

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DUPREE BRACKETT,

Defendant-Appellant.

UNPUBLISHED

January 22, 2013

No. 307040

Genesee Circuit Court

LC No. 10-027753-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm in the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve 87.5 to 133.3 years’ imprisonment for the murder conviction, life imprisonment for felon in possession conviction, and two-years’ imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

Defendant shot and killed the victim, who was also his cousin. The testimony indicated that the shooting was in retaliation for the victim breaking defendant’s front door. When defendant learned that the victim was responsible for the damage, he obtained a shotgun and confronted the victim later in the evening, even though defendant was aware that the victim was highly intoxicated. The two argued and defendant shot the victim in the stomach. The victim staggered back and fell to the concrete. Defendant then stood over the victim and discharged two more rounds. The medical examiner concluded that any of the three shots could have been fatal.

Defendant pursued an alibi defense at trial. He claimed that he was with his girlfriend at the time of the shooting. However, at the close of proofs, defense counsel requested that the trial court instruct the jury on both voluntary and involuntary manslaughter. The trial court declined to do so, finding that defendant’s alibi defense was inconsistent with either instruction. Defendant was convicted and sentenced as outlined above. He now appeals as of right.

II. JURY INSTRUCTIONS

Defendant first claims that the trial court erred in refusing to instruct the jury on voluntary and involuntary manslaughter. We disagree. We review de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him” and “when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.” *People v Mills*, 450 Mich 61, 80–81; 537 NW2d 909 (1995), mod on other grounds 450 Mich. 1212 (1995). The trial court’s obligation to give a requested instruction is relieved, however, where such a request is not supported by the evidence of record. *Id.* Here, defendant requested that the trial court instruct the jury on the theories of voluntary and involuntary manslaughter. Thus, the trial court’s duty to instruct on those theories must be determined by the evidence on the record. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Hall (On Remand)*, 256 Mich App 674, 677; 671 NW2d 545 (2003).

Here, the evidence would not have supported a verdict of voluntary or involuntary manslaughter. While the first shot was arguably the result of the heat of passion if the jury believed the testimony that the victim punched defendant or tried to grab his gun, the second and third shots to the victim’s neck and chest were point blank and delivered as the victim lay injured on the street. No rational view of the evidence would have supported the idea that defendant accidentally killed the victim or acted in a fit of passion. See *People v Reese*, 491 Mich 127, 143-144; 815 NW2d 85 (2012); *People v Mendoza*, 468 Mich 527, 535-536; 664 NW2d 685 (2003). The court “need not give requested instructions that the facts do not warrant.” *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Therefore, although the trial court erred as a matter of law in concluding that an alibi defense precluded the requested instructions, *People v Bryant*, 80 Mich App 428, 432; 264 NW2d 13 (1978), the record evidence did not support giving the instructions. Accordingly, there is no reversible error.

III. SENTENCING

Defendant claims that the trial court erred in sentencing him above the guidelines recommendation for the felon in possession conviction and in failing to request a separate Presentence Investigation Report (PSIR) scoring for this offense.

A. STANDARDS OF REVIEW

In reviewing a departure from the guidelines range: 1) the existence of a particular factor is a factual determination subject to review for clear error; 2) the determination that the factor is objective and verifiable is reviewed de novo as a matter of law; 3) the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion; and 4) the amount of the departure is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301701, issued October 23, 2012), slip op p 6. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Smith*, 482 Mich at 300. In ascertaining whether the departure was proper, we must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Babcock*, 469 Mich at 270.

The interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

B. GUIDELINES DEPARTURE

In sentencing defendant, the trial court noted:

THE COURT: Well, when I read through this report I see a man who had an astounding number of misconducts while in prison before, 154 major misconducts, most of which were assaultive. And then I see where you've shot two other people and I see where you've killed two people. And it all comes down to the fact that – well you even killed your cousin, a family member. What a terrible thing.

THE DEFENDANT: That's what a jury said.

THE COURT: All of those facts add up to the conclusion that you are just dangerous to the world. So you must be locked up as far as I can tell for the rest of your life. What I'll do is I'll say that you will be remanded to the custody of the Michigan Department of Corrections on count one [second-degree murder] for a minimum term of 1,050 months, a maximum of 1,600 months. On count two [felon in possession], for the rest of you[r] life, and on count three [felony-firearm] for 2 years.

Pursuant to MCL 769.12(1)(b), a life sentence is permissible for a fourth habitual offender convicted of felon in possession. Nevertheless, defendant argues that the trial court's sentence was a substantial deviation from the sentencing guidelines. Possession of a firearm by a felon is a crime against public safety and a Class E offense under the sentencing guidelines. MCL 777.16m. The highest minimum sentence on the sentencing grid for a fourth habitual offender convicted of a Class E offense is 76 months. MCL 777.66.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors meriting departure must justify the particular departure made, must be objective and verifiable, must "keenly attract" the court's attention, and must be of considerable worth. *Smith*, 482 Mich at 299; *Babcock*, 469 Mich at 257-258; *Anderson*, slip op p 3. Additionally, "[w]hen fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed." *Smith*, 482 Mich at 318.

Here, the trial court more than adequately explained the departure from the sentencing guidelines. The trial court set forth objective and verifiable reasons for departing from the guidelines and further justified why the departure was proportionate to defendant's crime. The court thought that defendant should spend the rest of his life in prison. Supporting factors were that defendant shot and killed his cousin, a family member; that he previously shot two other

people, one of whom died; that in prison he had 154 major misconducts, mostly assaultive; and that he was “just dangerous to the world.” “Although a trial court’s ‘belief’ that a defendant is a danger to himself and others is not in itself an objective and verifiable reason [for departing from the sentencing guidelines], objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure,” *People v Horn*, 279 Mich App. 31, 755 NW2d 212 (2008), as well as the extent of the departure.

B. PSIR FOR EACH OFFENSE

The PSIR in this case scored only one crime, second-degree murder, under the sentencing guidelines. Defendant argues that felon in possession should have been scored as well, citing *People v Johnigan*, 265 Mich App 463, 471-472; 696 NW2d 724 (2005).

The *Johnigan* Court’s lead opinion disagreed with *People v Mack*, 265 Mich App 122, 126-127; 695 NW2d 342 (2005), regarding the requirement of a PSIR scoring for all offenses. The panel in *Mack* found it permissible to use a PSIR that scored third-degree criminal sexual conduct but not assault with intent to commit criminal sexual conduct, a lesser offense. *Mack* relied on MCL 771.14(2)(e)(ii) and (iii), which required that a PSIR include a sentencing grid for each “crime having the highest crime class.” In *Johnigan*, the lead opinion found *Mack*’s interpretation of MCL 777.21(2) erroneous, because, at the time *Mack* was decided, this section stated, “If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part.” Thus, the *court* was required to score all offenses although the *PSIR* need score only the highest; the language of MCL 777.21(2) was not ambiguous on this point. *Johnigan*, 265 Mich at 470-472. However, Judge Sawyer wrote that a conflict with *Mack* need not be created because only one of the defendant’s convictions, felon in possession, was assigned a crime class. The others, first-degree murder and felony-firearm, were not covered by the guidelines, because both carried mandatory sentences. *Id.* at 472-473. Thus, to the extent that the lead opinion in *Johnigan* criticized *Mack*, the discussion was dicta.

Further, the Legislature amended MCL 777.21(2), arguably in response to *Johnigan*, and the amendment eliminated the conflict. The section now provides: “If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part.” Section 14 of chapter XI, MCL 777.14(2)(e), requires the Probation Department to score only the crime in the highest class when concurrent sentences are imposed. Accordingly, scoring only second-degree murder was permissible.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering