

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JEROME MURRIEL,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 276687

Wayne Circuit Court

LC No. 06-011269-01

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 45 to 80 years’ imprisonment for the assault with intent to murder conviction and a consecutive sentence of five years’ imprisonment for the felony-firearm (second offense) conviction. Defendant appeals as of right. We affirm.

I. Facts

On the evening of July 28, 2006, during a neighborhood gathering, defendant and “Al” started fighting after defendant told Al’s girlfriend to stop leaning on defendant’s broken fence.¹ After defendant and Al exchanged angry words, defendant went into his house and returned minutes later brandishing a gun. Defendant fired several shots at Al, chased him, and repeatedly threatened to kill him. Although Al was not hit, Takela Pearson, a bystander sitting in a lawn chair on the sidewalk, was hit four times, including in her jaw and neck. The gunshot in her jaw caused extensive damage, rendering her a quadriplegic and dependent on a ventilator. After Pearson’s brother exclaimed that Pearson had been shot, both defendant and Al fled.

¹ Apparently “Al” was a former neighborhood resident who had returned to the area to visit family. Police were unable to locate Al or to discover his full name.

II. Information

Defendant claims that the prosecution failed to properly give him notice of the charges pending against him when it listed on the information that he assaulted Pearson with the intent to murder and then argued at trial that defendant intended to murder Al and shot Pearson by mistake. We disagree. We review defendant's unpreserved claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights . . . that the error affected the outcome of the lower court proceedings." *Id.* at 763.

MCL 767.45(1) provides that an information must provide: (1) the nature of the offense stated in language that will fairly apprise the accused and the court of the offense charged, (2) the time of the offense as near as may be, and (3) that the offense was committed in the county or within the jurisdiction of the court. "An information must be specific for two reasons: it affords the defendant due notice of the charges against him and protection against double jeopardy should he be retried." *People v Traugher*, 432 Mich 208, 215; 439 NW2d 231 (1989), quoting *People v Covington*, 132 Mich App 79, 88; 346 NW2d 903 (1984) (Maher, J., concurring).

In light of the doctrine of transferred intent, defendant's claim of error fails. Because the prosecution could demonstrate that defendant intended to kill Al and in the process assaulted Pearson, even if only inadvertently, the elements of the charged offense have been established. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988) (under the doctrine of transferred intent, the defendant remains culpable even if he intended to shoot someone other than the actual victim). Listing Pearson as the victim on the information was proper because she was the actual victim, and the doctrine of transferred intent permitted the jury to find defendant guilty of assault with intent to commit murder. Consequently, defendant's claim fails.

III. Jury Instructions

Defendant claims that the trial court failed to instruct the jury regarding the specific intent necessary to convict him of assault with intent to murder or the lesser offense of assault with intent to commit great bodily harm less than murder. We disagree. We review defendant's unpreserved claim of instructional error for plain error affecting his substantial rights. *Carines*, *supra* at 763-764, 774.

Jury instructions must include all elements of the charged offense. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (internal quotations omitted). "The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *Id.* at 147 (internal quotations omitted).

The trial court properly instructed the jury regarding both offenses. In particular, the trial court instructed the jury that it must find that defendant possessed the intent to kill before finding

him guilty of assault with intent to murder and that defendant possessed the intent to commit great bodily harm before it found him guilty of assault with intent to commit great bodily harm. Accordingly, no error occurred.

IV. Sentencing

A. Second Habitual Offender Status

Defendant claims that the trial court erroneously scored him as a second habitual offender because his 2002 plea-based felony-firearm conviction was invalid and should not be used to enhance his current sentence. We disagree.

“[A]n appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.” Const 1963, art 1, § 20. In *Halbert v Michigan*, 545 US 605, 610; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the United States Supreme Court held that “the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.” Citing *Halbert*, defendant argues that because he was denied the assistance of appellate counsel to appeal his prior conviction, that prior conviction is constitutionally infirm and improperly considered for enhancement of his present sentences under *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972).

Pursuant to *Tucker*, prior convictions obtained in violation of the right to counsel cannot be considered in determining punishment for a subsequent offense. *Tucker, supra* at 448-449; *People v Alexander*, 234 Mich App 665, 670; 599 NW2d 749 (1999), citing *People v Moore*, 391 Mich 426, 436-438; 216 NW2d 770 (1974). However, *Tucker* involved the impropriety of considering prior convictions that were invalid under *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), because the defendant had not been afforded the assistance of counsel for the trial court proceedings that led to the convictions, not because of any impropriety related to appellate proceedings, as defendant claims occurred in this case.

Moreover, defendant’s 2002 felony-firearm conviction was entered at a time when the state had no obligation to appoint appellate counsel to defendants appealing their guilty pleas, and defendant fails to establish that the holding in *Halbert* applies retroactively.² In the absence of authority expressly stating that *Halbert* applies retroactively, we conclude that the general rule concerning the validity of convictions applies, namely, that a properly obtained conviction is presumed to be valid and this presumption is not affected by the inability to pursue an appeal. See *People v Peters*, 449 Mich 515, 521-522; 537 NW2d 160 (1995) (holding that “[t]he conviction of a criminal defendant destroys the presumption of innocence regardless of the

² In *People v James*, 272 Mich App 182, 184; 725 NW2d 71 (2006), the defendant entered a guilty plea in 2004, before the *Halbert* decision, and was denied appointment of appellate counsel pursuant to then-existing Michigan law. On appeal, the *James* Court held that the defendant was entitled to appellate counsel to seek leave to appeal his conviction. *James, supra* at 198. However, the *James* Court noted that it was *not* considering whether *Halbert* applies retroactively. *Id.* at 192 n 9.

existence of an appeal of right”; the conviction is deemed valid unless a showing of error is made). Accordingly, defendant’s prior felony-firearm conviction was not rendered invalid because he was denied appellate counsel in seeking leave to appeal, in accordance with then-existing law, and his prior conviction was properly used to enhance his present sentence.³

B. Departure from Sentencing Guidelines

Defendant was sentenced to 45 to 80 years’ imprisonment for his assault with intent to commit murder conviction. His minimum sentence range for this conviction, in light of his status as a second habitual offender, is 126 to 262 months. Defendant claims that the trial court lacked substantial and compelling reasons to depart from the guidelines. We do not agree. MCL 769.34(3) permits a court to depart from the sentencing range established by the guidelines “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” “[A] substantial and compelling reason [is] an objective and verifiable reason that keenly or irresistibly grabs [the court’s] attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases.” *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995) (internal quotations omitted).

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

The trial court properly identified five substantial and compelling reasons to depart from the guidelines. First, the serious nature of Pearson’s injuries was inadequately accounted for in the guidelines. Before the shooting, the 31-year-old Pearson was healthy and able-bodied. The shooting left her a quadriplegic. She cannot move, speak, or breathe without a ventilator. Although defendant was scored 25 points for OV 3 because Pearson sustained life-threatening, permanent, incapacitating injuries and ten points for OV 4 because Pearson sustained serious psychological injury requiring professional treatment, this scoring does not adequately account for the severe, devastating, and exceptional nature of Pearson’s injuries. Pearson has been hospitalized since the shooting and no evidence suggests that her condition will ever improve.

³ Counsel represented defendant during the 2002 plea proceeding and he does not claim that his plea proceeding was somehow flawed or fundamentally unfair. Defendant also fails to present any evidence that denial of assistance of appellate counsel impacted the accuracy of his plea-based conviction.

Defendant also claims that because he was not a second habitual offender, he should have been placed in the grid of 126 to 210 months rather than the grid of 126 to 262 months. However, defendant concedes that his placement in the 126- to 262-month grid would be proper if he were a second habitual offender. Because defendant’s prior felony-firearm conviction is valid and can be used to sentence defendant as a second habitual offender, his grid placement is proper.

The trial court did not abuse its discretion when it found that the guidelines inadequately accounted for Pearson's injuries.

Second, the guidelines did not take into account that Pearson was a completely innocent bystander when four bullets that were meant for Al struck her. Pearson's innocent bystander status was an objective and verifiable fact and constitutes a substantial and compelling reason to depart from the guidelines.

Third, the guidelines failed to adequately take into account that Pearson's two young children, aged 2 and 11, have been deprived of her care. Defendant received 15 points for OV 5 because Pearson's mother and 11-year-old daughter sustained serious psychological injury requiring professional treatment. However, the guidelines do not take into account that Pearson's condition prevents her from ever caring for or communicating with her children. Although Pearson is alive, the severity of her injuries means that her children will essentially grow up without a mother. This deprivation of a parent is an objective and verifiable factor constituting a substantial and compelling reason to depart from the guidelines.

Fourth, the guidelines do not take into account that, but for heroic medical intervention, Pearson would have died. Pearson was completely unresponsive and did not exhibit any vital signs when she was brought to the hospital after being shot, and she was only resuscitated after substantial medical efforts. Pearson has been hospitalized since the shooting and has required emergency resuscitation at least twice. Had heroic efforts not been continually used to repeatedly resuscitate Pearson, defendant would have faced a murder charge. The trial court did not abuse its discretion when it determined that Pearson's repeated near-death experiences were facts that constituted a substantial and compelling reason to depart from the guidelines.

Finally, the guidelines do not adequately account for defendant's high OV score. The sentencing grid applicable in defendant's case contains OV levels I through VI, each containing a 19-point range. With an OV score of 140, defendant was placed in OV Level VI, which is for "100+" points. Although the "100+" category expressly includes scores of 100 and above, defendant's score is well above the 19 point range typical of other OV levels. If the grid did not end at OV Level VI, but continued with additional OV levels containing 19-point ranges (OV Level VII would be 120-139, OV Level VIII would be 140-159, etc.), defendant would be placed two levels beyond OV Level VI. The trial court properly relied on defendant's high OV score to justify a sentencing departure. See *People v Sarah Stewart*, 442 Mich 937-938; 505 NW2d 576 (1993) (holding that the trial court did not abuse its discretion when it departed upward from the recommended minimum sentence range because defendant's OV score exceeded the score needed to reach the highest level of offense severity).

Because the trial court properly concluded that a substantial and compelling reason for the departure exists, we review the extent of the departure for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In light of the egregiousness of the offense and the devastating injuries suffered by Pearson, the trial court did not abuse its discretion when it sentenced defendant to 45 to 80 years' imprisonment for his assault with intent to commit murder conviction. Defendant's sentence does not violate the principle of proportionality.

V. Ineffective Assistance of Counsel

Defendant bases his claims of ineffective assistance on his counsel's failure to properly address the aforementioned alleged errors. However, we have concluded that no error occurred and, accordingly, defendant's counsel was not ineffective for failing to address these alleged errors. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette