

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

CHRISTOPHER JULIAN LANE,

Defendant-Appellant.

No. 309972
Genesee Circuit Court
LC No. 11-028262-FC

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant Christopher Julian Lane appeals of right his jury convictions of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possessing a firearm during the commission of a felony (felony firearm), MCL 750.227b. The jury found Lane not guilty of the most serious charge, open murder. The trial court sentenced Lane to serve 80 to 120 months in prison for his felon-in-possession conviction, which was to be served consecutively to a two-year prison term for his felony firearm conviction. Because there were no errors warranting relief, we affirm Lane's convictions. However, we conclude that the trial court failed to properly state a substantial and compelling reason to support its decision to depart from the recommended minimum sentence range provided under the sentencing guidelines. For that reason, we remand this case for resentencing.

In July 2010, Lane shot and killed Omar Richard during an altercation. Although the evidence was conflicting as to whether Lane initiated the altercation, there was no dispute that Lane brought a firearm to the location and that he did not have the right to possess a firearm as a result of a prior felony conviction. The sole dispute at trial was whether he acted in self-defense after being fired upon or whether he went to the location at issue with the intent to confront Richard or other persons. The jury determined—at the very least—that the prosecution failed to establish beyond a reasonable doubt that Lane was not acting in self-defense; it also accepted the evidence that Lane unlawfully possessed a firearm and possessed a firearm during the commission of a felony.

I. SENTENCING DEPARTURE

Lane first argues that the trial court did not state a substantial and compelling reason to depart from the recommended minimum sentence range and failed to properly explain its reasons for the minimum sentence that it imposed. Lane preserved this issue for appeal by moving for a remand, which this Court granted.¹ See MCL 769.34(10).

This Court reviews the trial court's factual finding that a particular factor in support of departure exists for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). "However, whether the factor is objective and verifiable is a question of law that this Court reviews de novo." *Id.* This Court reviews "the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence" for an abuse of discretion. *Id.* "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Id.*

Generally, a trial court must impose a minimum sentence that falls within the sentencing guidelines range. *Young*, 276 Mich App at 448. However, a court may depart from the sentencing guidelines range if it states substantial and compelling reasons for the departure on the record. MCL 769.34(3). Factors meriting departure must justify the particular departure made, must be objective and verifiable, must keenly or irresistibly attract the court's attention, and must be of considerable worth. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *Young*, 276 Mich App at 450. A court may not depart from a sentencing guidelines range on the basis of an offense or offender characteristic already considered in determining the guidelines range unless the court finds on the record "that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

The trial court provided three reasons for the departure at sentencing and provided an additional reason on remand. The trial court first stated that a departure was warranted because Lane committed several of his prior offenses while on parole and one while on probation. Lane concedes that these parole and probation violations are objective and verifiable, but contends that the violations were already taken into account when calculating the guidelines range. Lane also finds it noteworthy that one incident occurred when he was 14 years old and did not result in a conviction and that the remaining three violations occurred between 2003 and 2005 and only resulted in misdemeanor convictions. He argues that all four violations were included on the sentencing report and were used to calculate the guidelines.

These violations were, to some extent, taken into consideration in the calculation of the recommended minimum sentence range. As such, the trial court had to state how those prior violations affected the guidelines range and then state its rationale for determining that that characteristic was given inadequate weight. *Young*, 276 Mich App at 451. It appears from the

¹ *People v Lane*, unpublished order of the Court of Appeals, issued December 11, 2012 (Docket No. 309972).

record that the trial court may have been trying to indicate that Lane's inability to conform himself to the law while on parole and during probation was evidence that he is not amenable to rehabilitation, but the trial court did not say as much and it did not otherwise provide a rationale for departing on the basis of these prior convictions.

The trial court also stated that the guidelines did not take into consideration that seven involved some form of assault:

I don't think — and while the sentencing guidelines do look at your history it doesn't take into account in the way I have in mind that 7 of your prior cases were assaultive in nature. The guidelines talk about prior convictions, but they don't see the common factor of assault.

Lane's prior convictions are objective and verifiable and were already taken into account when calculating the guidelines range. However, the guidelines do not take into account the nature of the convictions; that is, the guidelines do not take into consideration the extent that Lane's prior misconduct involved assaults. Lane's criminal record demonstrates a pattern of dangerous assaultive behavior against others. The fact that Lane has continued to engage in violent altercations despite having been repeatedly incarcerated for doing so—and especially in light of the fact that his inability to refrain from violence has now resulted in a death—does keenly or irresistibly attract the court's attention and is of considerable worth in deciding his sentence. *Smith*, 482 Mich at 299. We conclude that the trial court did not abuse its discretion when it determined that this factor constituted a substantial and compelling reason for departure from the guidelines. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The trial court also relied on a juvenile psychological report wherein the author determined that Lane had a propensity toward violence and death. Lane contends that this report does not amount to an objective and verifiable fact because the report was not part of the current record, was prepared some 15 years ago, and is impossible to confirm.

The author of the sentencing report for the current offenses noted that a prior sentencing report contained information that Lane had been referred for a psychological evaluation as a juvenile. Thus, the existence of this report and the author's findings are objective and verifiable because a court may take judicial notice of its own files. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Lane does make a point that the psychological evaluation was completed when he was a juvenile and is now remote in time. However, the author's findings unfortunately seem to have accurately predicted Lane's future conduct and its grave consequences. Accordingly, in light of Lane's subsequent conduct, the report does keenly or irresistibly attract the court's attention and is of considerable worth in deciding his sentence. *Smith*, 482 Mich at 299. The trial court did not abuse its discretion when it determined that this factor also constituted a substantial and compelling reason for departure. *Babcock*, 469 Mich at 264-265.

On remand, the trial court gave an additional reason for departure of deterring violence and protecting the Flint community. Lane contends that the goal of deterrence is subjective and the need to protect the public is a factor already incorporated in the guidelines as a whole. We agree that this factor is subjective and not capable of being verified. *Smith*, 482 Mich at 299. The trial court abused its discretion when it determined that this factor constituted a substantial and compelling reason for departure from the guidelines. *Babcock*, 469 Mich at 264-265.

Finally, Lane challenges the extent and proportionality of the trial court's departure. "[T]he trial court's departure must be proportionate to the defendant's conduct and criminal history." *People v Portellos*, 298 Mich App 431, 453; 827 NW2d 725 (2012). "The trial court must justify the particular departure it made by explaining why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Id.* (quotation marks and citation omitted). One way in which a trial court may do this is to compare "the facts of the defendant's case against the sentencing grid to explain why its sentence is more proportionate." *Id.* "The requirement that the trial court justify the extent of the departure is not overly burdensome. The court need only reasonably comply with the statutory articulation requirement in order to facilitate appellate review." *Smith*, 482 Mich at 315.

Here, the trial court did not offer a rationale for the extent of its departure at either the original sentencing or the resentencing. While the trial court may have felt that Lane's recidivism warranted the departure, the trial court needed to articulate that on the record. *Id.* at 304. Because "[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear[.]" we must conclude that the trial court abused its discretion. *Id.*

The trial court identified two objective and verifiable reasons for departing from the recommended minimum sentence range, but also gave two invalid reasons for departure. It also failed to state how the sentence actually imposed was more proportionate than a sentence within the guidelines range. *Portellos*, 298 Mich App at 453. Because of the combined errors, and the lack of detail on the record, there is no way to know if the trial court would have imposed the same sentence. *Babcock*, 469 Mich at 260. Therefore, we must remand for resentencing.

II. SCORING ERRORS

Next, Lane argues that the trial court erred when it scored offense variable (OV) 3 at 100 points because the sentencing offense was felon-in-possession and that offense did not cause injury to anyone. This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Under MCL 777.33(1)(a), the Legislature provided that the trial court must score 100 points under OV 3 if a "victim was killed" during the commission of the offense. The Legislature explained that the trial court must only score 100 points if "death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(1)(b). Here, the record evidence shows that Lane illegally possessed a firearm, which he used to kill another person. Had he not violated the law prohibiting his possession of a firearm, he would not have

been able to shoot and kill another person. Hence, the trial court did not clearly err when it found that a victim was killed as a result of Lane's commission of the sentencing offense, which was not itself homicide.

Lane also argues that his lawyer was ineffective for failing to object to the scoring of OV 3. Because the trial court did not err in scoring OV 3 at 100 points, any objection on this basis would have been meritless. A trial lawyer is not ineffective for failing to make a meritless objection. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

III. INACCURATE SENTENCING REPORT

Lane next contends that his sentencing report is inaccurate because it erroneously duplicates two prior offenses (number 21 and number 19). We review the sentencing court's response to a claim of inaccuracies in defendant's sentencing report for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

Because the Department of Corrections makes critical decisions on the basis of the sentencing report, it "should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report." *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008) (quotation marks and citation omitted). When a defendant challenges the accuracy of information in the report, the trial court is required to respond. *Id.* The trial court may determine whether the information is accurate, accept the defendant's version, or disregard the challenged information. *Spanke*, 254 Mich App at 648. "If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 771.14(6).

Lane included this argument in his motion to remand and again in his motion for resentencing. Nevertheless, the trial court did not address this issue. At the hearing, defense counsel did not raise the issue orally, seemingly because defense counsel made a brief argument and then rested on the written pleadings. While Lane has not made an offer of proof, the sentencing report does indicate that offense number 21 occurred on September 17, 2010, which is after Lane's arrest and detention while awaiting trial in the present case. Offense number 19 is also curiously one year to the day before the date given for offense number 21. Because the report's accuracy is plainly at issue and the trial court must respond, we direct the trial court to resolve the dispute on remand. *Uphaus*, 278 Mich App at 182.

IV. STANDARD 4 BRIEF

Lane raises two related issues in a supplemental brief. He argues that his conviction and sentence for felony-firearm is invalid because the jury acquitted him of open murder, which was the sole predicate supporting that charge, and he argues that—even if the jury could find him guilty of felony firearm—for the same reason, the trial court could not order the sentence for felony firearm to be served consecutive to his sentence for felon-in-possession. Because this issue was not raised before the trial court, this Court's review is limited to plain error affecting Lane's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Lane's arguments hinge on his claim that the prosecution never listed his felon-in-possession charge as a predicate felony for the felony firearm conviction and, at first blush, he appears to be correct. The prosecution filed a complaint and information charging Lane with open murder and being a felon-in-possession. It also charged him with carrying or possessing a firearm during the commission of a felony with two predicate felonies listed in the alternative:

COUNT 3: WEAPONS - FELONY FIREARM

did carry or have in his possession a firearm, to-wit: an assault rifle, at the time he committed or attempted to commit a felony, to-wit: Homicide and/or Felony Firearm

It is evident that the complaint and information mistakenly list felony firearm as the alternate predicate felony rather than felon-in-possession. Both documents list open murder and felon-in-possession as the first two counts and both provide that there are two alternate predicate felonies to support the third charge, yet both list the alternate predicate felony as felony firearm rather than felon-in-possession. It is logically inconsistent for a felony firearm charge to serve as the predicate felony for a felony firearm charge. See MCL 750.227b(1). And it seems evident that the prosecutor mistakenly listed felony firearm rather than felon-in-possession. The prosecutor confirmed this understanding at Lane's February 2011 arraignment. As she began to read the information, the prosecutor realized that count three contained a mistake and asked the trial court to amend it to correctly state that the alternate predicate felony was felon-in-possession:

Count three, did have in his possession or carry a firearm, to-wit an assault rifle at the time he committed or attempted to commit [a] felony, to-wit homicide and/or—it states and/or felony firearm, however, Your Honor, I would like to amend that to read and/or possession of a firearm by a felon on count three.

The trial court went off the record briefly, but did not address the request when it returned to the record.

Similarly, on the first day of trial, the trial court instructed the jury on the charges at issue. It identified count three as felony firearm and stated that with that charge the prosecutor alleged that Lane "did carry or have in his possession a firearm; to-wit an assault rifle at the time he committed or attempted to commit a felony; to-wit homicide or felon in possession of a firearm." Although it read count three as though it alleged felon-in-possession as an alternate predicate felony, the trial court also recognized that, as written, count three contained a mistake: "Counselors we didn't write that correctly so we'll amend that." Consequently, the trial court recognized that count three should properly state homicide and felon-in-possession as the proper predicates to support the felony firearm count.

At trial, none of the parties questioned this understanding and both the prosecution and defense focused on whether the evidence showed that Lane acted in self-defense. Nevertheless, the parties submitted jury instructions that listed only homicide as a predicate felony for the felony firearm count:

And here comes the third and last charge, felony firearm. The Prosecutor has the burden of proving that. They have to give you — they have to prove certain elements to you beyond a reasonable doubt. And there's two in this case too. First they have to prove that the defendant committed the crime of murder, which has been defined for you. Now it's necessary that he be convicted of that crime. And then second it has to be proven that at the time he committed the crime he knowingly carried or possessed a firearm. And the Prosecutor also must prove beyond a reasonable doubt that this all happened here in Genesee County, on July 25, 2010.

Notably, the trial court also submitted a written instruction to the jury that was similar to this oral instruction except that it provided that the jury could find Lane guilty of felony-firearm if it found that he committed the murder *even if it chose not to convict him of murder*: “First, that the defendant committed the crime of Murder, which has been defined for you. It is *not* necessary, however, that the defendant be convicted of that crime.” (emphasis added).

At Lane's sentencing, his lawyer reminded the trial court that Lane was found not guilty of murder and argued that, as a result, there were no victims: “The only charges my client's here for sentencing on is possession of weapons by a felon and felony firearm, which is tied into the weapons—possession of [a] weapon by a felon.” Accordingly, it also appears that Lane's trial lawyer understood that being a felon-in-possession was an alternate predicate felony under count three.

There was sufficient evidence to support a finding that Lane carried or possessed a firearm during either the commission or attempted commission of murder or while being a felon-in-possession. In addition, there is record evidence that the prosecutor requested and obtained an amendment of the information to include felon-in-possession as an alternate predicate for the felony-firearm charge, which agreement was consistent with Lane's trial lawyer's position at sentencing and the trial court's initial instruction to the jury on the charge. Finally, even if the prosecutor abandoned felon-in-possession as an alternate predicate by the time the trial court gave the jury its final instructions, the trial court apparently instructed the jury that it could find beyond a reasonable doubt that Lane committed a murder for purposes of convicting him of felony firearm even though it found him not guilty of murder under the first count, which instruction is not at issue on appeal. See *People v Garcia*, 448 Mich 442, 461-463; 531 NW2d 683 (1995) (opinion by Riley, J.) (noting that juries may render inconsistent verdicts involving an offense with a predicate offense as an element and the predicate). Consequently, on this record, we conclude that Lane has not established a plain error that would warrant either dismissing his felony firearm conviction or requiring the trial court to order that it run concurrent with his felon-in-possession conviction.

For these reasons, we affirm Lane's convictions, vacate his sentence for being a felon-in-possession, and remand for resentencing consistent with this opinion.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood