

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ERNEST SCHAUB and
RANDOLPH KEVIN SCHAUB,

Defendants-Appellants.

UNPUBLISHED

April 10, 2003

Nos. 236165, 236166

Clare Circuit Court

LC Nos. 00-001511-FH,

00-001510-FH

Before: Talbot, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of conspiracy to commit arson, MCL 750.157a(a) (general conspiracy statute); see also MCL 750.73 (burning of real property). Defendant Charles Ernest Schaub was sentenced to five to twenty years’ imprisonment as an habitual offender, third offense, MCL 769.11. Defendant Randolph Kevin Schaub was sentenced to four years eight months to fifteen years’ imprisonment, as an habitual offender, second offense, MCL 769.10. Both defendants appeal as of right.¹ We affirm.

I. Facts and Proceedings

This case arises out of the suspected arson of the Garfield Township Fire Hall in Clare County. Randolph worked for his brother, Charles, who was hired to renovate the fire hall and construct an addition. The construction was nearly complete in July and August 1999. During the last week to two weeks of July 1999, local resident Kathryn Williams overheard two men calling each other “Chuck” and “Randy” having a conversation near a lake where Williams was swimming one evening. Williams testified that she heard the men say they wanted to make sure “people saw the tools at the fire hall so that they could claim insurance.” She also heard them say, “[O]ur fingerprints are all over the place, so even if it didn’t burn one hundred percent, we won’t be fingered.” Further, Williams testified that defendants stated that because they had “bid” the fire hall once, they could “bid” it again and “get it.” Williams then testified that, after the approximately one hour of conversation, she saw the two men walk in the general direction of what she knew to be Charles’ home.

¹ Defendants were tried jointly and this Court consolidated their appeals.

At approximately 1:00 a.m. on August 6, 1999, a fire started at the fire hall that ultimately destroyed it. Investigators discovered evidence of accelerants used to start and spread the blaze. Charles and friends of both defendants testified that defendants were with them through the night of August 5 through 6, 1999. Charles testified that he had been working on two construction contracts in the days before the fire, so he had no financial reason to commit the arson. Charles also testified that his brother Randolph had quit working for him three weeks before the fire.

The fire hall had to be rebuilt. According to a fire hall official, when the county again solicited bids for the construction, Charles was upset that he was not awarded the contract.

After Williams testified at the preliminary examination in this matter, she began finding dead animals, including fish, frogs and vermin, on her porch, and her phone and power lines were cut several times. Moreover, defendants' brother, Curtis Schaub, made an obscene gesture at Williams whenever he saw her in town. Williams confronted Charles about the matter, and he told her that if she "talked to his lawyer and . . . ma[de] everything end," he would help her resolve her problems with the father of her children. Without counsel from the prosecution, Williams swore to an affidavit prepared by Charles' attorney that the voice she heard at the lake was not Charles'. The harassment of Williams ended. However, at trial, Williams testified consistently with her statements at the preliminary examination and testified about the harassment she suffered. Also at trial, Charles denied promising Williams anything for her affidavit.

Both defense counsel moved for a directed verdict at the close of the prosecution's proofs. The motions were denied. Defendants were convicted of conspiracy to commit arson, but were acquitted of the arson charge. Charles was sentenced to five to twenty years' imprisonment, and Randolph was sentenced to four years eight months to fifteen years' imprisonment.

II. Great Weight and Sufficiency of the Evidence

In Docket No. 236165, Charles appears to raise both a great weight and a sufficiency of the evidence argument. In Docket No. 236166, Randolph raises solely a sufficiency of the evidence argument. We hold that the evidence was sufficient to convict each defendant of conspiracy to commit arson.

With regard to Charles' appeal:

It is unclear whether defendant's argument addresses the sufficiency of the evidence or charges that the verdict was against the great weight of the evidence. Because defendant argued this issue both in a motion for a directed verdict and a motion for new trial, we will address it using the stricter standard applicable to reviewing a denial of a motion for new trial based on the verdict being against the great weight of the evidence.

The standard of review applicable to a denial of a motion for a new trial is whether the trial court abused its discretion. The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice

has been done. *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). An appellate court will find an abuse of discretion only where the denial of the motion was “manifestly against the clear weight of the evidence.” *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985). [*People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989); see also *People v Stiller*, 242 Mich App 38, 53; 617 NW2d 697 (2000) (where defendant’s great weight argument paralleled his sufficiency argument, appellate court rejected great weight challenge for the same grounds as for its rejection of sufficiency argument).]

In evaluating a great weight argument, it is important to note that circumstantial and inferential evidence is admissible at trial to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). A trial court may not supersede the jury’s sole authority to make credibility judgments. *People v Elkhoja*, 251 Mich App 417, 447; 651 NW2d 408 (2002), quoting *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). This is true even if testimony adduced at trial was conflicting and some witnesses were impeached. *Elkhoja, supra* at 446, quoting *Lemmon, supra* at 647.

Conspiracy is defined by common law as a partnership in criminal purposes. Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense. Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the unlawful agreement meaning the crime is complete upon formation of the agreement.

The specific intent to combine, including knowledge of that intent, must be shared by two or more individuals because there can be no conspiracy without a combination of two or more. This combination of two or more is essential because the rationale underlying the crime of conspiracy is based on the increased societal dangers presented by the agreement between the plurality of actors. [*People v Hermiz*, 462 Mich 71, 786, n 12; 611 NW2d 783 (2000), quoting *People v Justice*, 454 Mich 334, 345-346; 562 NW2d 652 (1997).²]

First, Williams testified she overheard two men calling each other “Chuck” and “Randy” and, at the conclusion of their conversation, saw them walk toward the general direction of defendant Charles Schaub’s home. Thus, because Williams knew Charles and Randolph previously, she identified them as the speakers in this conversation. Second, Williams testified that she heard *both* men say that they wanted to make sure “people saw the tools at the fire hall

² See also MCL 750.157a:

Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein

so that they could claim insurance.” She also heard *both* of them say,³ “[O]ur fingerprints are all over the place, so even if it didn’t burn one hundred percent, we won’t be fingered.” Here, defendants refer to the propositions that “the” fire hall would be “burn[ing]” and that their tools, burned on the site, could be replaced by way of an insurance claim. There was only one fire hall where defendants were performing construction. Moreover, defendants state that they would not be implicated in some criminal way (“even if” all the evidence was not completely burned), because investigators would expect to find defendants’ fingerprints anyway. There was no reason for defendants to expect that the fire hall would be burned one to two weeks later unless they were planning to make that occur. See *Carines, supra* (elements of the crime may be shown by circumstantial and inferential evidence). Thus, the great weight of the evidence was not against the jury’s verdict because Williams’ testimony satisfied the test that defendants “voluntarily agreed to effectuate the commission of a criminal offense.” See *Hermiz, supra*; see also *Simon, supra*. Third and finally, Williams testified that defendants stated that because they had “bid” the fire hall once, they could “bid” it again and “get it.” This provides a motive for the conspiracy to commit arson – a chance at financial profit from building the structure twice. See *People v Fair*, 165 Mich App 294, 298; 418 NW2d 438 (1987), citing *People v Mihalko*, 306 Mich 356, 361; 10 NW2d 914 (1943) (proof of motive “is always relevant”).⁴

For the same reasons, we hold that the evidence for Randolph’s conviction of conspiracy to commit arson was also sufficient. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.).

III. Motion for Mistrial

Next, both defendants argue that the prosecution improperly elicited testimony from an arson investigator that, at the scene of the fire investigation, Charles offered to take a polygraph examination to clear himself. Defendants claim that this testimony properly formed the basis of their concurrent motions for a mistrial, and that the trial court’s denial deprived defendants of a fair trial. We disagree.

We review the trial court’s denial of a mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999).

³ A proper inference here is that one defendant said this statement to another, and the other agreed with the statement, adopting it as his own. See *Carines, supra*; see also *Hermiz, supra* (the essence of a conspiracy is the agreement).

⁴ In addition, we hold that Charles’ claim that the trial court used improper standards for his combined motion for new trial and renewed motion for acquittal is without merit. See *Simon, supra*.

Defendant correctly argues that [generally,] testimony concerning the polygraph was inadmissible. However, the inadvertent, unsolicited mention by a witness that a polygraph was administered does not necessarily require a mistrial. *People v Kiczenski*, 118 Mich App 341, 346; 324 NW2d 614 (1982). As previously noted, this Court, in [*People v*] *Yatooma*, [85 Mich App 236,] 240-241; 271 NW2d 184 [(1978),], summarized several factors that can be considered when deciding whether a trial court abused its discretion in failing to grant a mistrial when a witness has mentioned a polygraph:

(1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness' credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id.* at 240 (citations omitted).] [*Ortiz-Kehoe, supra* at 514.]

