

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 26, 2013

v

CHRISTOPHER KIRK ELLEDGE,

Defendant-Appellant.

No. 308379
Wayne Circuit Court
LC No. 11-007730-FH

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant, Christopher Elledge, appeals as of right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2); unarmed robbery, MCL 750.530; assault with intent to do great bodily harm less than murder, MCL 750.84; and larceny in a building, MCL 750.360. Defendant's convictions arise out of a June 29, 2011, incident where defendant attacked, beat, and robbed a 70-year-old woman at the entrance of her apartment building. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 40 to 60 years' imprisonment for the first-degree home-invasion conviction, 20 to 40 years' imprisonment for the unarmed-robbery conviction and the assault-with-intent-to-murder convictions, and 10 to 15 years' imprisonment for the larceny-in-a-building conviction. The sentences for unarmed robbery, assault, and larceny are concurrent to each other but consecutive to the sentence for home invasion. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of identity and of intent to cause great bodily harm.¹ When reviewing a claim challenging the sufficiency of the evidence, we examine the evidence at trial in a light most favorable to the prosecution to determine

¹ We note that defendant also argues that there was insufficient evidence of stealing a financial transaction device, MCL 750.157n. He erroneously states that he was "found guilty as charged" on this count. In fact, the jury found defendant not guilty of stealing a financial transaction device; therefore, we do not address this claim.

whether a rational juror could conclude that the essential elements of the crime were proven beyond reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient proof of identity to enable a rational juror to conclude beyond a reasonable doubt that defendant was the perpetrator. Identity may be established by direct or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Although the victim did not initially identify defendant at the live lineup, she later identified him in court and was sure of her identification; she explained that her face was severely injured during the assault, which affected her vision. See *id.* (stating that testimony of complaining witness alone was sufficient to identify the defendant as the perpetrator). In addition, another resident of the apartment building saw defendant on a prior occasion outside the same door of the building where the robbery later occurred, and the resident later identified defendant at a live lineup. The driver who took the victim to and from the grocery store before the robbery also identified defendant as the person he had seen at the door; he saw defendant on the street every day. Moreover, defendant's former girlfriend indicated that defendant had access to her car and that the car in the photographs admitted into evidence looked like her car, although her car did not have a broken side mirror; she also thought that the man in the surveillance video from the apartment building looked like defendant. The credibility of identification testimony is a question for the jury that this Court does not resolve anew on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

We also conclude that there was sufficient evidence of defendant's intent to do great bodily harm less than murder. Intent may be inferred from all of the facts and circumstances. *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003). Because of the difficulty in proving a defendant's state of mind, only minimal circumstantial evidence is needed to establish intent. *Id.* In this case, defendant severely beat the victim, a 70-year-old woman. He continued hitting her even after she fell down. He also told her to "shut up before he kill [sic] [her]" when she begged him to stop. This statement unmistakably indicated his intent to inflict serious, life-threatening injury. His blows focused on the victim's head and left her nearly unconscious. She suffered cuts, bruises, and swelling. She spent time in the hospital and suffered a permanent eye injury. Although defendant argues that only fists were used, assault with intent to commit great bodily harm does not require the use of a dangerous weapon; bare hands are sufficient. *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). In rendering a verdict, the jury heard the evidence, watched video footage of the incident recorded on the apartment-complex surveillance cameras, viewed photographs of the victim taken after the incident, and determined what inferences to draw from the evidence, which we do not disturb on appeal.

Accordingly, defendant's challenge to the sufficiency of the evidence lacks merit.

II. UNSOLICITED OPINION OF THE VICTIM'S HUSBAND

Defendant next argues that error requiring reversal occurred when the victim's husband, while taking the witness stand, blurted out, "I'd like to ask the Court to forgive me, please. But this low down . . . He almost killed my wife. He almost killed her." Defendant asserts that this statement improperly invaded the jury's province and affected the outcome of his trial. We review this unpreserved issue for plain error. See *People v Douglas*, 296 Mich App 186, 191;

817 NW2d 640 (2012). To be entitled to relief, defendant must show the following: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights, i.e., the error affected the outcome of the lower-court proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Furthermore, once defendant satisfies these requirements, we must exercise our discretion to reverse, which is only warranted when a plain error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *id.* at 763-764.

We conclude that, although the remark was improper and inadmissible, see *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985) (“As with matters of credibility, it is clear that a witness cannot express an opinion on the defendant’s guilt or innocence of the charged offense.”), defendant has not demonstrated that he is entitled to relief under the plain-error framework. See *Carines*, 460 Mich at 763-764. The remark by the victim’s husband was unsolicited, unanticipated, and isolated. Both the trial court and the prosecutor attempted to intervene before he could finish his statement. The trial court reprimanded him and instructed him to answer only the questions asked of him. Both the trial court’s handling of the situation at the time of the incident and its instructions before deliberations regarding the presumption of innocence, the burden of proof, that the jury should limit its consideration to properly admitted evidence, and that no bias or sympathy should influence its decision sufficiently diminished any prejudicial effect of the outburst. See *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005) (explaining that jurors are presumed to follow a court’s instructions and that instructions are presumed to cure most errors, including in the context of a witness outburst); see also generally *People v Gonzales*, 193 Mich App 263, 265-267; 483 NW2d 458 (1992) (mistrial not warranted where trial court advises jury not to consider a witness’s outburst when considering its verdict). A mistrial is only appropriate when a comment is so egregious that the prejudicial effect cannot be cured, which is not the case here. See *Bauder*, 269 Mich App at 195 (holding that a mistrial because of a witness outburst was unwarranted where the trial court took remedial steps to ensure that the defendant received a fair trial); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (“[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.”); *Gonzales*, 193 Mich App at 264-267 (holding that a trial court did not abuse its discretion by denying a motion for a mistrial in response to a witness’s unsolicited outburst). Moreover, considering these actions by the trial court in conjunction with the strong evidence of defendant’s guilt, the statement made by the victim’s husband was not an error affecting defendant’s substantial rights that would move this Court to exercise our discretion to reverse his convictions. See *Carines*, 460 Mich at 763-764.

In a related argument, defendant contends that his counsel was ineffective by failing to request a mistrial on the basis of the husband’s remarks. We likewise reject this argument. Defendant’s counsel did not render ineffective assistance for failing to object and move for a mistrial. Counsel attempted to intervene but was interrupted by the prosecutor’s and the trial court’s efforts to silence the witness. Counsel may have chosen not to pursue the matter because he did not want to draw further attention to the remark after the trial court and prosecutor had already addressed the issue. “Certainly there are times when it is better not to object and draw attention to an improper comment.” *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). We will not substitute our judgment for that of counsel in matters of trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Because a mistrial was not warranted in this case, defense counsel was not ineffective for failing to pursue a futile motion or

objection. See *People v McGhee*, 268 Mich App 600, 627-629; 709 NW2d 595 (2005) (explaining that the failure to pursue a futile motion or objection is not a basis for deficient performance).

III. GUIDELINES DEPARTURE

Defendant challenges the trial court's decision to depart from the recommended sentencing guidelines range for defendant's first-degree home-invasion conviction, arguing that the guidelines adequately considered his prior criminal record and the circumstances of this case and that the trial court impermissibly concluded that he had no possibility of rehabilitation.

A trial court must sentence a defendant within the recommended sentencing guidelines range unless it articulates on the record substantial and compelling reasons to depart from the guidelines. MCL 769.34(2)-(3); *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). When interpreting this requirement, our Supreme Court has explained that the reasons relied on must be "objective and verifiable," "of considerable worth in determining the length of the sentence," and "should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. A reason is objective and verifiable if it is "based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008) (citation omitted). Substantial and compelling reasons for departure exist only in exceptional cases." *Smith*, 482 Mich at 299. Furthermore, the reasons for departure may not be on the basis of an offense or offender characteristic that was already considered in calculating the sentencing variables, unless the trial court determines from the record facts, including the presentence investigation report (PSIR), that the characteristic was given insufficient or disproportionate weight. *Id.* at 300.

We review for clear error the factual findings supporting a departure. *Id.*, citing *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo whether the reasons given were objective and verifiable and for an abuse of discretion whether the reasons were substantial and compelling. *Id.* We give due deference to the trial court because of its familiarity with the facts of the case. *Babcock*, 469 Mich at 268-269.

At the outset, we emphasize that defendant fails to indicate specifically which sentencing variables he believes sufficiently accounted for the offense and his criminal history or otherwise address the trial court's articulated reasons for departure (other than rehabilitation); he only cites general propositions in support of his argument. A party may not merely state a position or assert error and then leave it to this Court to discover the basis for his claim or elaborate upon his arguments and search for applicable authority. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004); *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Nevertheless, we conclude that the trial court properly justified with substantial and compelling reasons its decision to deviate from the guidelines. The final sentencing guidelines range for the first-degree home-invasion conviction was 117 to 320 months' imprisonment. The trial court departed upward 160 months by sentencing defendant to 40 to 60 years' imprisonment, which equates to 480 to 720 months. The trial court's conclusion that defendant was unlikely to be rehabilitated was supported by objective and verifiable factors and justified the upward departure. See *Horn*, 279 Mich App at 45 ("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."); *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004) (concluding that a departure was justified given the defendant's extensive criminal history, the failure of prison to deter the defendant, and the trial court's concern for the protection of society).

As the trial court found, the sentencing guidelines did not adequately account for defendant's extensive criminal history. Defendant has 14 prior felony convictions according to his PSIR. In scoring prior record variable (PRV) 2, defendant received the maximum score of 30 points for having four or more prior low-severity felony convictions. MCL 777.52(1)(a). At least eight of the prior convictions were low-severity felony convictions. MCL 777.52(2)(a); MCL 777.19.² Thus, the guidelines failed to account for at least four prior low-severity felony convictions.

The trial court cited the fact that defendant was being sentenced for other crimes that occurred within the same time frame. Defendant received 20 points for PRV 7, which was the maximum number of points for having "2 or more" subsequent and concurrent felony convictions. MCL 777.57(1)(a). PRV 7 did not account for all of the eligible convictions, including larceny in a building and the convictions he was also being sentenced for at the same time: assault with intent to do great bodily harm and felon in possession of a firearm.

Additionally, offense variable (OV) 13 also did not adequately reflect all of the crimes that were part of the pattern of felonious criminal activity. This OV is scored if "[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). Any offense within a five-year period may be counted, even if it did not result in a conviction. MCL 777.43(2)(a). Left unaccounted for were defendant's plea-based conviction of assault with intent to do great bodily harm and two counts of felonious assault that were dismissed as part of the plea agreement.³

As part of its evidence that a departure was appropriate, the trial court also indicated that defendant's conduct was directed against women in particular and showed escalating levels of violence. Defendant's particularized victimization of women and his escalation of violence were objective and verifiable factors detailed during the sentencing hearing and in the PSIR and were not reflected in the guidelines. See *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882

² These included unlawful driving away of a motor vehicle, larceny in a building, larceny of a motor vehicle, attempted carrying a concealed weapon, escape, attempted larceny from a person, carrying a concealed weapon, and attempted second-degree criminal sexual conduct.

³ As part of defendant's plea agreement in the other cases, several pending charges were dismissed in which defendant was charged with felon in possession of a firearm, felony-firearm, two counts of felonious assault, possession of less than 25 grams of a controlled substance, and failure to comply with sex offender reporting requirements.

(2008) (departure was supported by the trial court's conclusion that the guidelines did not fully consider the similar nature of the defendant's pattern of crimes and aggravating circumstances).

In holding that defendant showed no promise for rehabilitation, the trial court also relied on misconduct violations that defendant received in prison, the fact that he was denied parole and "maxed out" on prior sentences, and his continued engagement in criminal activity despite serving these previous maximum sentences. The PSIR detailed numerous misconduct tickets involving aggressive, violent, threatening, disobedient, and inappropriate sexual behavior, in addition to smuggling and misusing state property. These factors were not considered in scoring his sentencing variables. They were also objective and verifiable because they were external to the mind and capable of being confirmed. A defendant's prison record and misconduct violations can support a departure from the guidelines. See *People v Watkins*, 209 Mich App 1, 6; 530 NW2d 111 (1995). Furthermore, defendant's "callous attitude toward correction" is undoubtedly reflected in the numerous misconduct violations and his repeated failures at being rehabilitated after prior prison terms. See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

The trial court, however, failed to explain how the scoring of defendant's guidelines failed to adequately account for the brutality of the attack, which it cited among its reasons for departure. See *Horn*, 279 Mich App at 45. For example, the trial court scored OV 3 at 25 points for causing a life-threatening or permanently incapacitating injury. MCL 777.33(1)(c). Defendant received 10 points for OV 4 for causing serious psychological injury that required professional treatment. MCL 777.34(1)(a). The court scored OV 7 at 50 points for treating the victim with "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). And, defendant received 15 points for OV 10 for predatory conduct. MCL 777.40(1)(a). These scores accounted for the fact that the elderly victim was severely beaten, suffered permanent damage to her eyes, and was prompted to seek treatment from a psychiatrist. They also accounted for the fact that defendant's actions indicated that he planned the attack because he previously attempted to enter the apartment building and he first drove up to the gate and tried to get in before parking in the street. Finally, the scoring reflected that defendant viciously attacked the victim and continued hitting her even after she fell to the ground.

