

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LENIER GIVAN,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 262019

Wayne Circuit Court

LC No. 05-000168-01

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

PER CURIAM.

Defendant appeals as of right his jury convictions and sentences, as a second habitual offender, MCL 769.10, for armed robbery, MCL 750.529, assault with intent to do great bodily harm (GBH), MCL 750.84, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm defendant's convictions and sentences for armed robbery and felony-firearm. However, we vacate defendant's conviction for felonious assault as violative of defendant's right to be free from double jeopardy. We also remand for resentencing on defendant's conviction for assault with intent to do GBH and felon in possession of a firearm because the trial court failed to articulate substantial and compelling reasons for the departure from the guidelines on the record.

Defendant's convictions arise from the robbery and shooting of Martin Love on the evening of December 10, 2004. Love alleged that defendant, accompanied by two masked men, placed guns to his head while defendant stole \$1,200 from Love's pocket. Love further alleged that defendant shot him in the leg following the robbery and later made several threatening phone calls to Love. Defendant, on the other hand, asserted that he was not involved in the robbery in any fashion. Defendant further asserted that the robbery was part of a failed drug transaction.

Defendant first challenges his convictions for armed robbery, assault with intent to do GBH, and felonious assault as violative of his right to be free from double jeopardy. Although defendant failed to properly preserve this issue by raising it below, we will consider his challenge because it involves "a significant constitutional question." *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). Generally, we would review such a constitutional double jeopardy challenge de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). However, an unpreserved constitutional error warrants reversal only when it amounts to plain

error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant contends that his sentences for felonious assault, assault with intent to do GBH, and armed robbery amount to "multiple punishments for the same offense." The Double Jeopardy Clauses of the United States and Michigan Constitutions protect individuals from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). For a successful double jeopardy claim, a defendant's guilt must arise from the same conduct or acts. *People v Hill*, 257 Mich App 126, 150; 667 NW2d 78 (2003). "Where two statutes prohibit violations of the *same* societal norm, albeit in a different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments." *People v Herron*, 464 Mich 593, 605; 628 NW2d 528 (2001) (emphasis in original). Legislative intent can also be determined by reviewing the amount of punishment that is statutorily authorized. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). "Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Id.*, quoting *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984).

In this case, defendant's felonious assault violates the same societal norms and arises from the same facts and circumstances as defendant's assault with intent to do GBH to Love. Further, the hierarchical nature of the punishments for escalating violations of the base offense of assault demonstrates the Legislature's intent that a single punishment be imposed in accordance with the seriousness of the behavior. Accordingly, defendant's conviction for felonious assault in conjunction with his conviction for assault with intent to do GBH violated defendant's right to be free from double jeopardy. The appropriate remedy when a defendant is unconstitutionally given multiple punishments for a single offense is to affirm the greater conviction and sentence but vacate the conviction and sentence for the lesser offense. *Herron, supra* at 609-610. Accordingly, we vacate defendant's conviction and sentence for felonious assault.

However, defendant's act of assault with intent to do GBH was not committed until after defendant had completed the armed robbery. Although the shooting occurred only seconds after the robbery, the robbery had been completed and the shooting constituted a separate and distinct event. Accordingly, defendant's convictions for assault with intent to do GBH and armed robbery did not violate his right to be free from double jeopardy.

Defendant also argues that the trial court failed to inform the jury that a defendant must have the specific intent required of the principal in order to be convicted of an offense under an aiding and abetting theory. Because defendant failed to object to the challenged instructions, this issue is not fully preserved for appellate review. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Generally, this Court reviews a defendant's claim of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). Jury instructions are to be reviewed as a whole to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, where the defendant has not raised a timely objection to the challenged instruction, this Court's review is limited to plain error affecting defendant's substantial rights. *Knapp, supra* at 375, citing *Carines, supra* at 766-767.

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). “Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). The instructions need not be perfect, but must fairly present the issues and sufficiently protect the defendant’s rights. *Katt, supra* at 310, quoting *Canales, supra* at 574.

Pursuant to MCL 767.39, there is no distinction between the direct commission and the aiding and abetting in the commission of a crime:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

In order to convict a defendant under an aiding and abetting theory, the prosecution must establish:

“(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” [*People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001), quoting *Turner, supra* at 568 (overruled in part as noted *supra*).]

“The ‘requisite intent’ for conviction of a crime as an aider and abettor ‘is that necessary to be convicted of the crime as a principal.’” *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001); *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). Therefore, in order to convict a defendant of a specific intent crime, the prosecution must establish that the defendant “possess[ed] the specific intent required of the principal or [that] they [knew] that the principal has that intent.” *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).<sup>1</sup>

Defendant correctly asserts that assault with intent to do GBH, *Brown, supra* at 147, and armed robbery, *King, supra* at 428, are specific intent crimes. Therefore, the prosecution must establish that defendant either had the specific intent to cause great bodily harm and to deprive Love of his property at gunpoint, or that defendant knew that the principal in these endeavors had that intent.

Contrary to defendant’s assertion on appeal, we find that the trial court gave proper specific intent instructions with regard to the charges of armed robbery and assault with intent to do GBH and subsequently gave a proper aiding and abetting instruction. In relation to each

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<sup>1</sup> However, we note that, even if defendant acted in concert with two other individuals, the record tends to establish that defendant was the principal in this case.

individual charge, the trial court gave a detailed specific intent instruction. These instructions sufficiently conveyed to the jury the necessary intent to commit these offenses and comported with the standard criminal jury instructions. The court also gave a detailed aiding and abetting instruction.

Reading the aiding and abetting instruction together with the instructions regarding the individual offenses, *Aldrich, supra* at 124, the court adequately conveyed to the jury that defendant must have the requisite specific intent in order to be convicted. The court informed the jury of the specific intent necessary to convict a defendant of armed robbery, assault with intent to murder (of which defendant was ultimately acquitted), and assault with intent to do GBH. The court repeatedly instructed the jury that an aider and abettor's acts must further or encourage the commission of the charged offense and gave several examples illustrating the necessary intent. Under these circumstances, the jury instructions were proper.<sup>2</sup>

Defendant next challenges the sentences imposed for the convictions of assault with intent to do GBH and felon in possession of a firearm because the trial court departed upward from the minimum sentencing guidelines range but failed to articulate substantial and compelling reasons for these sentences. "Ultimately, we review for an abuse of discretion the trial court's determination that the objective and verifiable factors constitute a substantial and compelling reason for departure." *People v Johnigan*, 265 Mich App 463, 469; 696 NW2d 724 (2005), citing *People v Babcock (Appendix)*, 469 Mich 247, 274; 666 NW2d 231 (2003). An abuse of discretion in a sentencing case "occurs . . . when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 269.

Defendant was placed in prior record variable Level D and offense variable Level III after being assigned a total PRV score of 35 points and a total OV score of 50 points. The minimum sentencing guidelines range for assault with intent to do GBH is 29 to 71 months. MCL 777.65. The minimum sentencing guidelines range for felon in possession of a firearm is 14 to 36 months. MCL 777.66. However, the trial court sentenced defendant to a minimum sentence of 80 months' imprisonment for assault with intent to do GBH and 40 months' imprisonment for the felon in possession of a firearm conviction.

A sentencing court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and *states on the record the reasons for the departure.*" MCL 769.34(3) (emphasis added); *Babcock, supra* at 256. Moreover, the reasons stated must support the particular departure in the case. *Babcock, supra* at 259. These reasons must be objective and verifiable and keenly or irresistibly grab the court's attention. *Id.* at 258. The court may depart from the guidelines where there are

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<sup>2</sup> Defendant also raised a claim of ineffective assistance of counsel in his argument, although he failed to properly present this issue to this Court in the Statement of Questions Presented section in his appellate brief. MCR 7.212(C)(5). Although not properly presented, we note that defendant's challenge must fail, because defense counsel is not required to raise futile or meritless objections to the jury instructions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure is appropriate if these reasons “lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history . . . .” *Babcock, supra* at 264. “A departure from the legislative guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and the individual’s criminal history.” *People v Hendrick*, 261 Mich App 673, 677-678; 683 NW2d 218 (2004), rev’d in part on other grounds 472 Mich 555; 697 NW2d 511 (2005).