An arson investigator testified at trial that Charles was at the investigation site of the fire the day it occurred. The prosecutor asked the investigator whether he spoke to Charles again that day at the scene. According to the investigator, Charles approached him and announced that he knew the fire was an arson and that he knew he was a suspect. The investigator testified that Charles also stated that he wanted to take a polygraph test and perform other tests to clear himself. Both defense counsel immediately objected. The trial court had previously issued an order forbidding testimony with respect to Charles' offer to take a polygraph examination, and the prosecutor stated in chambers that the testimony was a surprise. Both defense counsel moved for a mistrial. The trial court denied it in part on the ground that the testimony helped Charles' credibility more than hindered it, and both defense counsel declined the offer of a cautionary jury instruction. Thus, defendants have waived any claim that a jury instruction should have been issued, but, contrary to plaintiff's argument, defendants have not waived the issue whether the mistrial was improperly denied. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defense counsel had argued in their motion for a mistrial that a jury instruction would not cure the prejudice sustained by the polygraph testimony and a mistrial was the only remedy.

However, defendants' position on the instructional issue weighs against them in the analysis of the first factor concerning whether a mistrial should have been granted. See *Ortiz-Kehoe, supra* at 514. With regard to the second factor, the polygraph reference appeared to be inadvertent. *Id.* at 513-514. The prosecution stated its surprise at the reference, and the parties had been instructed not to elicit the testimony. Even if we were to remain equivocal on this factor, according to the record, the prosecutor did not dwell on the testimony. This weighs in favor of plaintiff on factors two and three. *Id.* Fourth, there is no evidence that the reference was intended to bolster the witness' credibility. The witness made the reference during a recitation of the events on the first day of the investigation at the scene concerning the witness' experiences with Charles. As a result, this factor weighs in favor of plaintiff. *Id.*

Ordinarily, the polygraph testimony issue revolves around a situation where the testifying witness states that the defendant *did*, in fact, take the test. Thus, the concern is the implication

that the defendant failed the test, and because he is now on trial, he is guilty. See, generally, *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995). However, that is not the case here, making the fifth factor in *Ortiz-Kehoe*, *supra*, weigh in favor of plaintiff. The only testimony on the topic was that Charles *volunteered* to take the test, not that he in fact took one. This was part of the investigator's testimony that Charles expressly stated he wanted to clear himself of the likely charge of arson. We agree with the trial court that this evidence could have been seen as exculpatory by the jury. See, generally, *id.* (mistrial should be granted for only a prejudicial irregularity that denied the defendant a fair trial). Indeed, the jury *acquitted* both defendants of arson, implying that the polygraph testimony might have been beneficial to defendants. The jury convicted defendants only regarding the conspiracy to commit arson charge, to which the polygraph test was not directly related. Moreover, we hold that the polygraph testimony, because it referred to *Charles only*, was even less prejudicial to the separate charges against Randolph, because Randolph obviously had nothing to do with the polygraph offer. Thus, the factors weigh in favor of plaintiff's position. *Id.*

Defendant contends that the trial court erred in denying his motion for a mistrial. To so hold would be tantamount to requiring a mistrial every time the word 'polygraph' is mentioned in a criminal prosecution. It was not established that the complainant had submitted to a polygraph examination nor was an attempt made to introduce the results of any such examination. The word 'polygraph' was not used by counsel but was volunteered by the witness. It was properly objected to and the trial court properly ruled that the subject not be pursued any further. It was not, in fact, pursued and no prejudicial error resulted. [*People v Paffhausen*, 20 Mich App 346, 351; 174 NW2d 69 (1969).]

Therefore, we hold that the trial court did not abuse its discretion in failing to order a mistrial. See *Nash*, *supra*.

IV. Rereading of Testimony

Next, Charles claims that his counsel was ineffective for waiving the issue whether the trial court should have granted the jury's request during deliberations to have the transcript of Charles' testimony given to the jury. The trial court did allow the transcript of Williams' testimony to be given to the jury. We disagree.

The defendant must make a testimonial record in the trial court in connection with a motion for an evidentiary hearing, or review of an ineffectiveness claim is limited to mistakes apparent on the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). This claim requires a showing that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

MCR 6.414(H) provides:

Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

It is error requiring reversal for the trial court to refuse to allow the jury to reread any testimony. See *People v Smith*, 396 Mich 109; 240 NW2d 202 (1976), citing *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974). However, the trial court has discretion to determine to what extent to grant this type of request. See MCR 6.414(H); *Howe*, *supra* at 675-676; *Carter*, *supra* at 218-219.⁵

Our review of the record reveals that the trial court's statements to the jury were that transcription or recitation of Charles' testimony would be lengthy and difficult, where Williams' testimony could be given to them more easily. Then the court asked for more specific information with respect to what portion of Charles' testimony were they concerned about. However, the jury never answered this request, and received the transcript of Williams' testimony in their deliberations. Thus, the court did not "refuse a reasonable request," but merely explained the unreasonableness of transcription or rereading of Charles' lengthy testimony. See MCR 6.414(H); *Carter*, *supra*. The trial court did not abuse its discretion in failing to pursue the jury's request to hear Charles' testimony after the jury did not respond to the trial court's inquiry on the matter.

Consequently, Charles has not overcome the strong presumption of effective counsel. *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Indeed, if the defense had objected to the trial court's statements to the jury that transcription or recitation of Charles' testimony would be lengthy and difficult, the objection likely would have been denied, and counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Deciding not to make a frivolous objection also qualifies as a matter of trial strategy that we will not second-guess. *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Counsel's failures can constitute ineffective assistance only where they deprive the defendant of an outcome-determinative substantial defense, which did not occur in this case. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902; 554 NW2d 899 (1996).

V. Sentencing⁶

⁵ Plaintiff claims that Charles waived this issue for review by generally agreeing to the trial court's jury instructions at the close of trial. However, we decline to consider the issue waived where Charles did not specifically agree to the trial court's handling of the rereading of testimony issue immediately after the court announced its course of action in that regard. See, generally, *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

⁶ Because defendants' alleged offenses occurred in July and August 1999, the legislative
(continued...)

Next, Randolph argues that the trial court should not have considered him guilty of the subject arson in this case when sentencing him for conspiracy. Charles echoes this claim and challenges his sentence on the grounds that the trial court failed to individualize his sentence with the requisite substantial and compelling reasons for departure, that the trial court departed from the guidelines for unauthorized reasons, and that the trial court's sentence violated the principle of proportionality. Again, we disagree. Initially, we note that none of defendants' sentencing issues are preserved for appeal because they did not object at the sentencing hearings. Thus, review of this forfeited issue is for plain error affecting substantial rights. See *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

The first issue is raised by both Charles and Randolph. They claim that the trial court improperly found them guilty of the underlying arson offense, although the jury acquitted them, and that the trial court used that factor to enhance their sentence for their conspiracy to commit arson convictions. With regard to Charles, the trial court stated, in pertinent part:

The act involved in this particular situation of conspiracy ultimately resulted in the fire hall in question being destroyed. When the target of arson is something that protects the public, certainly that's something that the Court should and must take into consideration.

. . . [T]he destroying of [the] . . . fire hall . . . made the public much more vulnerable than they should have been

You were not convicted of setting the fire, but you certainly were convicted of conspiring to commit this arson

In Randolph's sentencing hearing, the trial court stated in part:

In this situation, the conspiracy that you entered into ultimately resulted in the destroying of the Garfield fire hall [I]t certainly made the public much more vulnerable to fires

It . . . has had a severe impact on the public

. . . Because of the nature of the injury in this particular situation, and the vulnerability that was placed upon the public . . . this Court does in fact find that those are substantial and compelling reasons to depart from the sentencing guidelines.

Charles was sentenced to five to twenty years' imprisonment as an habitual offender, third offense. Randolph was sentenced to four years eight months to fifteen years' imprisonment, as an habitual offender, second offense. According to the offense statutes,

(...continued)

sentencing guidelines were applied by the trial court. See MCL 769.34(2).

conspiracy to commit arson carries a maximum sentence of fifteen years' imprisonment for a second habitual offender, and twenty years for a third habitual offender. See MCL 750.157a(a) (penalty for conspiracy is equal to that of underlying offense); see also MCL 750.73 (burning of real property carries a maximum penalty of ten years' imprisonment); MCL 769.11(1)(a) (habitual offender, third offense carries a penalty of not more than two times the original sentence), MCL 769.10(1)(a) (habitual offender, second offense carries a penalty of not more than 1 ½ times the original sentence).

Review of the sentencing transcripts does not persuade this Court that plain error occurred when the trial court considered the underlying arson in sentencing. In issuing a sentence, a trial court is permitted to *consider* whether the prosecution established at trial that defendant committed another crime, even if the defendant was not convicted of that charge. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998); *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). The trial court's comments in the present case indicate his proper *consideration* of the underlying crime of arson. In contrast, the trial court did not improperly make an express "independent finding of guilt" and sentence defendants with regard to a crime other than the one at issue. See *Fleming, supra*. While the trial court did not indicate by which level of proof the prosecution proved the underlying arson, there was evidence beyond a reasonable doubt that defendants committed the arson.⁷ Evidence was presented that fire accelerators were spread throughout the structure to enable the bare concrete and pressure-treated wood to burn where ordinarily they would not have. Moreover, a police canine indicated evidence of fuel on Charles' hand. Thus, due process is not offended by the trial court's consideration of defendants' guilt in the underlying arson. See *People v Mass*, 464 Mich 615, 635; 628 NW2d 540 (2001), quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Next, Charles argues that the trial court failed to individualize his sentence or articulate substantial and compelling reasons for the departure. Individualized sentencing for each defendant is the policy of this state. *People v Sabin*, 242 Mich App 656, 661; 620 NW2d 19 (2000). Thus, each sentence must suit the individual circumstances of the case and characteristics of the offender, balancing the protection of society against rehabilitation of the defendant. *Id.* at 661-662. The trial court may depart from the sentencing range set forth in the legislative guidelines if the court articulates on the record substantial and compelling reasons to do so. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may only base a departure on offense or offender characteristics already considered in the guidelines range if the court finds that, according to the record, the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Babcock*, 244 Mich App 64, 79; 624 NW2d 479 (2000). The factors employed in making the departure must be objective and verifiable. *Babcock, supra* at 75.

⁷ In Charles' sentencing hearing, the court stated, "from the evidence . . . presented at trial, the Court is clearly convinced that it's because of your conspiracy that ultimately this fire took place."

The offense statutes noted above set Charles' sentence as an habitual offender, third offense, at a maximum of twenty years' imprisonment, which the trial court set as the maximum sentence. According to the record, the legislative guidelines state the minimum sentencing range is zero to twenty-five months. See MCL 777.1 *et seq.* Charles' minimum sentence was five years.

Again, our review of the sentencing transcript reveals that the trial court did individualize Charles' sentence. See *Sabin, supra* at 661. The court specifically noted offense and offender characteristics that are unique to this case and were not sufficiently accounted for in the guidelines – that Charles' "particular situation of conspiracy ultimately resulted in the fire hall . . . being destroyed, that "the target of arson is something that protects the public," which "made the public much more vulnerable," and that Charles had a criminal history. See MCL 769.34(3); *Hegwood, supra*; *Babcock, supra* at 75, 79. These are among the substantial and compelling factors the trial court stated for proper departure. See *Rice, supra* at 446 (severity and nature of the crime are proper factors for departure); *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000) (circumstances surrounding the crime is a proper factor for departure); *Compagnari, supra* (effect of the crime on the victim is a proper factor for departure). The court also properly noted the objectives for sentencing – "deterrence, the need for punishment, the need to protect society, and the likelihood of rehabilitation." See *Rice, supra*. The court did not improperly impose a minimum that is greater than two-thirds of the statutory maximum. See MCL 769.34(2)(b). That is, Charles' minimum sentence of five years is not greater than two-thirds of the statutory maximum of twenty years. Thus, the trial court properly individualized Charles' sentence and articulated substantial and compelling reasons for departure.

Finally, Charles argues that his sentence was disproportionate. A departure from the statutory guidelines invokes an inquiry concerning whether the extent of the departure is proportionate. *People v Milbourn*, 435 Mich 630, 660; 461 NW2d 1 (1990). Generally speaking, a sentence is supposed to be proportionate to the particular offender, including any criminal history, and proportionate to the severity of the offense committed. *Id.* at 635-636, 654; *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). For the reasons already stated above, we hold that Charles' sentence was also proportionate to the severity of the crime and his habitual offender status.⁸

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell

⁸ Charles briefly argues that the trial court did not specifically inform him that he had a right to appeal the sentence departing from the legislative guidelines. See MCL 769.34(7); MCR 6.425(E)(4). Our review of the record reveals that the trial court did so inform Charles, orally and in writing, and that Charles signed the form without objection.