

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GENMONTE RAYMONE GAITHER,

Defendant-Appellant.

UNPUBLISHED

May 11, 2006

No. 258670

Jackson Circuit Court

LC No. 04-000793-FC

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to 12 to 20 years' imprisonment for the assault conviction, and five to ten years' imprisonment for being a felon in possession. The sentences are consecutive to his two mandatory, two-year felony-firearm sentences. Defendant appeals as of right. We affirm.

The instant case arose from allegations that defendant fired shots, which hit a young lady in the leg. Defendant was attempting to obtain retribution against another man for an altercation, which occurred earlier in the day. On appeal, defendant asserts that the prosecution presented insufficient evidence to support his convictions and, alternatively, that the case should be remanded for resentencing because the court failed to provide substantial and compelling reasons for its deviation from the sentencing guidelines.

I

This Court reviews a challenge to the sufficiency of the evidence in a jury trial by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

To convict a defendant of assault with intent to do great bodily harm less than murder, the prosecution is required to establish the following beyond a reasonable doubt: “(1) an assault, coupled with (2) a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). Additionally, identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). In this case, defendant argues that there was insufficient evidence to establish that he was the shooter. We disagree. When viewed in a light most favorable to the prosecution, the evidence supported defendant’s identity as the shooter. He had a motive, had a gun, was in the area at the time of the shooting, and was wearing clothes matching the shooters. Additionally, there was evidence that, after the shooting, he admitted to accidentally shooting someone. The evidence taken as a whole supports a reasonable inference that the defendant committed this assault.

II

Defendant next argues that the trial court’s departure from the recommended minimum sentence range under the legislative guidelines was not supported by substantial and compelling reasons. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination for the sentencing court and is reviewed for clear error, the determination that the factors are objective and verifiable is reviewed de novo, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A substantial and compelling reason for departure is an objective and verifiable reason that keenly or irresistibly grabs the Court’s attention, is of considerable worth in deciding the length of sentence, and exists only in exceptional cases. *Id.* at 257-258. This Court has also declared that “substantial and compelling implies that the factor must be capable of verification and thus is an objective standard as opposed to a subjective one. For example, a defendant’s prior criminal record is readily verifiable and objective.” *People v Hill*, 192 Mich App 102, 111; 480 NW2d 913 (1991). Here, the trial court concluded that defendant’s two previous violent crimes were not sufficiently accounted for by the guidelines and that they constituted a substantial and compelling reason for departure. We find no basis for reversal.

While prior offense variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, accounted for defendant’s past crimes, they did not account for the assaultive nature of those crimes, and they did not account for the fact that defendant was previously convicted of the identical crime of assault with intent to commit great bodily harm. Thus, the trial court did not err by concluding that defendant’s past assaultive crimes are substantial and compelling reasons supporting a departure in this case.

The trial court also did not err in concluding that the guidelines did not adequately account for the fact that an innocent party to a prior altercation was accidentally struck, or that defendant acted in broad daylight in a populated area near houses and at least one business. We will not disturb the trial court’s conclusion that these objective and verifiable facts keenly and irresistibly grab one’s attention.

Defendant also argues that the extent of the departure was an abuse of discretion, *Babcock*, *supra* at 265, which requires reversal. We review to determine if the sentence falls

outside of a principled range of outcomes, meaning that it meets the principle of proportionality. *Id.* at 269. The principle of proportionality requires a review of whether the sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 453 Mich 630, 635-636; 461 NW2d 1 (1990). We find that the imposed sentence was proportional to the circumstances surrounding the offense as well as to the offender.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder