

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH EDWARD MAXEY,

Defendant-Appellant.

UNPUBLISHED
February 24, 2011

No. 294418
Wayne Circuit Court
LC No. 09-012497-FC

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, discharge of a firearm in or at a building, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of 10 to 15 years' imprisonment for each assault with intent to do great bodily harm less than murder conviction, three to six years' imprisonment for each felonious assault conviction, 48 to 90 months' imprisonment for the discharge of a firearm in or at a building conviction, three to six years' imprisonment for the felon in possession of a firearm conviction, and a consecutive two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences except for the sentences imposed for the convictions of two counts of assault with intent to do great bodily harm less than murder, which we vacate and remand for resentencing consistent with this opinion.

Defendant first argues that counsel's failure to introduce into evidence medical records showing that defendant could not run at the time the shooting occurred, as well as counsel's not calling codefendant Shron Bennett and alibi witnesses to testify on defendant's behalf, denied him his constitutional right to effective assistance of counsel. We disagree.

Whether a defendant received effective assistance from his trial counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error and questions of constitutional law de novo. *Id.* For unpreserved claims, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. To meet this burden, “a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 312-314. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In claims alleging ineffective assistance of counsel, “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We will not substitute our judgment for that of counsel on matters of trial strategy, and we must assess counsel’s performance without the benefit of hindsight. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

According to defendant, the medical records indicating that defendant suffered gunshot wounds to his left knee less than four months before the shooting, had they been introduced, would have shown that the person the eyewitness saw running up the alley was not defendant. Defendant has not shown, however, that counsel’s performance in not introducing the medical records fell below an objective standard of reasonableness. To do so, a defendant must overcome the strong presumption that counsel’s decision constituted sound trial strategy. *Strickland*, 466 US at 689; *Horn*, 279 Mich App at 39. Overcoming this presumption requires the defendant to exclude hypotheses that support a finding that counsel provided adequate representation. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In the instant case, the medical records indicate only that defendant was shot in to his left knee—the records provide no indication that defendant’s injury made it impossible for him to run from a crime scene four months later. Accordingly, counsel may have determined that the evidence lacked sufficient probative value. Alternatively, trial counsel may have reasonably considered the medical records too prejudicial given that they reveal defendant’s involvement in another shooting and daily marijuana use. Whatever the case, we cannot conclude that counsel’s decision to attack the eyewitness’s ability to accurately perceive the incident rather than introduce the medical records for this purpose fell below an objective standard of reasonableness. Moreover, defendant has not shown the alleged error was prejudicial. Without an indication that the gunshot wounds actually prevented defendant from running four months later, there can be no reasonable probability that the jury would have discarded the eyewitness’s testimony that she saw defendant run up the alley because it was fabricated or otherwise inaccurate and acquitted defendant on that basis.

Similarly, defendant has not shown counsel seriously erred by failing to call codefendant Bennett to testify that defendant was not present when the shooting occurred. First, defendant has not established that Bennett would have testified regarding defendant’s absence from the crime scene. In his guilty plea made during the second day of trial, Bennett never said defendant was not at the crime scene, nor has he signed any affidavit to that effect. Further, calling Bennett to the stand would have been a last minute decision. Because Bennett maintained his constitutional right to remain silent and not testify until he pleaded guilty the second day into

trial, counsel may have thought it too risky to call him without adequate preparation. In addition, given Bennett's long friendship with defendant, counsel may have decided that the testimony was not sufficiently trustworthy and that, as a matter of trial strategy, the better option was to attack the eyewitness's ability to perceive the events. Again, defendant has not excluded these possibilities or shown a reasonable probability that the jury would have acquitted him had Bennett testified.

With respect to defendant's contention that counsel failed to call alibi witnesses or otherwise investigate them, we note this claim is unpreserved, so review is limited to errors apparent on the record. *Matuszak*, 263 Mich App at 48. Although it is true that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 US at 691, from the record, it is not apparent that counsel neglected to carry out this duty. The alibi witnesses that defendant purports would account for his whereabouts at the time the offense occurred are never mentioned in the record, and defendant offers no evidence to establish the testimony these individuals would provide. As such, defendant has failed to establish both that counsel's performance was deficient and that it resulted in any prejudice. *Pickens*, 446 Mich at 303, 312-314.

Defendant also argues that error warranting reversal occurred when the trial judge failed to articulate a rationale for denying his motion for a new trial. See MCR 6.431(B). The court's failure to assign reasons either orally on the record or in writing did not prejudice defendant. See *People v Schaner*, 302 Mich 6, 11; 4 NW2d 444 (1942). As outlined above, defendant has failed to establish his claim of ineffective assistance of counsel and any failing of the trial court in denying defendant's motion for new trial was harmless. MCR 2.613(A).

Defendant next argues that he is entitled to resentencing because the trial judge misscored OV 10 at 15 points for alleged predatory conduct when it should have scored the variable at zero points. We disagree.

We review factual findings at sentencing for clear error and the trial court's decision to score an offense variable for an abuse of discretion. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd but modified on other grounds 473 Mich 399, 410 n 22 (Young, J.), 416-417 (CAVANAGH, J.); 702 NW2d 530 (2005). The ultimate question we must decide is whether the trial court properly exercised its discretion and whether the evidence on the record adequately supports the particular score given. *Id.*

A judge may score OV 10 at 15 points only in instances where the defendant engaged in "predatory conduct," MCL 777.40(1)(a), defined as "preoffense conduct directed at a victim for the primary purpose of victimization," MCL 777.40(3)(a). A trial judge must ask the following three questions to determine whether the defendant engaged in predatory conduct within the meaning of the statute:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).]

In the instant case, defendant engaged in conduct before the commission of the offense. Defendant committed a felonious assault approximately an hour and a half before the shooting when he approached the two men, who were in a vehicle stopped at a stoplight, and lifted his shirt in a manner suggesting that he possessed a gun. Further, one of the men testified that he saw a black handgun protruding from defendant's waistband. With respect to the second inquiry, one could reasonably conclude that the individuals at whom defendant directed his preoffense conduct were vulnerable victims. The two men were unarmed and thus susceptible to injury. They were also restrained to some degree inside the vehicle stopped at a stoplight. Finally, the record supports a finding that defendant's primary purpose in committing the assault was to victimize the two men. "Victimize" means "to make a victim of"—i.e., to make a potential victim an actual victim. *Cannon*, 481 Mich at 161. Here, in approaching the vehicle and brandishing a gun, defendant exhibited his intent to make the two men actual victims. For that reason, the trial court did not abuse its discretion in scoring OV 10, and the evidence on the record adequately supports assessing defendant 15 points for predatory conduct.

In his final argument on appeal, defendant argues that the trial court relied on offense characteristics already accounted for under other scoring variables to justify a departing sentence but failed to articulate that such characteristics were given inadequate weight. This error, defendant contends, entitles him to resentencing. We agree, in part.

As the Michigan Supreme Court outlined in *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), we review claims challenging a trial court's decision to depart from the appropriate sentencing guidelines range under three standards. Whether a particular factor to support the departure exists is reviewed for clear error; whether the factor is objective and verifiable is reviewed de novo, and whether the court's reason for departing is substantial and compelling is reviewed for an abuse of discretion. *Id.*

A court may depart from the sentencing guidelines range only where it has a substantial and compelling reason for departing and articulates that reason on the record. MCL 769.34(3); *Babcock*, 469 Mich at 256-260. A substantial and compelling reason, which exists only in exceptional cases, is an objective and verifiable reason that keenly or irresistibly grabs the court's attention and is of considerable worth in determining the length of sentencing. *Id.* at 257-258. In addition, any sentence that departs from the guidelines must also satisfy the principle of proportionality, and in fact, be more proportionate than a sentence within guidelines. *Id.* at 264. Further, a "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 . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Just as a trial court deciding to issue a departure sentence must state on the record a substantial and compelling reason for doing so, in cases where it bases its departure on offense characteristics already taken into account under other scoring variables, it must specifically articulate that such characteristics were given inadequate or disproportionate weight. See *People v Smith*, 482 Mich 292, 302 n 21; 754 NW2d 284 (2008); *People v Jackson*, 474 Mich 996; 707

NW2d 597 (2006). In *Smith*, for example, as a basis for departing from the appropriate sentencing guidelines range, the trial judge referred to the fact that the defendant exploited the victim's vulnerability, which OV 10 partially takes into account. *Smith*, 482 Mich at 302 n 21. In remanding the case for resentencing, the Michigan Supreme Court refused to infer that the judge considered the offense characteristics already accounted for under other variables and found that they were given inadequate weight. *Id.* Similarly, in *Jackson*, 474 Mich at 996, the Court noted that, although the trial court referred to excessive brutality, violence, and terrorism to justify imposing a departing sentence, OV 7 already accounted for these characteristics. Because the trial court did not expressly find that the characteristics accounted for under OV 7 were given inadequate or disproportionate weight, the Court remanded the case for resentencing.

Here, the trial court's reasons for departing from the appropriate sentencing guidelines range were: (1) defendant was on parole at the time the offense occurred; (2) a jury convicted defendant of seven felonies in connection with the offense; and (3) the perpetrators possessed and discharged firearms during the offense.¹ These offense characteristics were accounted for by the guidelines. Specifically, defendant's parole status was accounted for under Prior Record Variable ("PRV") 6, for which the trial judge assessed him ten points; his concurrent felony convictions were accounted for under PRV 7, for which the trial judge assessed him 20 points; and the fact that the perpetrators possessed and discharged firearms was accounted for under OV 1 and OV 2, for which the trial judge assessed him 25 and five points, respectively. Thus, to justify departing from the appropriate sentencing guidelines range on the basis of these factors, the trial court was required to explicitly state a finding that these guidelines characteristics were given inadequate or disproportionate weight. MCL 769.34(3)(b); *Jackson*, 474 Mich at 996. Because the trial court failed to do so, we must vacate the sentences imposed for the two counts of assault with intent to do great bodily harm less than murder and remand for resentencing within the appropriate sentencing guidelines range, or, if the sentencing judge believes that a departure is justified, for a statement of substantial and compelling reasons supporting the departure that complies with MCL 769.34(3).

We affirm defendant's convictions and sentences except for the sentences imposed for the convictions of two counts of assault with intent to do great bodily harm less than murder, which we vacate and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

¹ Only defendant's sentences for his convictions of two counts of assault with intent to do great bodily harm less than murder exceeded the guidelines recommended range. Consequently, we must affirm the defendant's sentences for the other convictions. MCL 769.34(10).