

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK RICARDO SERVANT,

Defendant-Appellant.

UNPUBLISHED

April 21, 2009

No. 282609

Wayne Circuit Court

LC No. 03-012988-FH

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 1 to 20 years for the conviction of possession with intent to deliver less than 50 grams of cocaine, one to four years for the conviction of possession of less than 25 grams of heroin conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion when it failed to determine whether an inculpatory statement attributed to defendant, which defendant claimed he never made, was nevertheless involuntary. The issue of whether a defendant voluntarily made an inculpatory statement is reviewed de novo by this Court. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). The trial court’s factual findings will be reversed only where they are clearly erroneous. *Id.* at 708. A factual finding is clearly erroneous where this Court is left “with a definite and firm conviction that a mistake was made. *Id.*, quoting *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003).

We agree that defendant was entitled to a determination with respect to whether his statement was voluntary, but find that the trial court’s error in failing to ascertain the voluntariness of the statement was harmless.

In *People v Tate*, 471 Mich 959; 690 NW2d 702 (2005), the Court concluded that a defendant has the right to challenge both the authenticity of an inculpatory statement, and whether the inculpatory statement was made voluntarily. The Supreme Court’s ruling in *Tate*,

supra, reaffirms the proposition, explained by this Court in *People v Neal*, 182 Mich App 368, 372; 451 NW2d 639 (1990), that the issues of whether a statement was voluntary and whether the statement was made at all are two separate and distinct inquiries. In *Neal*, where the defendant claimed that he involuntarily signed a statement that the police had fabricated, the Court held that the trial court was required to conduct a *Walker* hearing before admitting the statement into evidence at trial. *Id.* The *Neal* Court explained:

At the hearing the trial court must determine, assuming the defendant made the statement, whether he did so voluntarily. If it is found that the defendant voluntarily made the statement, the defendant is free to argue to the jury that the police fabricated it. However, if the trial court at the hearing finds the statement was involuntarily made, the statement is inadmissible, regardless of the defendant's claim that he never actually made it. [*Neal, supra* at 372.]

In this case, unlike the factual scenario presented in *Neal*, defendant claimed at his *Walker* hearing that he had been assaulted by a police officer before questioning. Defendant admitted that he answered the first of three questions posed by the police officer, which related to whether defendant was located at the premises at the time when the search warrant was executed. However, defendant denied responding, "Cocaine, not heroin. The gun was also mine," to a question regarding whether defendant possessed cocaine and heroin. Defendant denied that he responded to the second question at all. Both the police and defendant agree that defendant declined to answer the third question. The trial court concluded that it did not need to determine whether the statement was coerced.

The trial court erred when it declined to rule on the issue of whether defendant's statement was voluntary. *Tate, supra* at 959; *Neal, supra* at 372. Although this case and *Neal* are factually distinguishable in many respects, both this case and *Neal* involve a voluntariness challenge to the admissibility of an inculpatory statement that the defendant claims he never made. *Neal, supra* at 372. If the trial court concluded that the statement was involuntary, the trial court should have concluded that the statement was inadmissible and granted defendant's motion to exclude it. *Id.* If, on the other hand, the trial court concluded that the statement was voluntary, then the issue of whether defendant made the statement at all was a question of fact for the jury to decide. *Id.*

Even assuming that defendant's statement was involuntary, the erroneous admission of an involuntary admission or confession is subject to a harmless error analysis. *People v McRunels*, 237 Mich App 168, 184-185; 603 NW2d 95 (1999). An error is deemed harmless unless the defendant demonstrates that "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Moreover, to prevail under a harmless error analysis, a defendant must show that "it is more probable than not that a different outcome would have resulted without the error." *Id.*

Here, defendant has failed to demonstrate that it is more probable than not that a different outcome would have resulted had his statement not been admitted. Even in the absence of the inculpatory statement regarding the cocaine and the handgun, there was sufficient circumstantial evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant possessed the cocaine and handgun that resulted in defendant's convictions.

The elements of possession with intent to deliver less than 50 grams of cocaine are: “(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver.” *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Constructive possession of a controlled substance exists where direct or circumstantial evidence shows that defendant had “dominion and control” over it, and may be found where the defendant had the power to dispose of the substance. *Wolfe, supra* at 521. Constructive possession of a firearm exists when the defendant knows the location of the weapon and it is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). “Possession may be either actual or constructive, and may be joint as well as exclusive.” *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Here, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant possessed the cocaine and the handgun. Police Officer Duncan Dorsey searched the closet where defendant was discovered, and noticed that one of the baseboards was ajar. When Dorsey removed the baseboard, he discovered a trap door. Inside the door, Dorsey recovered 62 individually wrapped packages of a substance later confirmed to be crack cocaine. Police Officer Michael Bryant testified that cocaine packaged in numerous, small packets is normally intended for distribution or sale. A laboratory analysis confirmed that the substances seized pursuant to the search warrant were cocaine and heroin, and confirmed that the weights of the cocaine and heroin were less than 50 grams and less than 25 grams respectively. Dorsey also recovered a loaded Ruger nine millimeter-caliber semi-automatic handgun from the area concealed by the trap door. Singleton’s search of the residence revealed numerous empty “zip lock” type plastic bags that were located in the kitchen.

From this evidence, a rational trier of fact could conclude that defendant had the requisite “dominion and control” over the cocaine, which was discovered in a cache in a closet where defendant had been discovered hiding; accordingly, there was sufficient evidence for the jury to conclude that defendant constructively possessed the cocaine. *Wolfe, supra* at 521. A rational trier of fact could also conclude that defendant intended to deliver the cocaine from the evidence with respect to the number of packages of cocaine that were recovered. Further, a rational trier of fact could infer that defendant knew the location of the handgun, and the handgun was reasonably accessible to defendant as it was also discovered in the closet where defendant was hiding. *Burgenmeyer, supra* at 438. Because the prosecution presented legally sufficient evidence that defendant possessed with the intent to deliver less than 50 grams of cocaine and the handgun, the trial court’s error with respect to the admission of defendant’s allegedly coerced statement regarding the cocaine and handgun was harmless. *McRunels, supra* at 184-185.

II

Defendant argues that defense counsel was ineffective by failing to object to the trial court’s decision not to consider whether defendant’s statement was voluntary. We disagree. Defendant’s ineffective assistance of counsel argument consists solely of two conclusory sentences. Under these circumstances, defendant has abandoned the issue. “An appellant may

not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

III

Defendant contends that his right to be present at his trial was violated. We disagree. “A criminal defendant has a statutory right to be present at trial.” *People v Woods*, 172 Mich App 476, 478-479; 432 NW2d 736 (1988); MCL 768.3. This statutory right is “impliedly guaranteed by the federal and state constitutions and [is] grounded in common law.” *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). However, a “defendant’s voluntary absence from the courtroom after trial has begun waives his right to be present and does not preclude the trial judge from proceeding with the trial to conclusion.” *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975).

Here, the record clearly indicates that defendant waived his right to be present during trial. On the second day of trial, the trial court observed that defendant was absent, and queried defense counsel regarding defendant’s whereabouts. After attempting to contact defendant by cellular telephone, defense counsel was informed by defendant’s girlfriend that she had driven defendant to a hospital following a motor vehicle collision. However, one of the trial court’s deputies observed the traffic accident, and stated on the record that the collision was minor. Further, the trial court’s assistant contacted the hospital where defendant’s girlfriend claimed to have driven him, and a hospital employee informed the trial court’s assistant that defendant had not been admitted as a patient. Given these circumstances, the trial court correctly determined that defendant’s absence from his trial was voluntary. The trial court’s conclusion is supported by subsequent events, which indicate that defendant was at large for three years after his disappearance.

IV

Defendant maintains that the trial court “pierced the veil of judicial impartiality” when it made an inquiry in the presence of the jury about defendant’s absence on the second day of trial. We disagree. This Court reviews an unpreserved challenge to the conduct of the trial court for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: “(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A defendant must also demonstrate that the error affected the outcome of the proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where “the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Carines, supra* at 763.

A trial court may exercise broad discretion with regard to matters of trial conduct. MCL 768.29; *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). However, in exercising its discretion, a trial court may not pierce the veil of judicial impartiality. *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006). The veil of judicial impartiality is

pierced where the trial court's conduct unduly influenced the fact-finder and deprived defendant of a fair trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Here, the trial court's questions to defense counsel regarding the reasons for defendant's absence were reasonable under the circumstances and constitute neither an abuse of discretion nor plain error affecting defendant's substantial rights. Instead, the record shows that the trial court merely observed that defendant was absent, attempted to ascertain whether defendant had contacted his counsel regarding a reason for his absence, and afforded defense counsel an opportunity to investigate and produce defendant for trial. The trial court further observed that it was important that defendant be present for his trial. The trial court then excused the jury in order to allow defense counsel to attempt to locate defendant. We fail to perceive how the trial court's actions indicated bias or prejudice against defendant. Further, we observe that although defendant concludes, "there were many less harmful ways that the judge could have explained [defendant's] absence to the jury," defendant fails to provide any examples of how, even using the benefit of hindsight, the trial court should have acted under the circumstances. The trial court's actions do not fall outside the range of principled outcomes, and, moreover, do not constitute outcome-determinative error. *Unger, supra* at 235.

