

**Court of Appeals, State of Michigan**

**ORDER**

People of MI v James Cicero Morgan

Docket No. 310643

LC No. 11-011105-FH

Peter D. O'Connell  
Presiding Judge

Kurtis T. Wilder

Patrick M. Meter  
Judges

---

The Court orders that the motion for reconsideration is GRANTED. The Court REMANDS the matter to trial court to vacate the assessment of costs. *People v Cunningham*, 496 Mich 145; \_\_ NW2d \_\_ (2014). In all other respects the July 24, 2014 opinion remains unchanged. We do not retain jurisdiction.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 26 2014

Date

A handwritten signature in cursive script, reading "Jerome W. Zimmer Jr.", is written over a horizontal line.

Chief Clerk

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

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 24, 2014

v

JAMES CICERO MORGAN, JR., a/k/a JAMES  
CICERO MORGAN,

No. 310637  
Wayne Circuit Court  
LC No. 11-011103-FC

Defendant-Appellant.

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

JAMES CICERO MORGAN, a/k/a JAMES  
CICERO MORGAN, JR.,

No. 310643  
Wayne Circuit Court  
LC No. 11-011105-FH

Defendant-Appellant.

---

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

In Docket No. 310637, defendant appeals as of right his conviction by a jury of malicious destruction of property with a value of \$1,000 or more but less than \$20,000, MCL 750.377a(1)(b)(i). The trial court sentenced him to two to five years in prison for this conviction. In Docket No. 310643, defendant appeals as of right his conviction by a jury of unarmed robbery, MCL 750.530. The trial court sentenced him to 10 to 15 years in prison for this conviction. Defendant appeals his sentences, which were both upward departures from the minimum sentencing guidelines ranges, and argues that his trial counsel was ineffective. We affirm in Docket No. 310643. In Docket No. 310637, we affirm defendant's conviction but remand for resentencing.

## I. FACTUAL SUMMARY (DOCKET NO. 310637)

Regarding defendant's appeal based on the conviction of malicious destruction of property, the following facts apply. On June 12, 2011, defendant and codefendant, Marcus Gooden, harassed the complainant at a liquor store and damaged her car. The incident began when the complainant drove her car to a party store in Highland Park at approximately 1:30 a.m. In the car with the complainant were her boyfriend and a few others. The group had attended a birthday party and left to buy more liquor for the party. Upon entering the party store, they saw defendant and codefendant and a couple others inside. The complainant's boyfriend knew defendant and Gooden from the neighborhood, but the complainant did not. The boyfriend and his cousin began arguing with defendant and Gooden. The complainant continued to shop and to purchase some beer and a pint of liquor. When the clerk gave her the liquor, Gooden "snatched" it from her hand, saying he was taking it. Because the argument continued, the store's owner told them all to leave.

The complainant got into her car and started the engine. Her driver's side window was down. Defendant put the upper half of his body into her car through the open window and tried to take the keys from the ignition while calling her a vulgar word and telling her he was going to take her car. The complainant was frightened. Her boyfriend, who was in the back of the car, came out to stop defendant from taking the keys. Defendant told Gooden to grab the boyfriend. Gooden yelled at him but did not grab him. The boyfriend pushed defendant away, and the complainant was able to lock her door, roll her window up and restart the car. Her boyfriend got in the car and, as they drove away, defendant kicked the car, denting the back and side and breaking a headlight. That night, the complainant gave the police an account of the incident. Subsequently, she gave the police a written statement and identified defendant in a photographic lineup. The police searched for defendant in the area of the incident, to no avail. Eventually, a warrant was issued for defendant, and he was apprehended.

At trial, defendant admitted that he was at the party store but claimed his actions regarding the complainant were merely flirtatious. He asserted that he never intended to take her car and that he was merely "trying to be funny." Defendant admitted that he kicked her car because he was "mad" at complainant's boyfriend for yelling at him. In contrast, complainant said she felt "scared" and "[t]errified" during the incident. She did not believe that defendant was flirting or fooling around.

Defendant was acquitted of carjacking and attempted unlawful driving away of an automobile (UDAA) but was convicted of malicious destruction of property for the damage he caused to the car.

## II. ANALYSIS (DOCKET NO. 310637)

Defendant claims that the trial court's upward departure from the guidelines was an abuse of discretion. Specifically, he argues that the trial court's departure was based on factors that were not substantial and compelling and were already taken into account by the sentencing guidelines.

Under MCL 769.34(7), the court must advise a defendant that he may seek review of a sentence that is more severe than the appropriate guidelines range. Thus, there is no preservation requirement for appellate review of such a sentence. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

The existence of a particular factor under the guidelines is a factual determination that we review for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Under the sentencing guidelines, a court's findings of fact must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). We review de novo whether the factual determinations are "adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438. Further, we review for an abuse of discretion the trial court's conclusion that there was a substantial and compelling reason to depart from the guidelines. *Id.* at 438 n 17. Whether the extent of the departure is supported by substantial and compelling reasons is also reviewed for an abuse of discretion. *Smith*, 482 Mich at 300. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

In "exceptional cases," the court may depart from the sentencing guidelines range if it articulates on the record a "substantial and compelling reason" supporting the particular departure. *Babcock*, 469 Mich at 255-257. The court may only rely upon factors that are objective and verifiable to determine whether a substantial and compelling reason exists. *Id.* at 257. In other words, "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Moreover, the trial court may not base the departure on characteristics already considered by the guidelines unless it finds that the characteristics were given inadequate or disproportionate weight. MCL 769.34(3)(b); *Smith*, 482 Mich at 300. It is permissible for a sentencing court to consider facts relating to "uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). The court may also consider at sentencing any evidence admitted during the trial. *Id.* "A trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record." *People v Anderson*, 298 Mich App 178, 185; 825 NW2d 678 (2012). The reasons warranting departure must "keenly" or "irresistibly" grab the court's attention and must be "of considerable worth" in determining the length of a sentence. *Babcock*, 469 Mich at 257 (quotation marks and citation omitted). "[C]ommonplace repercussions of criminal activity do not support departures" because the guidelines were designed "to promote uniformity in criminal sentencing" with such principles already taken into consideration. *Smith*, 482 Mich at 302.

"When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Smith*, 482 Mich at 304. The sentence must be proportionate to the seriousness of the offender's conduct and criminal record. *Id.* at 305. The trial court must provide a sufficient record for adequate appellate review regarding whether the departure was warranted. *Id.* at 318.

The sentencing guidelines range for defendant on the conviction of malicious destruction of property was 0 to 17 months, and the minimum sentence imposed by the trial court on that conviction was two years (24 months), a departure of seven months. At the sentencing hearing, the trial court stated:

[T]he Court, in hearing the evidence, didn't hear about a weapon in the case, a gun or a knife, but in fact heard an unusual circumstance where a defendant, this defendant, James Morgan, basically is trying to, by the evidence, strong arm a car away from a woman that he does not know, but who's accompanied by, I believe two or three men that he is well familiar with and has been familiar with for his whole life, people who can identify him.

And so did indicate [sic] that the [c]ourt in assessing the evidence may be able to, would be able to convict if it had been a waiver trial of attempt UDAA and that he did say, you know, in much more vulgar terms, give me your car. Give me your keys and tried to reach over and grab the keys and then kick the car violently when the complainant just tried to drive away instead of giving him her car with his people he knew in the car and malicious destruction of property because of that damage to the car, but certainly not carjacking.

And that maybe if the office had reviewed the case more carefully and especially in light of the fact that there are two cases, that I don't know about the other case [sic], but it could have been resolved.

Nonetheless, in this case, there were two defendants. And in this case, both the plea of the codefendant and the evidence in this case showed the defendant again to be a leader in a multiple defendant situation, and that codefendant pled guilty to, I believe, some larceny type charge.

He pled guilty to larceny from a person and was sentenced to 19 months to 10 years. That's [the] codefendant who was ordered by the defendant to grab one of the complainants who got out of the car [to] try to stop him from taking the car. And the property was taken from the complainant.

And so in assessing the entirety of these facts, certainly that [a] defendant . . . pled guilty to larceny from a person and the facts that the complainant is requesting restitution of \$1,550.96 and the other issues in this case support that the sentence in this case should also be prison time so at least slightly more than the 19 months that was given to the codefendant.

Thus, the trial court articulated two reasons for the upward departure: (1) the special circumstances of the entire incident and (2) defendant's position as the leader of this incident.

Regarding the "special circumstances" surrounding the malicious destruction of property, the trial court properly enhanced defendant's sentence based on objective and verifiable factors that constituted a substantial and compelling reason to depart. The trial court based its conclusion on the objective and verifiable facts that defendant tried to "strong arm a car away from a woman," used "vulgar" language to tell her to give him her keys, and "kick[ed] the car

violently” when she was driving away. The trial court determined that, had this been a waiver trial, defendant could have been convicted of attempted UDAA. At trial, the complainant testified that defendant put the top half of his body into her car, called her a vulgar name and told her, “I’m going to take your car.” He grabbed at her keys as the car was running. The complainant felt “[t]errified” and “scared” during the incident. The complainant further testified that, as she was leaving, defendant kicked her car, putting dents in the back and the middle and breaking a headlight. The trial court did not err in concluding that defendant’s other acts surrounding the damaging of the victim’s car were reasons not adequately addressed by the guidelines.

Moreover, the trial court did not abuse its discretion when it found that the special circumstances of the incident constituted a substantial and compelling reason to depart from the guidelines. As noted, it is permissible for a sentencing court to consider facts relating to “uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence.” *Golba*, 273 Mich App at 614. The court may also consider at sentencing any evidence admitted during the trial. *Id.* Defendant testified at trial and was afforded the opportunity to challenge the incriminating evidence. Additionally, while defense counsel objected on the grounds of bias to the trial court’s sentencing defendant, she did not challenge any specific evidence on which the departure was based. Therefore, the trial court properly considered facts on the record that defendant did not merely damage the complainant’s car but leaned into her car, attempted to take the keys from her and told her he was taking her car.

Regarding defendant’s position as the leader of this incident, the trial court abused its discretion in concluding that this was a substantial and compelling reason to depart from the guidelines. The trial court found that codefendant Gooden received a minimum sentence of 19 months when he pleaded guilty to larceny from a person. The trial court reasoned that defendant, being the leader of the encounter and ordering Gooden to grab the boyfriend, deserved a sentence that was slightly longer than Gooden’s. There was evidence to support the trial court’s factual finding. Specifically, the complainant’s boyfriend testified that, as he was struggling with defendant for the car keys, defendant called for Gooden to “grab me.” Gooden walked a few steps while yelling but did not touch him.<sup>1</sup>

Because defendant told Gooden to grab the boyfriend during the confrontation at the car, the trial court concluded that defendant deserved a greater sentence than his cohort. However, the lesser sentence of a defendant’s fellow participant in a crime is not a substantial and compelling reason to depart from the guidelines. *People v Clark*, 185 Mich App 127, 129-132;

---

<sup>1</sup> Defendant contends that the trial court enhanced his minimum sentence based on Gooden’s sentence for larceny from a person, a crime for which defendant was not on trial and a crime accounted for in the scoring of 10 points for OV 12. However, the scoring of OV 12 is irrelevant to the present analysis because the trial court’s reasoning was not based on the dismissed charge of larceny from a person but on defendant’s status as the leader of the incident.

460 NW2d 246 (1990). This is true because the policy of this state favors individualized sentencing for each defendant. *Id.* at 131; see also *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000), and *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). Therefore, we conclude, by analogy, that it was improper for the trial court to consider Gooden's sentence in enhancing defendant's sentence.

We may affirm a sentence where "the trial court would have imposed the same sentence regardless of a misunderstanding of the law . . ." *Anderson*, 298 Mich App at 191. However, it is not just unclear whether the trial court would have enhanced defendant's sentence despite this erroneous reason, it appears that the trial court used Gooden's sentence as the benchmark in determining defendant's sentence. The trial court stated that defendant's sentence should be "slightly more than the 19 months that was given to the codefendant," and it sentenced defendant to a minimum of 24 months. Because a main reason relied upon by the trial court to depart from the guidelines was not substantial and compelling, we vacate defendant's sentence and remand for resentencing on the conviction of malicious destruction of property. See *Babcock*, 469 Mich at 260-261. We note that the trial court is free to impose the same sentence on remand as long as it articulates proper reasons for departure. *Id.*

### III. FACTUAL SUMMARY (DOCKET NO. 310643)

After the above-stated incident, he committed an unarmed robbery at another liquor store in Highland Park. On August 20, 2011, at approximately 1:00 a.m., the 17-year-old complainant went with his friend to a party store in Highland Park. His friend wanted to purchase a drink. Defendant was there, along with six of his friends. The group was calling the complainant and his friend derogatory names. Once inside the store, one from the group "jumped" the friend. Defendant approached the complainant and told him not to watch the assault. As soon as the complainant looked at his friend, defendant punched him in the face. The complainant recalled falling to the floor and hitting the glass door of the cooler. He then lost consciousness. Defendant continued to stomp on him while he lay on the floor. After he regained consciousness, the complainant ran outside and into his car. He was bleeding and in pain. The complainant's jaw had been broken in three different places, his gums were split and he had a bruise on his brain. He was in the hospital for two days and had his jaw wired shut for six weeks. His wallet with money inside and his cellular telephone were taken from him while he was unconscious.

At trial, the complainant testified that he had never seen defendant before this incident. He identified defendant in a photographic lineup before defendant's arrest, as well as in video surveillance obtained from the party store and played for the jury at trial.

Defendant testified that he was at the party store on the night of the incident but was not the person who assaulted the complainant. Defendant also denied taking any of his property. Defendant insisted that he was wearing a white shirt and black hoodie and that, therefore, he was not the man in the video who hit the complainant. Defendant testified that he was arrested for this crime as part of ongoing harassment from Highland Park police officers.

The jury found defendant guilty of unarmed robbery.

#### IV. ANALYSIS (DOCKET NO. 310643)

##### A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that his trial counsel was ineffective for failing to challenge for cause a juror who admitted bias.

Defendant raised this issue for the first time on appeal in a motion to remand for a *Ginther*<sup>2</sup> hearing. Because this Court denied defendant's motion to remand, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id.*

To warrant a new trial based on the ineffective assistance of counsel, "the defendant must show that counsel's performance fell below an objective standard of reasonableness," and "the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). There is a presumption of effective counsel, and the defendant has the burden of proving otherwise. *Petri*, 279 Mich App at 410.

Defendant claims that his trial counsel was ineffective for not challenging an allegedly biased juror for cause. Defendant references the following interaction between the trial court and the juror during voir dire:

*THE COURT:* All right. And given the questions that were asked of the other prospective jurors sir, is there anything you can share with these lawyers?

*JUROR NO. 12:* Yes. My cousin was carjacked about a year ago, and the neighbor next door to him was robbed and beaten. And I feel like I wouldn't be a good juror because I would feel like he would be guilty.

*THE COURT:* All right. Well, let me first of all tell you that every juror must be fair to the Defense, as well as[] the prosecution. If you were charged with a crime, and you were innocent, you would certainly want the jurors to treat you that way, correct?

*JUROR NO. 12:* That's correct.

*THE COURT:* Okay. So just to clarify the issue, if these lawyers decided to choose you as a juror, I would have to instruct you that you must listen

---

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

carefully to the evidence, follow the law and come back with a fair verdict. Are you telling us you cannot do that?

*JUROR NO. 12:* I can do that.

*THE COURT:* You can do that?

*JUROR NO. 12:* Yeah, I can do that.

Defense counsel did not challenge the juror, who later deliberated on the verdict. Defendant's only offer of proof to support his appellate claim is the assertion that his trial counsel told his appellate counsel's assistant that she could not recall why she did not challenge the juror.

The juror initially stated that his cousin was carjacked a year before and his cousin's neighbor had been robbed and beaten, and thus he had a preconceived notion of guilt. Then the trial court explained that fairness required the juror to treat the defendant as fairly as he himself would want to be treated. Further, the trial court explained that, as a juror, he would have to listen to the evidence, follow the law, and come back with a fair verdict. The juror twice assured the court that he could listen carefully to the evidence, apply the law, and return a fair verdict.<sup>3</sup>

Jurors are presumptively competent and impartial, and the party alleging disqualification bears the burden of proving its existence. *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911); *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Removal for cause would have been warranted if the juror had a state of mind that (1) showed bias against the defendant, (2) prevented him from rendering a just verdict, or (3) would have improperly influenced his verdict. MCR 2.511(D)(2), (3), and (4). Here, the juror's promise to listen to the evidence and render a fair verdict was sufficient to protect defendant's right to a fair trial. Because defendant did not meet his burden of proving the juror's partiality, he also failed to establish that his counsel's performance fell below an objective standard of reasonableness when she did not challenge the juror for cause.

Moreover, defendant failed to show that, but for the seating of the juror involved, a different result was reasonably probable. Indeed, there is no indication from the record that the juror acted in any way other than fairly, as he promised the court. The record reveals that defendant's conviction rested on the strong evidence presented by the prosecution and not on any juror bias.

---

<sup>3</sup> The juror did not express reticence like the juror in *Matarranz v State*, 133 So3d 473, 489 (Fla, 2013), an out-of-state case cited by defendant.

## B. DEFENDANT'S SENTENCE

Defendant brings another sentencing claim, contending that the trial court's upward departure from the guidelines in his sentence for unarmed robbery was an abuse of discretion. Specifically, he argues that the trial court's departure was based on factors that were already taken into account by the sentencing guidelines. We disagree.

The guidelines range for defendant on the unarmed-robbery conviction was 43 to 86 months, and the minimum sentence imposed by the trial court for that conviction was 10 years (120 months), an increase of nearly 3 years. At the sentencing hearing, the trial court stated:

In this particular case in all that the prosecutor has stated in the minute motion, as well as, [sic] the oral statements, the Court does find substantial and compelling reasons to deviate from the guidelines.

And there are clearly, as the prosecutor let the record stand, and which stated on the record [sic] those objective and verifiable reasons that would have the [c]ourt look at a case where the conviction is unarmed robbery, a 15-year felony; but the defense in the case, one of the major defenses in the case was that the defendant was being picked on by the police.

And the defense attorney specifically cross-examined the officer in charge. Isn't it true you picked on my client? Haven't you arrested him and talked to him and questioned him about 12 or 17 times on different cases and accused him of having guns and armed robbery and crimes?

And the officer in charge responded that yes, he had because that's the number of complaints against the defendant in this community. And when the defense attorney asked him then, but you have no convictions on those cases, only on — not mentioning the two that were currently up for a trial in felony court in Wayne County, but the Highland Park cases of which he was not actually charged.

And the officer in charge had stated, yes, that's the fear in the community. I don't have the exact words, but that's a fear in the community that the complainants on these cases are so afraid of the defendant and his actions, and those were cases that were brought to the attention of the officer.

And that's one of the things that's mentioned in the prosecutor's sentencing memorandum is the danger to the community of this particular defendant.

This particular defendant in this particular case, the unarmed robbery, showed a defiance, a disregard for human life, for humanity, for concern for the legal system, for the community that shows that he is a great and unusual danger to the community.

Whether this is a hate crime against a particular kind of person or his hate in general, but to see the actions and the attitude on the videotape and to see his testimony in trial and clear disregard for the truth in asking a jury to consider that he is a different person when they are staring right at a videotape of him and the other person doesn't in any way match his description defies logic, as well as, [sic] addresses the probability of rehabilitation of this person who began his career with an assault a[t] age 13 and at age 21 has come to be addressed by this [c]ourt on this conviction.

Thus, the trial court articulated four reasons for the upward departure: (1) defendant's danger to the community, (2) defendant's hatred and disregard for human life, (3) defendant's disregard for the legal system and the truth, and (4) defendant's low probability for rehabilitation.

Regarding defendant's danger to the community, the trial court did not abuse its discretion when it concluded that this was a substantial and compelling reason to depart from the sentencing guidelines range. A court's opinion or speculation about a defendant's future dangerousness is not objective or verifiable. *People v Cline*, 276 Mich App 634, 651-653; 741 NW2d 563 (2007). However, the trial court may base a sentencing departure on a defendant's future dangerousness if objective and verifiable facts, such as the defendant's past failures at rehabilitation or demonstrated "obsessive or uncontrollable urges to commit certain offenses," support the court's determination. *People v Horn*, 279 Mich App 31, 45; 755 NW2d 212 (2008). Recurring and escalating acts of violence are objective and verifiable because they are external occurrences that can be confirmed. *Id.* at 46.

The trial court based its conclusion on the objective and verifiable facts of defendant's continual criminal activity from the age of 13 and the police's trouble in bringing cases because the witnesses were too scared to testify against defendant. There was testimony that police officers had questioned defendant multiple times on different cases, including cases where defendant was reported to have had a gun, but had never charged him because the complainants in those incidents were too scared of defendant. The trial court did not err in concluding that defendant's recurring acts of violence and intimidation of possible witnesses were reasons not adequately addressed by the guidelines.

Moreover, contrary to defendant's argument, the 10 points assessed for OV 13 do not account for this reason. "Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43(1). A defendant receives 10 points under OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . ." MCL 777.43(1)(d). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Defendant's criminal behavior reaches beyond the five-year period, stretching from the time he was 13 years old. Additionally, the intimidation of possible witnesses that the trial court found compelling was a factor that is not contemplated in the scoring of OV 13. Therefore, the trial court did not abuse its discretion when it determined that defendant's danger to the community justified an upward departure from the guidelines.

Regarding defendant's disregard for human life, the trial court found that defendant's actions showed "a defiance" and a "disregard . . . for humanity." The trial court mentioned defendant's "actions and attitude on the videotape . . . ." The court had noted, earlier during the sentencing hearing, that this was "probably in [the court's] 13 years on the bench, one of the most vicious attacks [the court had] seen on videotape . . . ." The trial court's statements were substantiated by the record. The complainant testified that he remembered defendant punching him in the face and falling backward into the glass cooler. After that, he lost consciousness. The surveillance video showed that defendant continued to beat the complainant, stomping on his head. The complainant's jaw was broken in three places and his brain was bruised from the brutal attack.

We note that the trial court assessed 50 points for OV 7. OV 7 addresses aggravated physical abuse and is to be scored when a person was placed in danger of injury or loss of life. MCL 777.37(1) and (2). A score of 50 points is warranted when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a). The trial court determined that 50 points should be assessed for OV 7 due to defendant's "words and actions . . . ." Specifically, the trial court noted that defendant and his friends were calling the complainant and the complainant's friend derogatory names and intimidating them, and defendant "order[ed] [the complainant] not to try to help his friend who was being beaten and then started to beat him[,] viciously attacking him." The trial court reasoned that these types of actions "certainly would be designed to substantially increase the fear and anxiety the victim suffered through this offense . . . ."

Arguably, some of the trial court's departure reasoning was accounted for in OV 7. However, as noted, the court had stated at one point that this was "probably in [the court's] 13 years on the bench, one of the most vicious attacks [the court had] seen on videotape . . . ." Even though the court did not make this statement explicitly during its departure analysis, it is still relevant in analyzing the court's ultimate sentencing decision,<sup>4</sup> and the exceptionally vicious nature of the attack is objective and verifiable. In addition, in making the departure decision, the court specifically referred to defendant's "defiance" and "disregard for . . . humanity," an observation supported by the fact that defendant viciously attacked a person he did not even know. Given the evidence and the statements made by the court, we find no abuse of discretion with regard to the trial court's findings; OV 7 did not fully encompass the factual circumstances.<sup>5</sup>

Regarding defendant's disregard for the legal system and the truth, the trial court did not abuse its discretion when it concluded that this was a substantial and compelling reason for departure. The trial court determined that defendant showed a lack of concern for the legal system in his disregard for the truth while testifying. Specifically offensive was defendant's

---

<sup>4</sup> Indeed, as noted, the court mentioned the videotape during its departure analysis.

<sup>5</sup> Even if the trial court did err with regard to this factor, we would nonetheless affirm the sentence. See *Anderson*, 298 Mich App 191.

“asking a jury to consider that he is a different person when they are staring right at a videotape of him and the other person doesn’t in any way match his description . . . . [It] defies logic.”

A sentence cannot be based on a defendant’s refusal to admit guilt. *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006). Here, the trial court was not asking defendant to admit to the crime, nor was it offering him a lesser sentence if he did. *Id.* Additionally, the departure was not based merely on defendant’s perjury. Rather, the trial court found reason to depart based on defendant’s blatant disrespect for justice in claiming misidentification where the video so clearly showed defendant was the perpetrator.

Furthermore, defendant’s contention that OV 19 precludes consideration of this factor is misplaced. OV 19 applies in instances where there is a “threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services[.]” MCL 777.49. The trial court must score 10 points for OV 19 when “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]” MCL 777.49(c). Defendant asserts that the trial court should have scored 10 points for OV 19 if it found that defendant gave false testimony. Again, it was not solely defendant’s perjury that caused the court to enhance his sentence. Instead, the trial court considered defendant’s illogical argument to the jury as a blatant lack of concern for the legal system. OV 19 does not account for such behavior toward the court. Therefore, this reason for departure was substantial and compelling, and the trial court did not abuse its discretion in considering this reason for enhancement.

Regarding defendant’s low probability for rehabilitation, the trial court did not abuse its discretion in concluding that this was a substantial and compelling reason to depart from the sentencing guidelines range. Objective and verifiable factors that go into determining a defendant’s rehabilitative potential may be considered in evaluating whether substantial and compelling reasons exist for a departure. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). Here, the trial court expressed that defendant was not likely to be rehabilitated. The court listed objective and verifiable factors to support this belief. The trial court found that defendant had a history of crime beginning at age 13. Defendant’s PSIR shows a juvenile history of multiple offenses, along with the two recent offenses that are the subject of this appeal. There was also evidence that defendant was involved in several other crimes in his neighborhood for which he was never charged. Clearly, defendant had a criminal history of violence, and there was evidence of intimidation in the community. Defendant’s low probability for rehabilitation was a substantial and compelling reason to support defendant’s sentence.

The trial court concluded that its sentence was proportionate to defendant and his conduct when it stated that the sentence was “a most conservative” one and was for “[t]his particular defendant in this particular case.” Unarmed robbery is not normally this extreme, and the trial court properly considered the extenuating circumstances in fashioning an appropriate sentence. Accordingly, we affirm defendant’s sentence of 10 to 15 years for unarmed robbery.<sup>6</sup>

---

<sup>6</sup> In a supplemental brief, defendant contends that, under United States Supreme Court case law, the sentencing factors should have been determined by the jury beyond a reasonable doubt. This

V. CONCLUSION (DOCKET NOS. 310637 & 310643)

We affirm in Docket No. 310643. In Docket No. 310637, we affirm defendant's conviction but remand for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter

---

Court has rejected defendant's contention. See *People v Herron*, 303 Mich App 392, 401-405; 845 NW2d 533 (2013), appeal held in abeyance \_\_\_ Mich App \_\_\_; 846 NW2d 924 (2014).