STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 286661 Jackson Circuit Court
PHILLIP DARNELL ALEXANDER, Defendant-Appellant.	LC No. 07-004204-FH

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions for five counts of assault with intent to do great bodily harm less than murder, MCL 750.84; five counts of felonious assault, MCL 750.82; and one count each of operating a motor vehicle with the presence of a controlled substance, MCL 257.625(8); driving with a suspended license (second offense), MCL 257.904(3)(a); and failure to stop after a collision, MCL 257.620. For the reasons set forth in this opinion, we affirm.

On July 15, 2007, defendant was traveling westbound on I-94 at a very high rate of speed, ramming vehicles and running them off the road, causing numerous accidents. Trial testimony indicated that defendant was ramming vehicles in the right and left lane, which forced motorists to maneuver their vehicles off the interstate from I-94 to northbound US 127, causing vehicles to run into the median, and leading to a number of accidents, until one of the crashes finally led to his car being disabled and his apprehension by police. Following his apprehension, defendant was taken to a nearby hospital where he became combative and spat on the medical staff. When his treating doctor informed defendant that he had been in multiple accidents, defendant "attempted to explain that he was trying to drive to Lansing to see his girlfriend" and that "[p]eople would not get the [expletive deleted] out of my way. They were trying to keep me from seeing her so I had to push them out of the way." When told that he could have been killed or seriously injured, defendant responded, "I don't give a [expletive deleted], I ain't afraid to die. I want to die and end it all." And, "I drove as fast as I [expletive deleted] could, at least a hundred the whole way and I ran--I ran the [expletive deleted] into whoever got in my way." Police discovered several packages of suspected marijuana "on the ground outside the suspect vehicle's door," and defendant indicated that he was using several drugs, including marijuana

and ecstasy. The blood test performed at the hospital revealed the presence of tetrahydrocannabinol (THC)[1] or marijuana, and PCP[2] in defendant's bloodstream.

On appeal, defendant first argues that there was no evidence supporting the predicate felonies in his presentence investigation report (PSIR). We review the unpreserved claims for plain error, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and conclude that no plain error exists.

In its notice, the prosecutor specified the two predicate felonies for purposes of the habitual offender, third offense, enhancement: a May 22, 2003 conviction from Hennepin County, Minnesota for "Drug-Crack Cocaine in violation of 152.025" and an October 10, 2003, conviction for "Assault Possession Firearm in violation of 609.2231" from the same Minnesota county. Defendant never challenged the existence of these convictions in the trial court, and the trial court never addressed their accuracy. A defendant bears the burden of "establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid." MCL 760.13(6); *People v Carpentier*, 446 Mich 19, 23-24, 31-35; 521 NW2d 195 (1994). However, a defendant cannot collaterally attack his prior convictions for the first time on appeal. *People v Jones*, 83 Mich App 559, 568; 269 NW2d 224 (1978).

We agree with defendant that his PSIR does not contain evidence of the existence of the above-listed felonies. However, a review of defendant's PSIR reveals a conviction for "Assault 4th Degree Peace Officer Demonstrate Bodily Harm (Person/G) same as Assaulting or Obstructing Certain Officials Causing Injury" from Hennepin County, Minnesota that occurred on October 10, 2003. The PSIR reflects that defendant was also convicted of fleeing a police officer in a motor vehicle on March 2, 2007, in Minnesota, which resulted in 15 months' imprisonment. A felony conviction is any conviction that entails punishment by imprisonment for one year or more. *People v DeLong*, 128 Mich App 1, 4; 339 NW2d 659 (1983). A foreign conviction may support a habitual offender conviction where the offense would have constituted a felony under Michigan law based on the facts of the offense. *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997). MCL 750.479a(1) criminalizes willfully failing to stop a motor vehicle or attempting to elude or flee, upon being commanded to stop by a police officer, and results in a felony conviction for fourth-degree fleeing and eluding, MCL 750.479a(2). Further, assaulting, resisting, or obstructing a police officer while knowing or having reason to know the person is performing his duties constitutes a felony punishable by not more than two years' imprisonment. MCL 750.81d(1). If the officer sustains injury requiring medical attention, the felony is enhanced to a sentence of not more than four years. MCL 750.81d(2). The trial court was allowed to rely on the information in the PSIR for proof of a conviction, *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997); MCL 769.13(5)(d), and defendant does not challenge the existence or accuracy of the two Minnesota convictions on appeal. They

[1] THC is "the proactive ingredient of marijuana." *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006).

[2] PCP is "phencyclidine, a controlled substance." *People v Crawford*, 143 Mich App 348, 351; 372 NW2d 550 (1985).

were a sufficient basis on which to sentence defendant as an habitual offender, third offense, MCL 769.11. Accordingly, defendant has failed to establish plain error requiring reversal.

Defendant next challenges the trial court's departure from the legislative guidelines' recommended minimum sentence range for his five assault with intent to do great bodily harm less than murder convictions. Defendant's maximum minimum range under the legislative guidelines was 114 months' imprisonment. MCL 777.21(3)(b). He was sentenced to 13 (156 months) to 20 (240 months) years' imprisonment.

"[I]f the sentence is not within the guidelines range, [this Court] must determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range." *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003); MCL 769.34(11). We review the trial court's factual findings that supported the departure for clear error. *Id.* at 264. Whether the reasons for departure are objective and verifiable, a matter of law is reviewed de novo. *Id.* We review for an abuse of discretion the determination that those reasons are substantial and compelling enough to justify the departure and the amount of the departure. *Id.* at 264-265. The trial court abuses its discretion where its decision falls outside the range of principled outcomes. *Id.* at 269. The trial court has discretion to determine the number of points to be scored, although this determination must be supported by adequate evidence on the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

> The trial court, in departing from the guidelines, noted:
> [Y]ou've been suspended drivers license [sic] over 20 different times. I mean, you should have never, ever even been behind the wheel of a car. And then you get—you get behind the wheel of a car and you're taking PCP, and apparently you are so—you are so high on drugs that you then engage in a pattern of driving that starts on I-94 in Washtenaw County where you begin ramming cars. And frankly, you're all over the road. I mean, you're ramming them in the right lane, you're ramming them in the left lane.
>
> You continue hitting cars in both the right lane, left lane. One of the witnesses even described you actually driving and physically forcing them into the median where their vehicle rolled. It wasn't just a situation—the speeds were estimated in some instances at well over a hundred miles an hour, multiple calls to 911, high speed charges, you know, by numerous different law enforcement agencies to try to get into a position to try to control your behavior out there on the interstate.
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> Frankly, it's the worst case of road rage I've ever seen. And—and it's just absolutely unexplainable. It continues all the way into Jackson County on 94, then you turn northbound on 127 and then you're ramming cars and running them off the road, at least three different vehicles flipped, all the way up into Ingham County before you're ultimately finally forced off the road by the police and your vehicle comes to a rest and they take you into custody.
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> Frankly, it's just a miracle out there that nobody was killed. And yet all I got a—well, I was high on PCP, Judge. I mean, you had 20 prior suspensions. You've got a criminal record that starts with armed robbery, you know, when you're a juvenile. And frankly, I feel that there's sufficient substantial and compelling

reasons such that I'm going to exceed the sentencing guidelines in this matter and I'm going to go over those reasons at this time.

The court—and I'm going to depart from the guidelines and impose a sentence, the maximum that I can impose by law, and that's on counts one, three, five, seven and nine, which are all assault with intent to commit great bodily harm . . . .

* * *

The court further is required to articulate, because I am exceeding the guidelines, to articulate the substantial and compelling reasons for that departure. And in addition to incorporating all of the reasons set forth by the prosecutor on the Record [sic], the court notes that the sentencing guidelines, at least in this jurist's opinion, do not adequately factor that [sic] the absolute indifference to the health and safety of numerous motorists whose lives were put at risk by your actions by deliberately ramming multiple vehicles on both I-94 and 127 in a course of conduct that covered three counties.

The sentencing guidelines also did not adequately reflect that the defendant was using PCP and was in possession of additional controlled substances.

The sentencing guidelines do not adequately reflect the high risk to other motorists who were not struck or who had to take evasive action and/or who were run off the interstate but were not subject to the charges in this case.

The sentencing guidelines do not adequately reflect the ongoing psychological trauma to numerous victims as set forth in the presentence reports and its attachments who clearly are on an ongoing basis traumatized, you know, even as we speak today.

The sentencing guidelines do not reflect the enhanced danger to responding law enforcement personnel who tried to intercept the defendant from multiple counties. The sentencing guidelines do not adequately reflect the defendant's lack of what I believe meaningful remorse for a true appreciation that this conduct reflects one of the worst road rage cases in Michigan history.

And again, I would note that the sentencing guidelines also just verbally doesn't [sic] reflect the fact of this escalating pattern of crime, the fact that you're drivers license was already suspended 20 different times, so I'm going to impose the maximum prison sentences.

And frankly, if I wasn't bound by that 2/3 rule you'd be going to prison for 20 years today, but I'm going to give you the maximum prison sentence allowed by law and I'm already exceeding the guidelines but I can't exceed the 2/3 rule, and so that is the sentence of the court.

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The trial court's substantial and compelling reasons for departing from the sentencing guidelines must be stated on the record. MCL 769.34(3). A substantial and compelling reason is an "objective and verifiable" reason that ''keenly or irresistibly" grabs the Court's attention, is of "considerable worth" in deciding the length of a defendant's sentence, and "exists only in exceptional cases." *Babcock*, *supra* at 258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Such reasons are objective and verifiable where they are capable of being confirmed and are actions or occurrences that are external to the mind. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court's reasons for departure may not be based "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

Defendant first argues that the trial court's finding that he exhibited "absolute indifference to the health and safety of numerous motorists" was adequately accounted for by his multiple convictions and offense variable (OV) 9, MCL 777.39, and that OV 9 also adequately considered the other known drivers that were affected by defendant's driving spree but were not considered in the charged offenses. Defendant received a score of ten points for OV 9, for placing two to nine victims in danger of physical injury and "4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). Defendant cites no support for his contention that, because he had multiple convictions arising from the incident both in Jackson County and other counties, the trial court could not use the fact that he rammed multiple victims in departing from the guidelines. There were a total of eight victims involved in the multiple charges against defendant in this case, and other-acts evidence indicated that several more individuals were hit by defendant, were nearly hit by defendant, or witnessed defendant as he drove at high speeds swerving at cars along the way, running them off the road, repeatedly ramming some cars, and causing physical injury and property loss. Defendant could not have been scored at 25 points for OV 9 because only the conduct surrounding the sentencing offense could be considered. *People v McGraw*, ___ Mich ___; 771 NW2d 655 (2009). Thus, OV 9 did not adequately take into account the number of victims placed in danger of physical injury during defendant's crime spree. The trial court's decision that the sentencing guidelines did not adequately consider the multiple victims placed in physical danger by defendant's indifferent and reckless driving was not an abuse of discretion, *Babcock*, *supra* at 264-265, was based on the objective and verifiable facts, *Abramski*, *supra* at 74, and constituted a substantial and compelling reason to depart from the guidelines that keenly and irresistibly grabs our attention and distinguishes this case, *Babcock*, *supra* at 258.

Defendant next argues that his use of the controlled substance commonly known as PCP was adequately taken into consideration by the fact of his conviction for operating a vehicle with the presence of a controlled substance. The conviction was based on the presence of marijuana in defendant's system at the time of the incident, and not PCP. Thus, the PCP in his system was not accounted for by this conviction. MCL 769.34(3). The presence of PCP was objective and verifiable. *Abramski*, *supra* at 74. Review of the record clearly indicates that defendant voluntarily ingested this drug and it caused him to hallucinate to such an extent that he engaged in his dangerous and reckless course of conduct. Hence, we conclude that the trial court's decision to base its departure in part on this factor did not fall outside the range of reasonable and

principled decisions. *Babcock, supra* at 264-265, 269. Defendant's use of PCP constituted a substantial and compelling reason on which to base the departure.

Defendant challenges the departure based on ongoing psychological trauma to numerous victims. OV 4, MCL 777.34, addresses psychological injury to a victim. Ten points are scored where there is "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Zero points are scored where there is "[n]o serious psychological injury requiring professional treatment" to a victim. MCL 777.34(1)(b). Defendant received zero points for OV 4. The reason for this scoring decision is unclear. There was record support for the trial court's finding of psychological injury. *Hornsby, supra* at 468. Four victims provided statements to the trial court at sentencing regarding the lasting emotional toll defendant's actions had on them, and one of the victims indicated that she "lost two weeks with my dad while he was terminally ill in the ICU before he passed away." Another victim indicated that as a result of the incident, he was too scared to drive on the highway thereafter and would take "back roads" instead. Defendant could have been scored ten points for OV 4 given the evidence of psychological injury. However, scoring OV 4 would not have changed the guidelines' recommended sentencing range because defendant's total OV score already placed him in the highest OV level, VI. MCL 777.65. Further, OV 4 only considered psychological injury to "a victim," and there were multiple victims here. *Babcock, supra* at 264. The psychological trauma was not adequately contemplated in the guidelines, even if defendant had been given the most points possible under OV 4. The fact that one victim was deprived of two weeks' worth of time with her terminally ill father and another victim changed his driving behavior was also objective and verifiable. *Abramski, supra* at 74. The objective and verifiable facts constituted a substantial and compelling reason for the departure. *Babcock, supra* at 258.

Defendant next asserts that there was no evidence supporting the trial court's holding that police were endangered during the incident while attempting to intercept him. On this issue we agree with defendant's assertion that the record failed to support any evidence of this finding and as a consequence, the trial court's reliance on this factor was clearly erroneous. *Babcock, supra* at 264; *Hornsby, supra* at 468. Additionally, the trial court's reliance on defendant's alleged lack of remorse was not an objective and verifiable fact. Considering a defendant's remorse is generally improper when deciding whether to depart from the sentencing guidelines because it is not objective and verifiable, *People v Daniel*, 462 Mich 1, 8, 11; 609 NW2d 557 (2000).

We further conclude, however, that the trial court's other reasons were also objective and verifiable and were substantial and compelling reasons on which to base a departure. Defendant's license was suspended over 20 times, he nonetheless continued to drive in disregard of the law and safety of others, he drove while high on marijuana and PCP, he repeatedly and intentionally rammed cars and forced them off the road or caused them to roll over, he drove at dangerously high speeds, there was adequate room on the road to avoid the other cars, he subsequently stated that he "ran the [expletive deleted] into whoever got in my way," he was only released from prison three months before the instant offenses occurred, and he had nine concurrent convictions.[3] Although a trial court's belief that a defendant presents a danger to

[3] Although defendant argues that the trial court was not permitted to incorporate the prosecutor's arguments as further support of its articulation requirement under MCL 769.34(3), defendant (continued…)

others is not "an objective and verifiable reason," the "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, 44-45; 755 NW2d 212 (2008) (citations omitted). A defendant's prior criminal record is objective and verifiable. *People v Solmonson*, 261 Mich App 657, 669; 683 NW2d 761 (2004).

Where we find some of the given reasons invalid, we must examine whether the trial court would have nonetheless departed and to the same extent, based on only the valid reasons. *Babcock*, *supra* at 260-261. If such a determination is not possible, a remand for resentencing and re-articulation is appropriate. *Id.* at 271. Given the trial court's repeated reference to the extent of defendant's road rage behavior and lengthy prior record, along with the substantial and compelling reasons that were validly relied upon and the trial court's comment that it would sentence defendant to 20 years' imprisonment if it were legally possible, it is clear that the trial court would have departed to the same extent regardless of the above inappropriate considerations. We further conclude that defendant's sentence was not disproportionate. The trial court's degree of departure "adequately account[ed] for the gravity of the offense and any relevant characteristics of the offender" and the sentence was appropriate. *People v Smith*, 482 Mich 292, 318; 754 NW2d 284 (2008); *Babcock*, *supra* at 262.

In his final claim of error on appeal, defendant asserts that there was insufficient evidence of specific intent to sustain his convictions for assault with intent to do great bodily harm less than murder. We view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We also "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish assault with intent to do great bodily harm less than murder, MCL 750.84, the prosecutor must prove: "(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." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis removed). "No actual physical injury is required for the elements of the crime to be established." *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992). Intent to do great bodily harm is defined as "an intent to do serious injury of an aggravated nature." *Id.*, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Intent to harm may be inferred from a defendant's conduct, *Parcha*, *supra* at 239, and words, *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

(…continued)

cites no support for this proposition. The trial court must "state[] on the record the reasons for departure," and the prosecutor's reasons for departure, which were adopted by the trial court, were stated on the record. MCL 769.34(3). Accordingly, we assign no error for the trial court's incorporation of the prosecutor's arguments to support it conclusions pursuant to MCL 769.34(3).

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient record evidence for a jury to find, beyond a reasonable doubt, that defendant possessed the intent to do great bodily harm based on defendant's words and actions and the other evidence at trial. *Parcha, supra*; *Mack, supra*. The evidence established that defendant struck the vehicles of each of the victims in this case repeatedly and purposefully, causing them to spin out of control, sometimes striking them again as they attempted to maneuver back on the road, and his actions caused roll-overs, damage to all of the vehicles, and physical injuries to some of the victims. By his own admission, defendant drove 90 to 100 miles per hour. Numerous witnesses testified that there was an empty lane for defendant to use for passing, but he chose not to use it. In addition, Sergeant Alan Avery, a crash reconstructionist expert, testified that "ramming cars off the freeway at 70, 80, 90, 100 miles an hour . . . has the probability of causing serious injury or death," and increased the risk of roll over. Other witnesses testified that defendant's car did not appear to be out of control, but made purposeful and intentional movements toward the other cars. And, other-acts testimony further established defendant's intent in that defendant drove at a high rate of speed, down the middle of the road, repeatedly ramming or coming close to ramming other vehicles. Defendant also admitted that he "ran the [expletive deleted] into whoever got in my way."

Contrary to defendant's arguments, testimony presented at trial does not lead us to conclude that defendant was so foggy-headed because of the drugs[4] that he could not form the requisite intent. Rather, the evidence reveals that defendant was coherent enough to inform hospital personnel that he had the specific intent to commit the assaults with a dangerous weapon for which he was convicted, and he repeatedly and intentionally rammed the victims' cars. We find defendant's arguments on this issue devoid of merit. Accordingly, we affirm defendant's convictions and the sentence imposed by the trial court for the reasons set forth above.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

[4] Voluntary intoxication is a defense to a specific intent crime only where the intoxication was so great that a defendant was not able to form the requisite intent. *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998).