

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENNETH EDWARD JONES,

Defendant-Appellant.

UNPUBLISHED

July 22, 2003

No. 238557

Washtenaw Circuit Court

LC No. 00-000962-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his sentence of forty-five to eighty years' imprisonment after a jury convicted him of second-degree murder, MCL 750.317. The trial court exceeded the statutory guidelines recommended minimum range of 180 to 300 months or life, MCL 777.61, III-B. Defendant argues that the trial court committed several guidelines scoring errors, that the trial court erred by finding substantial and compelling reasons to exceed the guidelines, and that his sentence was disproportionate. We affirm.

We first review the alleged offense variable (OV) scoring errors. Underlying factual findings of the trial court at sentencing are reviewed for clear error, MCR 2.613(C); *People v Babcock*, 244 Mich App 64, 74-75; 624 NW2d 479 (2000), while the proper construction or application of statutory sentencing guidelines present a question of law reviewed de novo, *id.* at 72; *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

Defendant argues that contested guidelines' scores must be established by the preponderance of the evidence to comply with due process. We disagree. When adequately supported by evidence in the record, a trial court has discretion in scoring the sentence guidelines. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We recognize that in *People v Walker*, 428 Mich 261, 268; 407 NW2d 367(1987) our Supreme Court adopted as a matter of policy that when a defendant "effectively challenges" a material fact pertinent to a guidelines score, the prosecutor has the burden to prove that fact by the preponderance of the evidence. However, when record evidence both supports and opposes a particular guidelines' score, the trial court has discretion to entertain further proofs. *Walker, supra*; *People v Ewing (After Remand)*, 435 Mich 443, 474-475 (Boyle, J.); 458 NW2d 880 (1990). Although the preponderance of evidence standard satisfies due process, *People v Gahan*, 456 Mich 264, 275 n 15; 571 NW2d 503 (1997), "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," *McMillan v Pennsylvania*, 477 US 79, 91;

106 S Ct 2411; 91 L Ed 2d 67 (1986). In *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993), our Supreme Court found that this Court had correctly applied the *Walker* standard in *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986), where this Court upheld the trial court's guidelines' scoring where any evidence supported it. Thus, this Court has consistently upheld guidelines' scoring challenges on appeal where there is any evidence in the record to support the trial court's scoring decision. *People v Spanke*, 254 Mich App 641, 647; 658 NW2d 504 (2003); *People v Phillips*, 251 Mich App 100, 108; 694 NW2d 407 (2002); *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The legislative sentence guidelines apply here because the offense was committed on or after January 1, 1999. MCL 769.34(1), (2); *Hegwood*, *supra* at 438; *Babcock*, *supra* at 72. The alleged scoring errors are addressed seriatim applying the guidelines "in effect on the date the crime was committed." MCL 769.34(2).

A. OV-1 assesses points for the aggravated use of a weapon. MCL 777.31. The trial court assessed 10 points for this variable because the victim "victim was touched by any other type of weapon." MCL 777.31(1)(c). At trial, a police officer testified that she found two sticks in the area where the victim's body was found. Each stick was about one to one-and-a-half feet long and about two inches wide, with no bark. Defendant told the police that he threw a stick matching those police found at the victim in the initial part of the assault. Defendant wrote in a statement to the police that after he knocked the victim down, "[The victim] then scurried to his feet and began to run. I threw a stick and hit him in the L[eft] leg above the knee. He went down and I kicked him." Thus, record evidence supported the trial court's finding that defendant used a stick as a "weapon" in the furtherance of his attack on the victim. Further, defendant's admission that throwing the stick at the victim caused the victim to fall was sufficient to support the trial court's finding that the stick "touched" the victim. Thus, OV-1 was properly scored 10 points in accord with the plain and ordinary meaning of MCL 777.31. *Hornsby*, *supra* at 468. See also, *People v Lange*, 251 Mich App 247; 650 NW2d 691 (2002) (OV-1 was properly scored as 10 points where the defendant used a glass mug as a weapon).

B. OV-2 assesses points for the lethal potential of a weapon possessed. At the time of the offense MCL 777.32 required points for possession of various weapons, including, 15 points for possessing "an incendiary device, an explosive device, or a fully automatic weapon," 10 points for possessing "a short-barreled rifle or a short-barreled shotgun," 5 points for possessing "a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon," and 1 point if the "offender possessed any other potentially lethal weapon." MCL 777.32(1)(d). The trial court assessed one point for OV-2, finding that because the stick defendant threw struck the victim's leg, it was not used in a lethal manner, "but [the stick] certainly was potentially lethal."

The word "potential" is defined in the *Random House Webster's College Dictionary* (1992), p 1056, as "possible, as opposed to actual." Therefore, the trial court properly applied the plain, ordinary meaning of the words of the statute, *Lange*, *supra* at 253, to conclude that a weapon need not have actually have been used in a lethal manner but only that a weapon the offender possessed had the possibility of being lethal. Here, defendant admitted possession of a stick, which he used as a weapon when thrown at the victim. Defendant offered no evidence that a stick the size of one found at the crime scene which defendant admitted using could not be lethal. The trial court did not err finding from the evidence in the record that defendant possessed a "potentially lethal weapon." *Hornsby*, *supra* at 468.

C. OV-5 requires that points be assessed for psychological injury to a member of a victim's family. MCL 777.35. At the time of the instant offense the statute instructed sentencing judges to score 15 points when “[s]erious psychological injury requiring professional treatment occurred to a homicide victim’s family,” MCL 777.35(1)(a). The statute also instructed judges to score “15 points if the serious psychological injury to the victim's family may require professional treatment [but] [i]n making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.35(2).

The trial court found evidence to support assessing 15 points for OV-5 in the victim’s impact statement, MCL 780.764, and from the testimony of the victim’s daughter at trial. The record also indicates that the trial court reviewed victim statements from several family members. Further, the prosecution averred in its sentencing memorandum that the victim’s daughter had attended thirteen counseling sessions to cope with the death of her father. Defendant failed to offer any evidence to rebut the evidence submitted by the prosecutor. MCL 777.35(2) requires assessment of 15 points “if the serious psychological injury to the victim's family *may require professional treatment*,” (emphasis added), and provides that “the fact that treatment has not been sought is not conclusive.” Thus, evidence of professional treatment as a result of the crime would clearly support a finding that a family member of the victim sustained “serious psychological injury” within the meaning of MCL 777.35. Because the prosecutor offered evidence that victim’s daughter obtained counseling, and defendant offered no rebuttal evidence, the record supported the trial court’s scoring. *Hornsby, supra* at 468.

D. OV-6 requires assessing points for an intent to kill or injure another individual. MCL 777.36. The trial court scored this offense variable at 25 points, consistent with finding that defendant “had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result,” MCL 777.36(1)(b), and with the requirement that the, “sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury,” MCL 777.36(2)(a).

Defendant, relies on MCL 777.36(2)(b), which instructs sentencing judges to score “10 points if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.” He argues that OV-6 should have been scored at 10 points rather than 25 points because the victim’s death was intentional but “occurred in a combative situation.” Defendant’s position is more clearly stated in his sentencing memorandum.

The defense objects to the proposed scoring of OV6 at 25 points, and states that it disregards the claims of James Moreno furnished it in discovery. James Moreno advised Mr. Woodside, a retired Ann Arbor detective that [defendant] told him shortly after the killing that the deceased asked for change, and that [defendant] took out his wallet and decedent reached for it, at which point [defendant] struck him, and that instigated the contact which ended with the death of [the victim] moments later. Defendant believes 10 points is the appropriate scoring.

The evidence at trial, overwhelmingly supported the trial court’s finding that defendant acted with “the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.” MCL 777.36(1)(a).

Further, assessing 25 points for OV-6 was “consistent with a jury verdict.” MCL 777.36(2)(a). The only evidence proffered in opposition to the trial court’s scoring was a self-serving hearsay statement defendant allegedly made that was three times removed (defendant to Moreno to Woodside to police report). Self-serving hearsay is generally inadmissible without corroboration. MRE 804(b)(3) (“A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”). Here, not only was there no corroboration but also the other evidence supported defendant’s statement to the police that the victim did not attempt a robbery and did not fight back after defendant knocked him down in a surprise attack. Indeed, the physical evidence indicated that the victim attempted to flee from defendant for 300 feet and possessed a wallet containing \$45. In sum, defendant failed to mount an “effective challenge” to the trial court’s scoring, *Walker, supra* at 268, and the record evidence more than adequately supported the trial court’s scoring, *Hornsby, supra* at 468.

E. OV-7 requires that points be assessed for aggravated physical abuse. At the time of the homicide, MCL 777.37(1)(a) provided that 50 points be assessed where a victim “was treated with terrorism, sadism, torture, or excessive brutality.” The statute defined “terrorism” as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense,” MCL 777.37(2)(a)¹, and defined “sadism” to mean “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification,” MCL 777.37(2)(b). The statute does not define “excessive brutality.”

The trial court found that defendant had multiple opportunities to stop his attack on the victim and that from the evidence at trial the victim suffered repeated blows: “a gunshot or a knife would be less brutal because the victim would not suffer.” The trial court found that the victim suffered terribly and concluded “the evidence submitted convinces this Court beyond any doubt that the actions of the defendant were entirely brutal and were to an extent that the Court can only consider that the scoring of fifty points is appropriate.”

