

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DEJUAN JAMES,

Defendant-Appellant.

UNPUBLISHED

June 21, 2007

No. 266653

Wayne Circuit Court

LC No. 03-013914-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

In *People v James*, this Court affirmed defendant Derrick James's conviction of assault with intent to do great bodily harm less than murder,¹ but remanded for resentencing.² On remand, the trial court resentenced James to 47 months to 15 years' imprisonment. James now appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises out of an altercation between James and his stepdaughter's boyfriend, Charles Barnett. James had learned that Barnett had been involved with drugs and had told Barnett to stay away from his house and his stepdaughter. On October 18, 2003, James was at a bar with his wife. At approximately 11:00 or 11:30 p.m. that night, Barnett arrived at James's house to visit James's stepdaughter.

James arrived home with his wife around 1:30 a.m., and Barnett ran into the basement. Thinking he had heard something in the basement, James went downstairs. Barnett lunged at James and hit him on top of the head. James grabbed Barnett around the neck and took him upstairs. Once upstairs, James kept Barnett in a headlock, called 911, and then punched Barnett twice in the face causing Barnett to fall to the ground. James then stomped on Barnett's face and chest, called 911 a second time, and again stomped on Barnett despite the fact that Barnett was still lying on the floor.

¹ MCL 750.84.

² *People v James*, 267 Mich App 675, 678-680; 705 NW2d 724 (2005).

A jury convicted James of assault with intent to do great bodily harm less than murder.³ The trial court originally sentenced James to 47 months to 15 years' imprisonment. This Court affirmed James's conviction, but remanded the case for resentencing on the ground that the trial court erroneously scored two points for prior record variable 5.⁴ On remand, the trial court corrected James's PRV score, thereby making the sentencing guidelines range 10 to 28 months. However, the trial court again sentenced James to 47 months to 15 years' imprisonment for his conviction. In departing from the appropriate guidelines range, the trial court explained that the guidelines failed to consider the "brutality of this offense," the multiple attacks on Barnett, the size disparity between Barnett and James, Barnett's prior relationship with James, as well as the acute suffering and deterioration of Barnett resulting in his death.

II. Departure From The Guidelines

A. Standard Of Review

James argues that the trial court failed to articulate substantial and compelling reasons for its upward departure from the appropriate sentencing guidelines range. This Court "review[s] the trial court's determination of the existence of a factor for departing from the guidelines for clear error, review[s] de novo the determination that a factor is objective and verifiable, and review[s] the determination that objective and verifiable factors justified departure from the guidelines range for an abuse of discretion."⁵

B. Legal Standards

A trial court may depart from a sentencing guidelines range provided it has a substantial and compelling reason and it states this reason on the record.⁶ A substantial and compelling reason is one that is objective and verifiable.⁷ Objective and verifiable factors are those which are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and . . . [are] capable of being confirmed."⁸ An objective and verifiable factor must "keenly" or "irresistibly" grab the court's attention and be of "considerable worth." in deciding the length of the sentence.⁹ Moreover, the court may not depart from the guidelines range based on an offense or offender characteristic already accounted for in determining the appropriate sentence range unless the "court concludes that the characteristic was given inadequate or disproportionate weight."¹⁰

³ MCL 750.84.

⁴ *People v James*, 267 Mich App 675, 678-680; 705 NW2d 724 (2005).

⁵ *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005), citing *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

⁶ MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001).

⁷ *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

⁸ *Id.*

⁹ *People v Hendrick*, 472 Mich 555, 563; 697 NW2d 511 (2005), quoting *Babcock*, *supra* at 257.

¹⁰ *Havens*, *supra* at 18, citing MCL 769.34(3)(b).

C. Applying The Standards

James's appropriate sentencing guidelines range was 10 to 28 months for his assault with intent to do great bodily harm less than murder conviction. Notwithstanding, even though the trial court imposed a sentence of 47 months to 15 years, the court provided substantial and compelling reasons supporting its upward departure from the appropriate sentencing guidelines range. Specifically, the trial court explained that the guidelines failed to consider the "brutality of the offense," the multiple attacks on Barnett, the size disparity between James and Barnett, Barnett's prior relationship with James, as well as the acute suffering and deterioration of Barnett resulting in his death. These reasons are supported by the evidence and are objective and verifiable.

These reasons are also external to the mind of the court. Specifically, evidence was presented showing that: James placed Barnett in a headlock and dragged Barnett upstairs where he punched, kicked, and stomped on Barnett's face and chest until he was unresponsive; James weighed approximately 100 pounds more than Barnett; on previous occasions, James had told Barnett, whom James believed to be involved with drugs, to leave his house and stay away from his stepdaughter because of their five-year age difference; and Barnett died after enduring a great deal of suffering while in a vegetative state, a condition that resulted from the injuries he had sustained from the altercation with James.

Moreover, these reasons keenly or irresistibly grabbed the trial court's attention. Specifically, the court noted:

[Barnett] had been dragged from the basement up the stairs in what I deemed a wrestling-type headlock. There was loss of oxygen. The - - there were tapes played for the jury. The defendant did initiate the 911 call, I believe, and in a very excited tone during the late hour that occurred, et cetera, the surprise. There was another altercation, there was testimony of a stomping on [Barnett].

Thus, each of the reasons cited by the trial court justifying the departure were both objective and verifiable, were external to the mind of the court, and keenly or irresistibly grabbed the court's attention. Therefore, we conclude that the trial court did not abuse its discretion in its departure from the appropriate sentencing guidelines range.

III. Proportionality

James claims that his sentence is not proportional. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record¹¹—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed."¹² Here, it is reasonable to infer that Barnett ultimately died because of the injuries he sustained when James punched, kicked, and stomped

¹¹ Defendant was convicted in 1985 of carrying a concealed weapon. MCL 750.227(2).

¹² *Babcock*, *supra* at 262.

on his face and chest repeatedly. In light of this, we conclude that James's sentence of 47 months to 15 years was proportional to the seriousness of the offense.¹³

IV. Due Process

A. Standard Of Review

James argues that his sentence violates his right to due process because it is vindictive. Although James failed to preserve this issue, it is nevertheless appealable because his sentence was outside the appropriate sentencing guidelines range.¹⁴ But because James did not preserve this issue, we review this argument for plain error affecting his substantial rights.¹⁵

B. Vindictiveness

“When a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a presumption of vindictiveness.”¹⁶ Here, James's second sentence was not longer than his first sentence. Therefore, there is no presumption of vindictiveness.

We acknowledge that, with the exception of Barnett's death and prolonged suffering, each factor cited by the trial court as a substantial and compelling reason for its upward departure was before the court at the time James was originally sentenced. Notwithstanding, the trial court noted at the first sentencing hearing that it would depart neither upward nor downward from James's original sentencing guidelines range because that original range was proportional to the offense. Thus, it is clear that in departing from the corrected guidelines range by resentencing James to a term of imprisonment identical to his first sentence, the trial court aimed to fashion a sentence proportional to the severity of the offender and the offense. As the reasons given for the departure were substantial and compelling, we conclude that the trial court did not abuse its discretion or violate James's due process rights in resentencing him.¹⁷ In light of this, James's sentence was not vindictive.

¹³ We note that even though Barnett had drugs in his system at the time of the altercation, the doctor, who examined Barnett, indicated that brain damage due to lack of oxygen—a condition consistent with the injuries Barnett sustained from trauma to his trachea or voice box—would lead to Barnett's death. In contrast, no evidence was presented at trial creating the inference that Barnett's condition was caused by marijuana or amphetamine use.

¹⁴ See *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

¹⁵ *Kimble*, *supra* at 312, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *People v Parker*, 267 Mich App 319, 325 n 22; 704 NW2d 734 (2005) (a defendant preserves the issue that his sentence is outside the appropriate guidelines range by raising the issue at sentencing or in a motion for resentencing).

¹⁶ *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997).

¹⁷ *Hegwood*, *supra* at 439; *Lyons*, *supra* at 323.

V. Violation Of The Court Rules

A. Standard Of Review

James claims that the court rules precluded the trial court from resentencing him. Although we agree that the trial court sentenced James in violation of the court rules, James failed to preserve this issue below and has failed to show that his substantial rights were affected. We therefore review this unpreserved issue for plain error affecting substantial rights.¹⁸

B. Timing

Although a judgment of this Court is effective after expiration of the time for filing an application for leave to appeal to our Supreme Court or following the Michigan Supreme Court's disposition of the case,¹⁹ the filing of an application stays proceedings on remand.²⁰ Here, this Court remanded this case for resentencing on August 18, 2005.²¹ James filed his application for leave to appeal to the Supreme Court on October 10, 2005. The trial court resentenced James on October 14, 2005, but the Supreme Court did not deny leave to appeal until December 27, 2005.²² Because James's application for leave to appeal to the Supreme Court stayed the proceedings pending the Supreme Court's disposition of the case, the trial court's resentencing of James on October 14, 2005, constituted plain error.

Notwithstanding this error, James has failed to show how the error was outcome determinative. Indeed, James was truly guilty of the crime with which he was charged. Moreover, James's corrected sentencing guidelines range and the trial court's departure from the appropriate guidelines range were not erroneous. Therefore, James has failed to show that this error affected his substantial rights.

VI. Ineffective Assistance Of Counsel

A. Standard Of Review

James argues that he was denied the effective assistance of counsel at trial. However, "where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand."²³ Therefore, because this Court remanded this case solely for resentencing, the issues here are limited to resentencing. Consequently, because James not only failed to raise this issue on his first appeal, but also because this issue does not arise out of resentencing, James

¹⁸ *Carines, supra* at 763-764.

¹⁹ MCR 7.215(F)(1)(a).

²⁰ MCR 7.302(C)(5)(a).

²¹ *James, supra* 267 Mich App at 675.

²² *People v James*, 474 Mich 982; 707 NW2d 199 (2005).

²³ *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994).

has forfeited this issue for appeal by failing to timely assert it.²⁴ Therefore, because James has forfeited this issue, he must show plain error that affected his substantial rights.²⁵

B. Legal Standards

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel.²⁶ “To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.”²⁷ Although a defense counsel’s failure to reasonably investigate a case may constitute ineffective assistance, this Court must afford deference to counsel’s strategic judgments.²⁸ However, strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation.²⁹

C. Failure To Interview

James claims that trial counsel failed to interview police officers and medical personnel called to the scene and review the 911 tapes and Barnett’s medical records in a timely fashion. However, the record is devoid of any evidence supporting this claim. Thus, James has failed to establish a factual predicate showing that trial counsel’s investigation of witnesses was incomplete or that his failure to investigate this case was outcome determinative.³⁰

Notwithstanding, a physician who treated Barnett testified at trial that Barnett’s condition resulted from lack of oxygen to his brain – an injury consistent with trauma to the trachea or voice box. The physician also discovered swelling across Barnett’s neck and chest following the altercation with James. Moreover, other witnesses testified that during the time James was calling 911, he had Barnett in a headlock and kicked and stomped on Barnett. Similarly one of the police officers called to the scene indicated that James admitted he had punched and kicked Barnett in the face. In light of this, even if trial counsel’s investigations of the witnesses were incomplete, they were not outcome determinative.³¹ Further, this testimony would have rendered any further investigation into the 911 tapes or medical records merely cumulative. Therefore, we

²⁴ *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

²⁵ *Carines, supra* at 763-764.

²⁶ US Const, Am VI; Const 1963, art 1, § 20.

²⁷ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

²⁸ *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

²⁹ *Id.*

³⁰ See *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999) (it is necessary for a defendant to establish a factual predicate to support a claim of ineffective assistance).

³¹ *Effinger, supra* at 69.

conclude that reasonable professional judgment supported any limitation on the investigation of this evidence.³²

D. Failure To Seek An Opinion

James also claims that trial counsel failed to seek the opinion of a medical expert who could have ascertained that Barnett's condition after the altercation with James was the result of the drugs in Barnett's system at the time of the altercation rather than James's actions. This argument is without merit. Indeed, in light of the testimony submitted at trial, James's claim that Barnett's drug use contributed to his death is completely speculative and wholly unsupported by the record. Thus, James has failed to establish a factual predicate supporting his claim.³³ Further, even if trial counsel did not consult a medical expert, James has failed to show how this failure was objectively unreasonable or constituted outcome determinative error in light of the incriminating testimony presented against him at trial. Consequently, we conclude that James has failed to show plain error affecting his substantial rights.

VII. Sufficiency Of The Evidence

A. Standard Of Review

James argues that the evidence was insufficient to support his conviction. To the extent James bases his argument on grounds raised in his first appeal to this Court (that is, that insufficient evidence was presented to refute his claim of self-defense), the law of the case doctrine bars our review of the issue.³⁴ To the extent James raises this issue on different grounds than those raised in his first appeal to this Court, he has forfeited this issue for appeal for failure to timely assert it in his first appeal.³⁵ Therefore, we review for plain error affecting substantial rights.³⁶

B. Elements Of The Crime

“Assault with intent to commit great bodily harm less than murder requires proof of (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.”³⁷ James only challenges that the evidence was insufficient to show intent. Intent to do great bodily harm is defined as “an intent

³² *Wiggins, supra* at 521-522.

³³ *Hoag, supra* at 6-7.

³⁴ See *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994) (The law of the case “doctrine provides that an appellate court’s decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case.”); see also *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996) (“Under the law of the case doctrine, an appellate court’s determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same.”).

³⁵ *Carter, supra* at 215-216; *Kincade, supra* at 481.

³⁶ *Carines, supra* at 763-764.

³⁷ *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); MCL 750.84.

to do serious injury of an aggravated nature.”³⁸ “An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.”³⁹

C. The Evidence

We conclude that sufficient evidence existed to show James intended to commit the offense at issue. After James placed Barnett in a headlock and dragged him upstairs, Barnett pushed James and tried to get away. James secured Barnett in a headlock and called 911. Although Barnett did not strike James, James punched Barnett twice in the face causing Barnett to fall to the floor. While Barnett was on the floor, James stomped on Barnett’s face and chest, called 911, and then stomped on Barnett’s face and chest again. James weighed approximately 100 pounds more than Barnett. From this evidence it may be inferred that James intended “to do serious injury of an aggravated nature.”⁴⁰ Indeed, Barnett remained on the floor while James stomped on his face and chest on two separate occasions. Therefore, the evidence was sufficient to show that James intended to commit the offense at issue.⁴¹

VIII. Jury Instructions

James argues that the trial court failed to instruct the jury regarding the offenses of simple and aggravated assault. However, James not only failed to raise this issue on his first appeal by right to this Court, but he also expressed his satisfaction with the instructions. Therefore, he has waived this issue for appeal.⁴²

IX. Admission Of Evidence

A. Standard Of Review

James argues that the admission of photographs depicting Barnett in the hospital was erroneous. James failed to raise this issue on his first appeal by right to this Court. Therefore, he has forfeited this issue for appeal and must show that plain error affected his substantial rights.⁴³

³⁸ *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

³⁹ *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (internal citations omitted).

⁴⁰ *Mitchell*, *supra* at 39.

⁴¹ We note that although defendant claims the amphetamines and marijuana in Barnett’s system at the time of the altercation were the superceding cause of his injuries, no evidence was presented to support this inference.

⁴² *Carter*, *supra* at 215-216.

⁴³ *Carter*, *supra* at 215-216; *Carines*, *supra* at 763-764; *Kincade*, *supra* at 481.

B. Legal Standards

For photographs to be admissible they must be relevant under MRE 401 and their probative value must not be substantially outweighed by danger of unfair prejudice under MRE 403.⁴⁴ Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.⁴⁵ Generally, relevant evidence is admissible.⁴⁶

C. Applying The Standards

Here, James was charged with assault with intent to murder.⁴⁷ Given that all elements of an offense are at issue in a criminal trial, James's intent was directly at issue in this case.⁴⁸ Furthermore, evidence of injury is admissible as evidence of a defendant's intent.⁴⁹ Therefore, photographs depicting Barnett's injuries were relevant in this case.

Regarding unfair prejudice, "if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors."⁵⁰

We conclude that the photographs at issue were not unfairly prejudicial. Although Barnett had bed sores and had lost weight since the incident, the trial court indicated that the photographs admitted depicted Barnett in a gown with tubes affixed to him. Further, the court elaborated that Barnett's weight could not be determined from the photographs. In contrast, the trial court refused to admit photographs that graphically depicted Barnett's bed sores. In light of this, it does not appear that the photographs at issue were particularly gruesome. Moreover, even though medical apparatuses were included in the photographs, this did not render the photographs unfairly prejudicial because, as the trial court noted, these photographs depicted the treatment Barnett had been receiving since the time of his admission to the hospital. Therefore, given that Barnett suffered brain damage and was in a vegetative state, and these conditions require the use of medical apparatuses, the photographs of Barnett were an accurate representation of the extent of Barnett's injuries and were not unfairly prejudicial.

James claims that the photographs are inadmissible because they depict injuries that could have arisen from self-defense. However, even assuming that the injuries could have arisen

⁴⁴ *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, mod and remanded on other grounds 450 Mich 1212 (1995).

⁴⁵ MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

⁴⁶ MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002).

⁴⁷ MCL 750.83

⁴⁸ "The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995); MCL 750.83. *Mills*, *supra* at 66.

⁴⁹ *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997).

⁵⁰ *Mills*, *supra* at 77.

from self-defense, this does not negate the fact that photographs of injuries are also probative of criminal intent as a matter of law. Therefore, we conclude that this claim fails.

X. Ineffective Assistance Of Appellate Counsel In First Appeal

A. Standard Of Review

James argues that he was denied the effective assistance of appellate counsel on his first appeal to this Court because appellate counsel failed to raise the following issues: whether James was denied the effective assistance of trial counsel, whether sufficient evidence existed to support James's convictions, whether the trial court failed to provide instructions on simple and aggravated assault, and whether the admission of photographs of Barnett was improper. "The test for ineffective assistance of appellate counsel is the same as that for trial counsel."⁵¹

B. Applying The Standards

At the outset, we note that each of the issues James claims appellate counsel failed to present in his prior appeal to this Court were raised by James in his Standard 4 Brief in this appeal. As noted above, none of these issues amounted to error requiring reversal. Therefore, given that appellate counsel "does not render ineffective assistance by failing to present meritless claims,"⁵² James has failed to establish ineffective assistance of appellate counsel. Moreover, although James claims that appellate counsel did not meet with him or even allow him to review the trial transcripts, no evidence exists to support this claim. Therefore, James has failed to establish a factual predicate showing that he was denied the effective assistance of counsel.⁵³ Finally, we note that James has failed to assert any prejudice resulting from appellate counsel's failure to raise these issues in his first appeal to this Court. Indeed, as noted above, each of the issues James claims that appellate counsel failed to raise are meritless. Therefore, James's argument fails.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

⁵¹ *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

⁵² *People v Reed*, 449 Mich 375, 402; 535 NW2d 496 (1995) (Boyle, J.).

⁵³ See *Hoag*, *supra* at 6-7.