At the sentencing hearing, the trial court made the following statement:

I think you’re incorrigible. You’ve been in and out of trouble all of his [sic] life, and then comes in here and tells me, oh, these people have been knowing [sic] each other how long, and the man is shot. He knows who shot him.

He’s not going to come in here and let the real guy off, and – well, I don’t have any question about it. I mean, the jury was absolutely correct; I agree with them.

The trial court failed to sufficiently elucidate its reasons for departing upward from the minimum sentencing guidelines range. The court merely indicated that it agreed with the jury, cited defendant’s prior criminal record and nature for being “incorrigible,” and implied that defendant was not truthful while under oath. However, defendant’s prior criminal history and recidivist nature had already been considered in scoring the prior record variables and the court did not indicate whether those factors had been given inadequate consideration. See *Hendrick, supra* at 564 n 10. Although, the trial court implied that defendant’s testimony was neither credible nor truthful while under oath, “[a] departure from the guidelines cannot be affirmed on the basis of a reason that the appellate court perceives but the trial court did not articulate.” *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005). Accordingly, we must remand to allow the trial court to articulate the reasons for its departure on the record or to impose a minimum sentence within the appropriate guidelines range.<sup>3</sup>

Finally, defendant argues in a Standard 4 brief that defense counsel was ineffective for failing to investigate and produce certain telephone records in relation to phone calls referenced by the prosecution at trial. Absent a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to plain error on the existing record, affecting defendant’s substantial rights. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel’s deficient performance

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<sup>3</sup> This Court would note that the trial court’s implication that it perceived defendant to not be truthful while under oath would comprise a substantial and compelling reason to support the trial court’s departure from the sentencing guidelines, if fully articulated on the record.

denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Id.* at 600.

At trial, the prosecution presented evidence tending to establish that defendant called Love several times after the robbery and shooting, threatening to kill Love. These calls were made from defendant's cell phone prior to his arrest, and a subsequent call was made from jail. One officer testified that Love's phone number appeared in the "recent call" directory on defendant's cell phone and that the precinct telephone log book indicated that defendant had made a call to an undisclosed number at the same time that he allegedly called Love. Another officer was at Love's home when Love received another threatening call allegedly made by defendant.

The prosecutor argued in closing that these calls were made by defendant and further implicated him in the shooting and robbery. However, defense counsel made no mention of these telephone calls in closing argument. On cross-examination of Love, defense counsel did elicit testimony that Love called defendant after the shooting and threatened revenge. Defense counsel also elicited testimony from the testifying officers 1) that the responding officer did not know the identity of the caller who made the threats to Love, and 2) that the booking officer did not know who defendant called from jail and was not present during the conversation.

Generally, the question of what evidence to present is presumed to be a matter of trial strategy. *Rockey, supra* at 76. The failure to introduce evidence can constitute ineffective assistance of counsel when it deprives a defendant of a substantial defense; i.e., one that might affect the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In this case, defendant asserts only that defense counsel should have sought the production of the relevant telephone records to prove that defendant had not called Love. However, this evidence would not have helped the defense. Defendant admitted at trial that Love called him and that he called Love several times after the shooting. Defendant also admitted that he made a collect phone call from jail after he was booked, but refused to identify the person called. The telephone records would not have revealed the content of these calls, which were admittedly made, and, therefore, could not have affected the outcome of defendant's trial. Accordingly, defendant's challenge to defense counsel's performance is without merit.

Affirmed in part, vacated in part, and remanded for resentencing of the assault with intent to do GBH and felon in possession of a firearm charges. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot