

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN LUCAS,

Defendant-Appellant.

UNPUBLISHED

June 23, 2005

No. 254521

Wayne Circuit Court

LC No. 03-012942-01

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, interfering with a crime report, MCL 750.483a(2)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of thirty to sixty years for the assault conviction, three to ten years for the interfering with a crime report conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals by right. We affirm defendant's convictions and his sentences as modified and remand for correction of the judgment of sentence.

I. Underlying Facts

Defendant was convicted of shooting his estranged wife in her home. The complainant had a personal protection order ("PPO") against defendant. The parties' son, KL, who was fifteen years old at the time of the incident, resided with the complainant. On October 18, 2003, defendant let himself into the complainant's house. KL indicated that after he told defendant that the complainant was sleeping, defendant directed him to wake her. Defendant then went in the basement where he had a gun cabinet to which he had the only key. The complainant testified that shortly after KL told her "daddy's in the house," defendant came to her bedroom doorway and "angrily" stated that he "didn't want no sh** out of [her]."

The complainant testified that after getting dressed and while defendant was in the basement, she went to the kitchen and started washing the dishes and making coffee. The complainant explained that the stairs from the basement lead directly to the kitchen. According to the complainant, defendant came up from the basement, "already angry, hands in his pocket," and asked her a series of questions, including, "Why are you doing this sh** to me?" and, "Why you keep getting these PPO's on me?" The complainant did not answer. Defendant then told the

complainant that he needed his social security card and birth certificate. She told him that she did not have them. At this time, the complainant was facing the sink with her back to defendant.

The complainant testified that out of the side of her eye, she saw defendant's hands come out of his pockets and come together. She heard a loud pop and felt something in her stomach and abdomen. The complainant told defendant that he shot her and began "begging him" for help and water. Defendant allegedly responded that she "wasn't getting nothing." The complainant indicated that defendant knelt in front of her, put a gun against her forehead and asked, "Why shouldn't [he] kill [her]," and blamed her for making him "do this." The complainant testified that she could clearly see the gun when it was against her head.

KL testified that after hearing the gunshot, he ran into the kitchen and saw the complainant on the floor, and defendant holding a gun. According to KL, defendant threatened, "don't nobody move or [he'll] shoot [the complainant] again." KL also heard defendant say "something about why should [he] let [her] live . . ." The complainant testified that, at that point, KL pleaded with defendant saying "don't, don't daddy." When defendant again asked why he should let the complainant live, KL replied that he loved and needed her. Both the complainant and KL testified that the complainant repeatedly exclaimed that she was dying. KL indicated that defendant did not help the complainant and would not allow him to call for assistance.

KL testified that defendant then sent him to the basement to put his guns and papers back in the gun cabinet and threatened to kill the complainant if he refused. Defendant accompanied KL, leaving the complainant in the kitchen. According to KL, defendant then asked the whereabouts of the complainant's purse, and after he found it, he rummaged through it and took the complainant's keys and money. Before leaving in the complainant's car, defendant directed the complainant and KL to tell the police that a stranger came to the door and shot the complainant. Defendant warned that if they disclosed his identity to anyone, he would return to kill the complainant and, if he was in prison, he would send someone else to do it. After defendant left, KL called 911.

According to the responding police officers, neither KL nor the complainant initially disclosed the identity of the shooter. After the complainant was taken to the hospital, KL revealed to the police that defendant had shot the complainant. KL testified that he did not initially disclose defendant's identity because he was afraid that defendant was "going to kill [his] mom." The complainant testified that defendant shot her in the back, and, as a result of the shooting, she was in a coma for seven days, in the hospital for thirty-two days, and sustained injuries to her stomach, spleen, liver, lung, diaphragm, and colon.

Defendant testified that the shooting was accidental. He indicated that he took a handgun from the basement, and as he was putting it in a plastic bag on the landing, it discharged and struck the complainant. He indicated that he panicked and initially told the complainant and KL not to call emergency and to claim that a stranger shot the complainant. He denied threatening to kill the complainant or taking money from her purse, but admitted taking her keys. He claimed that before leaving, he told KL to call emergency.

II. Bindover

Defendant first contends that the district court abused its discretion in binding him over for trial because insufficient evidence was presented at the preliminary examination to identify him as the perpetrator. We disagree. Defendant failed to timely raise this issue below. “If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover.” *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003). Defendant does not argue on appeal that the prosecutor presented insufficient evidence at trial to sustain his convictions or that he was otherwise prejudiced by the claimed error. As discussed *infra*, defendant was fairly convicted. Accordingly, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination. *Wilson, supra*.

We also reject defendant’s claim that defense counsel was ineffective for failing to move to quash his bindover. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court’s review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that but for counsel’s error the result of the proceedings would have been different. *Id.*

In light of our conclusion that defendant was fairly convicted on sufficient evidence following a jury trial, he cannot establish that he was prejudiced by the bindover. *Wilson, supra*. Therefore, he cannot establish a claim of ineffective assistance of counsel. *Effinger, supra*.

III. Prosecutorial Misconduct

Next, defendant contends that he was denied a fair trial by two instances of prosecutorial misconduct. We disagree.

Because defendant failed to object to the prosecutor’s conduct below, this Court reviews his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor’s remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. Cross-Examination

Defendant contends that the prosecutor impermissibly asked him to comment on the credibility of another witness when he asked him a series of questions regarding whether KL was “telling the truth” in his testimony. It is improper for the prosecutor to ask a witness to comment

on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Although the prosecutor's questions were improper, defendant has not demonstrated that his substantial rights were affected. *Carines, supra*. In *Buckey*, our Supreme Court noted that this type of error is harmless where the defendant "dealt rather well with the questions," and it is not clear how the questioning harmed the defendant. *Id.* Here, defendant handled the questions well, and nothing in the transcript suggests that defendant suffered any harm. Furthermore, a timely objection "could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction." *Buckey, supra* at 18 (citation omitted). Indeed, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility. Consequently, reversal is not warranted on the basis of this unpreserved issue.

B. Facts Not in Evidence

Defendant also contends that the prosecutor impermissibly argued facts not in evidence when he stated that one month after the incident, the complainant made "the *same exact statement* she made today." A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Although plaintiff asserts that the prosecutor's remarks were responsive to defense counsel's statements that the case was a "liar match," and that some facts "have been manipulated," there was no evidence to support an inference that the complainant gave a statement one month after the incident that was identical to her trial testimony. But as previously indicated, defendant did not object to the remark; therefore, our review is limited to plain error affecting substantial rights. *Carines, supra*.

Viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments, was of comparatively minor importance considering the totality of the evidence against defendant, and was not so inflammatory that defendant was prejudiced. Any prejudice that may have resulted could have been cured by a timely instruction. *Watson, supra* at 586. Indeed, the trial court instructed the jurors, before and after closing arguments, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The instructions were sufficient to dispel any possible prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Consequently, reversal is not warranted on the basis of this unpreserved issue.

IV. Ineffective Assistance of Counsel

Next, defendant contends that defense counsel was ineffective for failing to "impeach" the complainant with several inconsistent statements. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *Sabin (On Second Remand), supra*.

In support of this claim, defendant notes that, at the preliminary examination, the complainant testified that KL woke her, said something, got up, got dressed, and went into the kitchen. But “by the date of trial,” “her story had changed to include defendant standing at her bedroom door, ‘already angry.’” Defendant next notes that at the preliminary examination, the complainant indicated that, after going into the kitchen, she was washing dishes, but at trial she “added” that she was also making coffee. Defendant also notes that at the preliminary examination, the complainant testified that after being shot, KL came into the kitchen, and she asked him to call 911. But at trial she testified that after KL came into the kitchen, he pleaded with defendant not to shoot the complainant, but she did not indicate that she told him to call 911. Lastly, defendant notes that, “for the first time at trial,” the complainant claimed that defendant blamed her for the shooting by testifying defendant said, “you made me do this[,] you make me do this.”

It is not apparent from the record that counsel was deficient in his cross-examination of the complainant. Considered in context, it is questionable whether the cited testimony is actually contradictory. See, e.g., *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982) (“[a]s a general rule, the only contradictory evidence that is admissible for impeachment purposes is that which directly tends to disprove the exact testimony of the witness”). Although the complainant’s trial testimony contained certain facts about the incident that she did not indicate at the preliminary examination, her preliminary examination testimony was not inconsistent. It simply appears that the prosecutor asked her more questions, and she simply added more details at trial. Because a preliminary examination is merely an inquiry into probable cause, it is not surprising that a prosecutor might seek and a witness might add further details at trial. See, e.g., *People v Drake*, 246 Mich App 637; 633 NW2d 469 (2001). Because defendant cannot demonstrate that counsel’s alleged inaction was deficient or prejudicial, he cannot establish a claim of ineffective assistance of counsel. *Effinger, supra* at 67.

V. Sentencing

A. Upward Departure

Defendant also contends that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 135 to 225 months (or 11.25 to 18.75 years) and sentenced him to thirty to sixty years’ imprisonment for his assault with intent to commit murder conviction. We disagree.

Under the sentencing guidelines statute, in most instances the trial court must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it “has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure.” MCL 769.34(3). Our Supreme Court has reiterated that the phrase “substantial and compelling” constitutes strong language indicating that adequate reasons exist only in “exceptional cases.” *Babcock, supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). The reasons justifying departure should “keenly and irresistibly grab” the court’s attention and be recognized as having “considerable worth” in determining the length of a sentence. *Babcock, supra* at 258. Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 272. This means that

the facts considered must be actions or occurrences that are external to the minds of the judge, the defendant, or others involved the sentencing process and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

This Court reviews for clear error a trial court's factual determination that a factor exists. *Babcock, supra* at 264, 273. Whether a factor is objective and verifiable is a question of law subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 274. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 269-270.

In this case, the trial court stated its reasons for departure on the record:

Now, in looking at the sentencing guidelines, I see that the sentencing guidelines do call for a sentence of 135 to 225 months on the minimum.

And looking at the offense variable score, it reaches the maximum which looks at 100 points as the maximum. The point total though for [defendant] is 190, almost double what would be the maximum, which I think is reflective of the fact that the sentencing guidelines do not appropriately reflect the devastation in this particular case.

I do recognize that there were points given, 25 points for life threatening injury, but his was a situation where [the complainant], a diabetic, was shot, was in a coma for seven days, in the hospital for 30 days, had a colostomy as a result of this particular situation and can't work now.

The guidelines, while recognizing life threatening injury, I don't believe take into account the sustained catastrophic impact that this has had on the victim. And I also note and look and see that once this incident occurred, and [defendant] himself is a diabetic, knew his wife was a diabetic, knew the healing difficulties that diabetics have, immediately after this shooting was concerned about his own welfare and not the welfare of his wife.

If this had been an accident, there would have been an immediate call to 911, but there wasn't. There was no sympathy. There was no compassion. What it ultimately resulted in was putting a gun to the head of his wife and saying, "why shouldn't I just kill you now," and that reflects, I think, a coldheartedness [sic] that is not reflected in these guidelines.

His son, his only child who bears his own name was told "don't call for help immediately. Don't tell the police who did it, or I'll come back and kill her or hire someone if I'm locked up."

He forced his son to choose between getting help to save the life of his mother or to risk death to himself and his mother if he were to defy his father, who was standing there with a gun. He forced his son to lie to the police.

Then [defendant] got on the stand and said that his own son was not telling the truth when he testified.

This serious offense for the reasons that I've articulated, and I would also note seeing [KL], testify here in court, he was breaking down and crying, and his testimony at the time of sentencing was where he had a very difficult time not breaking down, certainly is reflective of the fact that counseling would be very valuable to him.

While I know the guidelines do take that into account, the severe emotional impact on this entire family, which needs counseling, along with the devastation and severity of the injuries, the threat and coldheartedness [sic] of this particular incident are not adequately covered in the guidelines.

The court also noted in the sentencing information report departure evaluation form:

The following aspects of this case led me to impose a sentence outside the recommended range:

- OV point total (190) was almost twice the number of points for the maximum on OV sentencing grid.
- Victim's injuries and permanent incapacitating results are not reflected adequately in the guidelines.
- Viciousness of the defendant's conduct during and immediately after the shooting is not adequately reflected in OV 6 guidelines.

Initially, we find that one of the court's articulated reasons for departure, i.e., that when testifying at trial defendant said that his own son was not telling the truth, is not substantial and compelling. It is not remarkable that a defendant accused of a heinous crime would deny criminal culpability at trial and claim that a prosecution witness, even his own child, was untruthful. Accordingly, this articulated factor, standing alone, does not provide a basis for departing from the sentencing guidelines range.

But the trial court relied on other factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines. Although defendant was scored ten points for OV 4 (psychological injury to a victim), MCL 777.34(1)(a), fifteen points for OV 5 (psychological injury to a member of the victim's family), MCL 777.35(1)(a), twenty-five points for OV 6 (intent to kill or injure), MCL 777.36(1)(a), and fifty points for OV 7 (aggravated physical abuse), the trial court did not err by finding that the offense and offender characteristics that are unique to this assault were not adequately reflected in the guidelines. In other words, as noted by the trial court, the factors did not adequately account for the vicious nature and

enduring and devastating consequences of this offense, or that the defendant committed these crimes against his own family members.

In sum, the objective and verifiable reasons the court cited to justify departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of defendant's sentence. For the same reasons, the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272. Defendant is not entitled to resentencing.¹

B. *Blakely v Washington*

We reject defendant's claim that he is entitled to resentencing because the trial court's "articulated findings" supporting his sentence were not determined by a jury, as mandated by *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. But our Supreme Court has stated that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

C. Felony-firearm Sentence

Defendant next contends that his judgment of sentence must be amended because the trial court erred by making his felony-firearm sentence consecutive to his sentences for assault with intent to commit murder and interfering with a crime report. The prosecutor concedes, and we agree, that defendant's felony-firearm sentence should be imposed consecutively only to his sentence for assault with intent to commit murder. See *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). Because this error did not affect defendant's overall sentence, we remand for correction of the judgment of sentence to reflect that the felony-firearm sentence run consecutively only to the sentence for assault with intent to commit murder. *Id.* at 465.

D. Jail Credit

Defendant's final claim is that that trial court erred by applying his jail credit against his concurrent sentences for assault with intent to commit murder and interfering with a crime

¹ Although one of the reasons the trial court articulated is not substantial and compelling, remand for resentencing is unnecessary. If a trial court articulates multiple reasons for a departure, and we determine that some of the reasons are invalid, we must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Babcock, supra* at 260, 273. If we cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for rearticulation or resentencing is necessary. *Id.* at 260-261. Here, having reviewed the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone.

report, as opposed to his felony-firearm sentence, which must be served first. The prosecutor concedes, and we agree that because defendant's felony-firearm sentence must be served first, MCL 750.227b(2), any credit for time served should be applied against the felony-firearm sentence. See *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991), and *People v Cantu*, 117 Mich App 399, 403; 323 NW2d 719 (1982) (if consecutive sentences are imposed, any credit for time served should be applied against the first sentence). Therefore, on remand, the trial court shall correct the judgment of sentence accordingly.

We affirm and remand for correction of defendant's judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Christopher M. Murray