that at one point defendant pointed a gun in his direction and fired what the officer believed was three shots. Grand Traverse County Sheriff's Deputy Ryan Salisbury fired back three or four times, and defendant fired back at Salisbury three or four times. Defendant testified that his companion fired the first three or four shots at the officers. He testified that she then put the gun down, and he picked it up and reloaded it. He then testified that when he stood up, shots were fired at him. He flinched and fired the gun three or four times, but not in the direction of the officers or with the intent to

kill them. No officers were harmed during the incident. Police recovered three guns from the scene.

Defendant first argues that there was insufficient evidence to support a conviction of two counts of assault with intent to do great bodily harm because there was insufficient evidence to support a finding that defendant specifically intended great bodily harm. We review a claim of insufficient evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). Viewing the evidence in a light most favorable to the prosecution, we determine “whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196. For assault with intent to do great bodily harm, the prosecution must establish that “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Defendant must have intended to inflict serious injury of an aggravated nature. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

Weber testified that defendant raised his hand and pointed a gun directly at him, and Salisbury saw that defendant had a gun in his hand. Weber yelled out to Salisbury that defendant had a gun, ran for cover, and heard what he believed to be three gunshots. Salisbury heard Weber yell that defendant had a gun, then he, too, heard three gunshots. Salisbury testified that the gunshots did not come from defendant’s companion. Salisbury testified that defendant also pointed the gun in the direction of his patrol car. Salisbury told him to drop the gun and then shot at defendant three or four times. Defendant fired back at him three or four times.

Michigan State Police forensic scientist William Tyrell testified that the location of a bullet hole in the pharmacy ceiling was consistent with someone’s shooting in the direction of Weber. He also testified that holes in the counter, a skip mark on the window, and a .38 caliber bullet lodged between windowpanes were consistent with someone’s attempting to shoot Salisbury. Viewing the evidence in a light most favorable to the prosecution, we conclude it is sufficient to show that defendant assaulted the two officers by firing a gun in their direction.

This same evidence is sufficient to find that defendant intended to inflict great bodily harm when he fired the weapon at the officers. That a bullet did not actually hit the victim does not negate defendant’s intent. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Again, Tyrell testified that there was evidence that a shot had been aimed at Weber and that four were fired toward Salisbury. Both officers feared for their lives and took cover to avoid being hit. Viewing this evidence in the light most favorable to the prosecution and considering the dangerousness of a firearm, we again conclude that there was sufficient evidence for a rational jury to find that defendant intended to do great bodily harm to the two officers. *Id. Brown*, 267 Mich App at 147.

Next, defendant argues that the trial court plainly erred when it scored offense variable (OV) 13 at 25 points. We disagree. OV 13 requires a score of 25 points when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). In scoring this variable, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). The trial court’s scoring here is consistent with that affirmed in *People v*

*Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), on the basis that the defendant was convicted of four counts of making child sexually abusive material, MCL 750.145c(2). In the present case, defendant was convicted of four crimes against a person (two counts of assault with a dangerous weapon and two counts of assault with intent to do great bodily harm less than murder). MCL 777.16d. Under the plain terms of the statute and *Harmon*, defendant's four assault convictions support the trial court's scoring OV 13 at 25 points.<sup>1</sup>

Defendant also argues that the trial court erred when it departed from the sentencing guidelines. We review a trial court's reasons for a departure from the sentencing guidelines for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "The conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Id.* Applying an abuse of discretion standard, we review the amount of departure and whether the reasons are substantial and sufficiently compelling to warrant a departure from the guidelines. *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

The trial court may depart from the sentence range provided by the sentencing guidelines if it articulates on the record substantial and compelling reasons for the departure. MCL 769.34(3). "[A] 'substantial and compelling reason' must be construed to mean 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.'" *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). The trial court should not base its 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); see also *Babcock*, 469 Mich at 258 n 12.

The trial court departed from the guidelines recommended minimum range on each of 34 to 134 months when it imposed a minimum sentence of 180 months for defendant's convictions of breaking and entering, felon in possession of a firearm, and two counts of assault with intent to do great bodily harm.

First, defendant argues that the trial court erred in reasoning that departure was justified based on additional crimes that were not scored. The trial judge stated:

But as you testified, there were eight other felonies that occurred within 24 hours that you've never been charged with. Two of which are more serious than everything you were convicted of prior to habitual enhancement. You did two,

---

<sup>1</sup> Additionally, the court noted that defendant "did two, 20-year home invasions at night in an occupied dwelling" within the 24 hours of the robbery, although it also noted that they had not been scored. These crimes against a person also support the score of 25 points. A trial court's scoring decision is not clearly erroneous if any evidence in the record supports it. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

20-year home invasions at night in an occupied dwelling, which is far more serious than a felon in possession of a firearm for a 10-year, great bodily harm, less than murder. Those haven't even been scored.

You had two other felonies that you committed two weeks prior, that aren't even scored that involved, essentially, the theft of your father's gun.

Defendant argues that not only were there were not eight other felonies within the 24 hours, that even if there were, that through OV 12, they were already factored into the guidelines. First, although OV 12 allows a court to consider those crimes defendant committed within 24 hours, it allows for scoring when the record indicates that defendant committed a limited number of crimes of a certain type. For example, 25 points is scored where "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). Ten points can be scored where defendant either committed "[t]wo contemporaneous felonious criminal acts involving crimes against a person" or "[t]hree or more contemporaneous felonious criminal acts involving other crimes." MCL 777.42(1)(b), (c). Defendant was scored 10 points under OV 12. The court's concern that OV 12 did not adequately account for the extent of defendant's criminal behavior is reasonable given that there was a litany of crimes that the prosecution did not charge. The court could reasonably conclude that the open-ended classifications (three or more), which blur distinctions between an increasing number of contemporaneous criminal conduct, inadequately accounted for the extent of defendant's contemporaneous felonious conduct.

Second, defendant argues that the trial court incorrectly departed from the guidelines because of an implicit finding by the jury that defendant committed perjury when he testified that his female companion had fired the first shots at the officers. We agree. "The phrase 'objective and verifiable' has been defined to mean 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). "[W]hether a person perjured himself or herself at trial may on some occasions be a subjective conclusion, i.e., an internal belief that the person was lying without a firm confirmation." *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007). Unlike in *Kahley*, where the defendant admitted that he had lied, *id.*, defendant has not acknowledged providing perjurious testimony. Thus, there was no firm confirmation that defendant lied under oath. Indeed, because defendant had consumed a large amount of drugs before and during the incident, his perception or memory of the events could have been altered to the extent that he actually believed that his companion fired the first shots. Thus, on this record, that defendant committed perjury is incapable of being confirmed, and the trial court clearly erred in determining that the perjury was a substantial and compelling reason for departure.

Third, defendant argues that the trial court erred in reasoning that departure was necessary because defendant had a loaded gun. Defendant argues that the loaded gun was considered significantly throughout the sentencing guidelines and comprised some of the actual counts. Again, we agree. It cannot be said that the loaded gun was not already given considerable weight. The trial court scored OV 1 (aggravated use of a weapon) at 25 points, the highest possible, which means that the court concluded that "a firearm was discharged at or toward a human being." MCL 777.31(1)(a). The loaded gun was also considered in OV 2,

which was scored at 5 points because “the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). The sentencing guidelines give considerable weight to the fact that defendant brought and used a gun at the scene. Therefore, the trial court clearly erred when it determined that the loaded gun was a substantial and compelling reason for departure.

Fourth, defendant argues that the trial court erred in departing from the guidelines based on defendant’s planning of the crime. Here, we disagree. While the guidelines, specifically OV 12, considered some of the contemporaneous felonies that defendant committed, they did not clearly reflect that many of those crimes were carried out according to a plan that had robbing the pharmacy as its goal. Based on the significant planning and multiple opportunities defendant had to reconsider his plan to rob the pharmacy, the trial court could have reasonably determined that the guidelines did not give the advance planning adequate weight or consideration.

Fifth, defendant argues that the trial court erred in departing from the guidelines because only two of the concurrent offenses could be scored in the guidelines, although “there were six concurrent offenses here.” Defendant assumes the court was referring to prior record variable (PRV) 7, for which he was scored 20 points. MCL 777.57(1)(a). If the court were referencing PRV 7, the court was expressing a belief that the PRV inadequately embodied the extent of defendant’s criminal conduct. Defendant asserts that the court’s stated reason does not support departure because the remaining convictions were scored in OV 13. In other words, the guidelines adequately took into account the additional concurrent felony convictions, albeit in a different guidelines variable. This argument lacks merit. That the guidelines allow the same convictions to be scored under PRV 7 and OV 13 belies the assumption implicit in defendant’s argument that as long as the criminal behavior is accounted for somewhere in the guidelines, the behavior is adequately considered within the statutory framework. Further, PRV 7 provides for scoring increments of 10 points, starting with zero points for “no subsequent or concurrent convictions,” moving to 10 points for “subsequent or concurrent conviction,” and topping out at 20 points for “2 or more subsequent or concurrent felony convictions.” MCL 777.57(1)(a)-(c). The court’s concern that PRV 7 does not adequately account for the extent of defendant’s adjudged criminal behavior is reasonable given that the PRV evinces a recognition that each subsequent or concurrent conviction demonstrates an increasingly concerning criminal history.

Defendant then argues that the trial court erred in not explaining how it determined the extent of the departure. The trial court is only required to articulate how the reasons justify the extent of the particular departure. *Smith*, 482 Mich at 311. After setting the maximum, the trial court once again reiterated the reasons that it felt defendant deserved to go to prison for longer than the sentencing guidelines. It articulated that departure was necessary because the guidelines did not take into account all of the other offenses defendant committed. The trial court also recognized that these crimes were very similar to defendant’s previous crimes and that he committed them shortly after he was paroled. The trial court adequately explained the reasoning for the extent of its departure. *Id.*

Although two of the reasons that the trial court gave for departure from the sentencing guidelines were clearly erroneous, we believe that the record clearly substantiates that the trial court would have departed, and departed to the same extent, based on the remaining substantial

and compelling reasons. We find no need to remand for resentencing or rearticulation of the court's determining factors. *Babcock*, 469 Mich at 259-261.

We affirm.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Michael J. Kelly