Defendant argued below and argues on appeal that the trial court erred by rejecting the opinion of Dr. Lynn Blunt, former director of the Center for Forensic Psychiatry, that the killing was not excessively brutal, and that the incident was not extended or protracted, but rather defendant took only two minutes to beat the victim to death. As to the former point, apparently Dr. Blunt opined that “any beating sufficient to cause death has to be considered brutal.”

Defendant’s arguments must fail. The words of the statute must be given their plain, ordinary meaning. *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002). The word “brutality” is defined in the *Random House Webster’s College Dictionary* (1992), 176, as “the quality of being brutal; cruelty; savagery,” while “excessive” is defined as “going beyond usual, necessary, or proper limit or degree; characterized by excess,” *id.* at 465. Although Dr. Blunt may be correct that any beating resulting in death is excessive, the Legislature has clearly vested the trial courts of this state with discretion to assess guidelines points for such deaths

¹ 2002 PA 137, effective April 1, 2002, amended MCL 777.37 to replace the word “terrorism” with its former definition and rearrange the section.

along a continuum ranging from one blow resulting in an unanticipated death to the type of savage, relentless beating the evidence in this case established. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *Hornsby, supra* at 468. As the finder of fact at sentencing, the trial court determines the weight to be accorded the evidence and the credibility of the witnesses. See, e.g., *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989), and *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Here, the trial court as the fact finder properly “discounted” Dr. Blunt’s opinion.

Finally, whether the entire incident was measured in minutes or seconds, the evidence at trial, which showed that defendant pursued the victim over a distance of 300 feet, and administered “countless” blows to the victim’s torso and head until the victim could not move, and ultimately bled to death from internal injuries, clearly supports the trial court’s finding of “excessive brutality.” *Hernandez, supra* at 16-18; *Hornsby, supra*.

F. OV-10 provides for assessment of points for exploitation of a vulnerable victim. MCL 777.40(1)(c) requires a score of 5 points when the “offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” The trial court ruled that OV-10 should be scored 5 points without further explanation. Defendant argued at the sentencing proceeding that the mere fact that defendant was larger and stronger than the victim is not an automatic determinant that five points is an appropriate score, MCL 777.40(2). On appeal defendant also argues that there was no evidence in this case of “exploitation,” defined as “to manipulate a victim for selfish or unethical purposes” MCL 777.40(3)(b).

This Court must apply the plain language of the statute, *Lange, supra* at 253, and here the Legislature requires that to be assessed 5 points defendant must have exploited the victim. Unless defined by the statute, words must be ascribed their plain and ordinary meaning and consulting a dictionary for that purpose is acceptable. *Lange, supra*. The *Random House Webster’s College Dictionary* (1992), 825, defines “manipulate” as “to manage or influence skillfully and often unfairly; to handle or use, esp. with skill.” “Selfish” is defined as “caring only or chiefly for oneself; concerned with one’s own interest, welfare, etc., regardless of others,” *id* at 1216. Here, the evidence in the record established that defendant acted without any concern for the victim and skillfully used his size and strength to methodically pursue and pummel the victim for no other reason than he experienced “sensations” of wanting to hurt somebody. Clearly, the evidence supported finding exploitation in defendant’s manipulation of the victim for his own selfish purposes, whatever they may have been. MCL 777.40(3)(b).

Defendant’s reliance on MCL 777.40(2) also fails. While not “automatic,” a size and strength differential may equate to victim “vulnerability” as defined in the statute: “susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). Further, there was evidence of more than mere differential in size and strength. The vulnerability of the victim is portrayed by the author of the presentence report. “The instant offense involved the beating death of a 46-year-old homeless man late one rainy night in July of 1999 in a deserted park near Frog Island in Ypsilanti.” Moreover, the evidence supports the conclusion that defendant possessed the skill to use his advantage in size and strength because he had been employed primarily as a “bouncer” at bars for five years. Thus, more than adequate evidence supported the trial court’s assessment of five points for OV-10. *Hornsby, supra* at 468.

Additionally, defendant argues that the trial court erred by exceeding the guidelines recommended range. We disagree. Generally, a trial court must impose a minimum sentence upon conviction for an “enumerated felony” within the properly calculated recommended minimum guidelines’ range. MCL 769.34(1), (2); *Hegwood, supra* at 438-439; *Babcock, supra* at 72. A trial court may, however, depart from the guidelines recommended minimum range “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3); *Hegwood, supra* at 437 n 10; *Babcock, supra*. We review the trial court’s factual finding that a particular factor exists for clear error, *Babcock, supra* at 75-76, but whether the factor is objective and verifiable is a question of law subject to de novo review on appeal, *id.* at 76, 78. The trial court’s determination that a substantial and compelling factor is a reason to depart from the guidelines recommended minimum sentence range is reviewed for an abuse of discretion. *Id.* at 75-76. An abuse of discretion exists when the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *Id.* at 76.

The trial court articulated compelling justification to depart from the guidelines recommended range for a sentence of a term of years²: the brutal nature of the crime and defendant’s lack of remorse. In *Babcock, supra* at 74-75, this Court concluded that the Legislature must have had in mind the decision of our Supreme Court in *People v Fields*, 448 Mich 58, 69-70; 528 NW2d 176 (1995), which held that “substantial and compelling” reasons for justifying a downward departure from a mandatory minimum sentence must be “objective and verifiable.” Thus, this Court inferred that the Legislature must have intended the same interpretation be applied to the words, “substantial and compelling reason,” as used in MCL 769.34(3), and that therefore a “substantial and compelling reason” to justify a sentence guidelines departure must also be “objective and verifiable,” *Babcock, supra* at 75-76.

The trial court’s first reason - the brutality of the offense - can be objectively verified by the physical evidence of the crime scene, and the autopsy results. As the trial court articulated, “[t]he photographs, the testimony of Dr. Cassin, the suffering that [the victim] had to go through prior to his last breath, all just speaks volumes to me with regard to the nature of your attack.” Because the brutality of a crime is an objective and verifiable factor, it may justify a departure from the guidelines recommended range. MCL 769.34(3); *Babcock, supra* at 76, 78. Further, the Legislature has clearly authorized sentencing judges to find that a reason already accounted for in the guidelines has been given inadequate weight, and therefore, is a substantial and compelling reason to depart from the guidelines’ recommended range. MCL 769.34(3)(5); *People v Deline*, 254 Mich App 595, 598; 658 NW2d 164 (2002); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Here, the trial court did not abuse its discretion by concluding that both brutality of the crime and defendant’s own admissions, constituted substantial and compelling reasons to depart upward from the guidelines’ recommended sentence. *Deline, supra; Armstrong, supra*.

² If the trial court had sentenced defendant to life in prison, the sentence would have been within the guidelines recommended range, *People v Greaux*, 461 Mich 339, 345; 604 NW2d 327 (2000), and this Court would have been required to affirm, MCL 769.34(10). *Babcock, supra*, 73; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

The trial court also found from his admissions that defendant lacked remorse, which was a second substantial and compelling reason the trial court relied upon to depart upward from the guidelines' recommended sentence. Although our Supreme Court has disapproved of using a defendant's professed remorse as a substantial and compelling reason to depart downward from a mandatory minimum sentence, *People v Daniel*, 462 Mich 1, 5-6; 609 NW2d 557 (2000); *Fields, supra* at 80, we need not answer whether defendant's admission evidencing lack of regret may justify an upward departure from the guidelines. The statute plainly requires only a singular substantial and compelling reason to depart. Here, as noted above, the trial court did not clearly err or abuse its discretion by finding both that the brutality of the crime was "a substantial and compelling reason for that departure," MCL 769.34(3), and by that the offense characteristic had been given inadequate weight, MCL 769.34(3)(b).

In sum, the trial court articulated a substantial, compelling, objective and verifiable, reason for departing from the guidelines. Further, based on all of the evidence before the trial court at sentencing, it did not abuse its discretion by finding that the brutality of the offense was given inadequate weight by the guidelines and justified an upwards guidelines departure. MCL 769.34(3). Moreover, the trial court did not abuse its discretion by imposing a sentence that was proportionate to the seriousness of the circumstances underlying the offense and the offender. *People v Milbourn*, 435 Mich 630, 636, 651; 461 NW2d 1 (1990); *People v Moorner*, 246 Mich App 680, 685-686; 635 NW2d 47 (2001).

Finally, defendant alleges that he was denied due process because his sentence was based on inaccurate information - that the trial court assumed that he could not be rehabilitated and was an extremely dangerous person. In addition to the alleged inaccuracies being opinions or inferences drawn from other facts, defendant failed to preserve his claim that the trial court relied on inaccurate information at sentence because he did not raise the issue at or before sentencing. MCR 6.429(C); MCL 769.34(10); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). We review alleged sentencing errors that have been forfeited for plain error affecting substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

Although a sentence is invalid when it is based on inaccurate information, *People v Miles*, 454 Mich 90, 98; 559 NW2d 299 (1997); *People v Harris*, 224 Mich App 597, 599-600; 569 NW2d 525 (1997), because this claim is unpreserved, defendant bears the burden of establishing that plain error affected his substantial rights, *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Defendant has not highlighted any part of the record that indicates that the trial court relied on inaccurate information when imposing sentence. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Simply put, defendant has not established that plain error affected his substantial rights. *Carines, supra* at 763, 774; *McCrady, supra* at 32.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder