

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 15, 2013

v

STEVEN WARREN STEWART,
Defendant-Appellant.

No. 311270
Montcalm Circuit Court
LC No. 2010-013581-FC

Before: WHITBECK, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of unlawful possession or use of a harmful device, MCL 750.200i(1)(d). He was sentenced to a term of 27 to 50 years' imprisonment, with credit for 376 days. We affirm his conviction, but vacate his sentence and remand for resentencing.

On September 11, 2008, the victim opened a box left in his driveway and was sprayed with sulfuric acid. At the time, he lived with his girlfriend, who previously dated defendant. The incident left the victim blind in his right eye.

On appeal, defendant argues that the trial court abused its discretion when it departed from the sentencing guidelines and failed to articulate reasons for the extent of the departure. We review "a circuit court's conclusion that there was a 'substantial and compelling reason' to depart from the guidelines" for an abuse of discretion. *People v Hardy/Glenn*, ___ Mich ___ (Docket Nos. 144327 and 144979, decided July 29, 2013), slip op at 6 n 17, citing *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). "We review for clear error a court's finding of facts at sentencing." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). However, these only exist in exceptional cases. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). The reasons the trial court relies on must be objective and verifiable. *Id.* Objective and verifiable means "that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

“A trial court’s reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record.” *People v Anderson*, 298 Mich App 178, 185; 825 NW2d 678 (2012). In addition, the reasons “must be 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. Finally, the trial court cannot base the departure on characteristics already considered by the offense variables, unless it determines from the facts in the record that the characteristic is given inadequate weight. MCL 769.34(3)(b).

Once it is determined that objective and verifiable reasons exist, “the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith*, 482 Mich at 304. The sentence must be proportionate to the seriousness of the defendant’s conduct and criminal history. *Id.* at 300. “The trial court bears the burden of articulating the rationale for the departure it made.” *Id.* at 318. And it must provide a sufficient record for the reviewing court to make an adequate determination of whether the departure was justified. *Id.*

The appropriate minimum sentencing range for defendant was 135 to 225 months. However, the trial court imposed a minimum sentence of 27 years (or 324 months). In doing so, the trial court identified four reasons for the upward departure: (1) the event occurred on September 11, (2) the impact on the community related to the hospital shutting down and proceeding in disaster mode, (3) the pain and suffering to the victim, his family, the victim’s girlfriend, and her family, and (4) the victim’s loss of sight.

First, the trial court did not abuse its discretion when it found defendant’s actions resulting in the altering of the operation of the hospital was a substantial and compelling reason to depart from the legislative sentencing guidelines. The hospital had to be shut down and enter into disaster mode. Special tents were set up at the hospital and staff was dealing with an unknown substance. Such an unusual event as altering the operations of a hospital keenly grabs a court’s attention. *Smith*, 482 Mich at 299.

However, the trial court did abuse its discretion by determining that the significance of the date was a substantial and compelling reason that could justify an upward departure. Although the event occurred on September 11, the trial court did not make a factual determination that defendant specifically intended to “mastermind” the event to occur on that date to make a statement regarding terrorism. The record seems to indicate that defendant only intended to target his ex-girlfriend and did not intend to accomplish an act of terrorism. The trial court failed to identify facts in the record demonstrating that defendant specifically chose that date for a reason. Further, the trial court stated that the date has ramifications for every individual who became aware of defendant’s act. However, this is not objective and verifiable, as there is no way to determine how every individual reacted.

The trial court also abused its discretion by relying on the victim’s loss of sight and the pain and suffering of the families involved as justification for an upward departure. Although the victim’s injuries and the pain and suffering that these people endured were objective and verifiable, as they were presented at trial, in the PSIR, and in statements at sentencing, the trial court failed to address how these characteristics were given inadequate weight by the scoring variables. The trial court had already scored defendant 25 points under OV 3 for causing

permanent incapacitating injury to the victim, MCL 777.33, and 10 points under OV 4 for causing psychological injury to the victim, MCL 777.34. Further, defendant was scored 25 points for OV 9, reflecting 10 or more victims. Psychological injury to the victim's family is already considered by OV 5, and defendant was scored zero for that. MCL 777.35. The trial court's vague statement that "the prior record variables and the offense variables simply do not adequately address the pain and suffering that has been wreaked upon this family, going beyond [the victim] to his family and also to [the victim's girlfriend] and her family as it relates to what transpired here," does not indicate why the trial court believed the scoring variables did not adequately address the victim's injuries and the pain and suffering to the families to justify an upward departure. This Court may not "speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated." *Smith*, 482 Mich at 318.

Further, the trial court erred by not explaining why the sentence imposed is more proportionate than a sentence that is within the guidelines range. *Smith*, 482 Mich at 304. The trial court must also articulate reasons to support the *extent* of the departure. "The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence." *Id.* at 318. When the record is insufficient to determine why the trial court made a particular degree of departure, this Court "cannot substitute its own judgment about why the departure was justified." *Id.* at 304. Accordingly, we vacate defendant's sentence and remand for resentencing. On remand, the trial court must explain why the scoring variables were inadequate to address the victim's injuries and the families' pain and suffering,¹ and it must articulate reasons to support the extent of the departure.

Defendant also argues that there was insufficient evidence to convict him because defense counsel was ineffective for stipulating to the essential elements of the crime and for not hiring an expert witness to challenge the essential elements of the crime. Additionally, defendant asserts that plaintiff did not provide sufficient scientific evidence to substantiate the essential elements of the crime. Claims of insufficient evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

Defendant was convicted of unlawful possession or use of harmful substances causing serious injury, contrary to MCL 750.200i, which provides in relevant part:

¹ We note that "[t]o determine whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a court must first determine the effect of the factor on the recommended minimum sentence range." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008).

(1) A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose:

* * *

(b) A harmful chemical substance or a harmful chemical device.

“For an unlawful purpose” includes having the intent to injure any person. MCL 750.200h(e)(i). A “harmful chemical device” is one “that is designed or intended to release a harmful chemical substance.” MCL 750.200h(h). And a “harmful chemical substance” is “a solid, liquid or gas that through its chemical or physical properties . . . can be used to cause death, injury, or disease in humans” MCL 750.200h(i).

We find there was sufficient evidence to support defendant’s convictions. The liquid from the device tested to be sulfuric acid, which causes severe burns. Defendant told a witness that he created and delivered to the victim’s driveway a device that sprayed liquid. Defendant admitted to a cellmate that the device sprayed acid, and the device left in the victim’s driveway did, in fact, spray sulfuric acid on the victim, injuring him. Based on the evidence, a rational trier of fact could determine beyond a reasonable doubt that the essential elements of the crime were met, specifically that defendant manufactured, delivered and possessed a harmful chemical device designed to release a harmful chemical substance, for the unlawful purposes of injuring the victim. *Wolfe*, 440 Mich at 515.

With regard to defendant’s ineffective assistance of counsel claims, we find that they have no merit. It appears the stipulation defendant is referring to was made at the preliminary examination, for purposes of that proceeding only, and counsel only stipulated to the fact that the device was a harmful chemical substance, which is only one element of the crime. Decisions on what evidence to present are presumed to be matters of trial strategy, and defendant has failed to show how this was objectively unreasonable. See *Horn*, 279 Mich App at 39. Further, when sufficient evidence is presented at trial to convict defendant, as it was here, any error in the bindover is harmless. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Additionally, defendant has failed to provide support for his assertion that counsel was required to hire an expert witness to challenge the essential elements of the crime. Not only is this a matter of trial strategy, but there is a strong presumption that counsel was effective. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant has failed to overcome this presumption.

Defendant further argues that the verdict was against the great weight of the evidence. However, defendant merely makes a conclusory statement that the evidence clearly preponderated in the other direction and was attributed to passion, prejudice, or sympathy, and fails to provide factual support for this argument. A defendant may not merely announce his position and leave it to this Court to rationalize his claims. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). When an appellant fails to properly address the merits of his assertion of error, the issue is abandoned. *Id.*

Finally, defendant argues that based on the alleged errors outside of the sentencing issues, there was cumulative error denying him a fair trial. Reversal based on cumulative errors “is

warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.” *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). As explained, aside from the sentencing errors, there were no errors that occurred that, together, would seriously prejudice defendant. In addition, while defendant argues that he is, at least, entitled to an evidentiary hearing, he has failed to follow the requirements necessary to seek such a hearing. MCR 7.211(A), (C)(1).

For the foregoing reasons, we affirm defendant’s conviction, but vacate his sentence and remand for resentencing.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Michael J. Kelly