Nevertheless, we conclude that, even though this aspect of the trial court's reasoning was faulty, the trial court would have departed to the same extent considering its statements on the record and the several other substantial and compelling, objective and verifiable reasons it gave. See *Babcock*, 469 Mich at 260-261, 273. In its written memorandum, the trial court indicated that defendant's criminal history and prior conduct was "[e]ven more significant." The trial court stated that it believed a deviation from the guidelines was appropriate given defendant's criminal history, prior convictions, failure to be paroled, misconduct violations, particularized targeting of women in violent attacks within a short period of time, escalating violence, and his failure to rehabilitate after serving prior sentences. It stated that this was one of the worst cases it had seen in 25 years.

Accordingly, we affirm defendant's sentence on this basis.

IV. PROPORTIONALITY OF GUIDELINES DEPARTURE

In his final claim on appeal, defendant argues that the sentence imposed was disproportionate to the offense and the offender. Defendant directs this Court's attention to our Supreme Court's decision in *Smith*, emphasizing that the trial court did not sufficiently explain the extent of its departure.

A sentence that deviates from the recommended guidelines range must be proportionate to the seriousness of a defendant's conduct and criminal history. *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003); *Smith*, 482 Mich at 300, 305. A trial court must justify the particular departure made, and the justification must be sufficiently articulated to enable appellate review. *Smith*, 482 Mich at 303-304. "[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Id.* at 304.

In this case, the trial court did not use express "proportionality" language to address the extent of its departure; nonetheless, there are no precise words that the trial court must state to justify a particular departure. *Id.* at 310; see also *Babcock*, 469 Mich at 259 n 13. The record provided by the trial court is "sufficiently detailed to facilitate appellate review." *Smith*, 482 Mich at 311. The court's statements and written memorandum illustrate its conclusion that a sentence within the guidelines would not have been proportionate to the seriousness of the offense and the offender. The trial court considered defendant's sentencing guidelines and the sentencing variables in ascertaining what an appropriate sentence would be. The trial court acknowledged that it believed an upward departure was appropriate in defendant's case and that the sentencing variables did not give adequate weight to his criminal history. The trial court also stated that the factors that it cited and the circumstances of defendant's offenses justified its particular departure, not just a departure.

Defendant's reliance on *Smith* is misplaced. The trial court in *Smith* sentenced the defendant to a minimum sentence that was twice the highest recommended minimum sentence under the guidelines. *Id.* at 298. Our Supreme Court explained that, although the trial court articulated substantial and compelling reasons to depart from the guidelines, it could not "discern why the trial judge selected a minimum sentence so far in excess of the recommended guidelines range." *Id.* at 311. The Court emphasized that it could not "uphold a departure when the connection between the reasons given for departure and the extent of the departure is so unclear." *Id.* at 312. The Court encouraged, but did not require, trial courts contemplating departure to seek the assistance of objective factual guideposts by considering where a defendant's sentence falls in the sentencing grid. *Id.* at 306-309. The trial court's departure in the instant case is not the same as the departure in *Smith*. Unlike in *Smith*, defendant's total OV and PRV scores far exceeded the minimum score necessary to reach the highest level of offense severity in his sentencing grid, MCL 777.63; as a result, it is questionable whether it would have been helpful to compare the departure sentence to a sentence on the grid. *Smith*, 482 Mich at 301-303, 306-309. Moreover, given defendant's conduct, "the connection between the reasons given for

departure and the extent of the departure” is clear; it is plainly discernible to this Court why the trial court departed to the extent that it did. *Id.* at 311-312. The 480-month minimum sentence is proportionate considering the appropriate reasons for departure articulated by the trial court.⁴

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Jane M. Beckering

⁴ We note that, although the trial court imposed consecutive sentences pursuant to MCL 750.110a(8), this did not impact the proportionality of the sentence for first-degree home invasion. See *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998) (“In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences.”).