V

Defendant next argues that the trial court erred in concluding that substantial and compelling reasons supported its decision to depart from the sentencing guidelines and impose a prison sentence of 1 to 20 years for defendant's conviction of possession with intent to deliver less than 50 grams of cocaine. We disagree. Where a trial court departs from the guidelines range at sentencing, this Court will review the issue regardless of whether the defendant has taken steps to preserve the issue for review. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). However, unless the defendant has raised a challenge to the trial court's decision to depart from the guidelines range at sentencing, a motion for resentencing, or a motion to remand, this Court will review the issue under the plain error standard set forth under *Carines, supra* at 763. *Kimble, supra* at 312. Here, defendant failed to assert that there were no substantial and compelling reasons for the trial court to depart from the guidelines. Thus, review is for plain error affecting defendant's substantial rights. *Kimble, supra* at 312.

A trial court is required to impose a minimum sentence falling within the appropriate statutory sentencing guidelines range. MCL 769.34(2). A trial court may deviate from the range only if there is a "substantial and compelling reason" to depart from the guidelines range. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). "[T]he reasons justifying departure should 'keenly' or 'irresistably' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995) (internal quotations omitted). The substantial and compelling reason must be objective and verifiable. *Babcock, supra* at 258. Further, the trial court is required to articulate a substantial and compelling reason for the specific departure from the guidelines range on the record. *Id.* at 259-260. Moreover, "in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportional criminal sentence than is available within the guidelines range." *Id.* at 264.

MCL 769.34(3)(b) provides, in relevant part:

The court shall 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(4) states, in pertinent part:

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Our Supreme Court recently recognized that MCL 769.31(b) provides “that a prison sentence is not an intermediate sanction.” *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008). Instead, under MCL 769.31(b), an “intermediate sanction” may include “community service, probation, a jail sentence, a fine, [or] house arrest, but [MCL 769.31] unequivocally states that a prison sentence is not an intermediate sanction.” *Muttscheler, supra* at 375. Where a trial court does not articulate substantial and compelling reasons for a departure, the trial court may impose “a jail term that does not exceed the upper limit of the recommended minimum sentence, or 12 months, whichever is less.” *Id.*, quoting MCL 769.34(4)(a) (emphasis deleted). Even if the length of the sentence is within the 12-month maximum set forth under MCL 769.34, if the trial court sentences the defendant to serve the sentence in prison, the sentence is an upward departure. *Id.*

The Court also reaffirmed the applicability of MCL 769.34, holding that where the upper limit of a defendant’s recommended minimum sentence range is 18 months or less, “the trial court cannot impose a prison sentence unless it identifies substantial and compelling reasons for the departure.” *Muttscheler, supra* at 375. The Court clarified that a trial court may no longer simply indicate why it decided to upwardly depart by imposing a prison sentence, but under the legislative sentencing guidelines, the trial court must identify substantial and compelling reasons for its departure from the guidelines.

Here, the trial court articulated substantial and compelling reasons to support its decision to sentence defendant to 1 to 20 years’ imprisonment, instead of an intermediate sanction of 1 to 11 months’ incarceration in jail, for the conviction of possession with intent to deliver less than 50 grams of cocaine. The court noted that defendant’s decision to flee during trial and remain at large for three years, as well as his subsequent arrest and conviction for an assault crime in Oakland County, demonstrated defendant’s disrespect for the judicial system and the judicial process. These reasons are both objective and verifiable. *Babcock, supra* at 258. Further, that defendant absconded for three years after the first day of trial, and remained at large until he was

arrested for assault, should “keenly” or “irresistibly” grab a court’s attention, and are of considerable worth in deciding the length of defendant’s sentence. *Id.* at 257.

Moreover, we observe that the trial court specifically stated on the record that it intended to impose a sentence of imprisonment “with the Department of Corrections.” Thus, the trial court specifically articulated, on the record, that its departure from the guidelines applied to the length of defendant’s sentence and that the sentence was to be served in prison instead of in jail. Thus, the trial court articulated sufficient substantial and compelling reasons for the trial court’s departure from 0 to 11 months’ incarceration in jail to 1 to 20 years’ imprisonment. *Babcock, supra* at 259-260.

VI

Defendant argues that he was sentenced on the basis of inaccurate information because the sentencing court stated that it intended to “depart slightly” from defendant’s sentencing guidelines range of 0 to 11 months, but imposed a prison sentence of 1 to 20 years for the conviction of possession with intent to deliver less than 50 grams of cocaine. This, according to defendant, was not a “slight departure,” but instead, was a significant departure because, under defendant’s sentencing guidelines range, defendant would have been entitled to an intermediate sanction instead of the sentence of imprisonment that the trial court actually imposed. However, even if the trial court used the word “slightly” in a literal, and not a rhetorical or relative, manner, the trial court nevertheless articulated substantial and compelling reasons for the specific departures from the sentencing guidelines range, and articulated the reasons and the extent of the departures on the record. In other words, although defendant’s sentences are arguably more than a “slight departure,” the substantial and compelling reasons relied upon by the trial court nonetheless support its departures from an intermediate sanction of 0 to 11 months’ incarceration in jail to 1 to 20 years’ imprisonment.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher