

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 29, 2014

v

ARTHUR LEON JONES,

Defendant-Appellant.

No. 312250
Lake County Circuit Court
LC No. 12-4957-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME ANTHONY LEWIS,

Defendant-Appellant.

No. 312288
Lake County Circuit Court
LC No. 12-4959-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal by right convictions arising from the shooting death of Andrew Jerome Smith. In Docket No. 312250, defendant Arthur Leon Jones appeals as of right his conviction for second-degree murder, MCL § 750.317. Jones was sentenced as a habitual offender, fourth offense, MCL § 769.12; to 40 to 60 years' imprisonment. We affirm defendant Jones' conviction and sentence. In Docket No. 312250, defendant Jerome Anthony Lewis appeals as of right his conviction for accessory after the fact to a felony, MCL 750.505. The trial court sentenced Lewis as a habitual offender, fourth offense, MCL 769.12; to 72 months to 20 years' imprisonment. In defendant Lewis' case, we vacate the conviction and sentence.

I. BACKGROUND

This case involves both a car crash and a homicide in Lake County. Both occurred in the small town of Baldwin Michigan. The car crash occurred at around 3:10am on 96th Street. The

homicide was discovered later that morning when Smith was found in a pool of blood on the side of 72nd street, a few blocks from the crash site.

Early in the morning of July 23, 2011, a local tow truck driver was awakened by the sound of what he described as a squealing that turned into screeching, like when a vehicle is trying to stop. He observed a car partly off the road trying to navigate a turn and a second car, “a light-color SUV” go around the curve behind the first car. Thereafter, he heard a crash. He immediately got dressed and drove his personal vehicle down the road to observe. When he arrived he saw a single vehicle, a silver Dodge Avenger (SUV) smashed against a tree but no one was at the scene.

It was some time before law enforcement connected the homicide and the car crash. The prosecutor presented evidence of the connection to a grand jury on January 5, 2012. As a result of the grand jury defendants Arthur Jones and Jerome Lewis were indicted for the open murder of Smith.

After lengthy pre-trial proceedings, some of which will be discussed later, trial began on July 9, 2012. The prosecution’s theory of the case was that the car crash occurred shortly after the homicide and that the car crash was a part of the attempt to flee the homicide scene. According to multiple witnesses at trial, defendants Jones, Lewis, decedent Smith, and Smith’s friend Jamesquent Gidron were at a party together on June 22 in Idlewild, a neighboring community to Baldwin. Lewis and Jones came to the party together. Witnesses testified to hearing Jones, who was seen with a gun, and Lewis say they were going to “shut the party down” when someone who owed them money appeared at the party and also that they would “fuck up” that individual. This conversation occurred before Smith and Gidron arrived at the party. Testimony revealed that Lewis identified Smith to others as someone who owed him money and who had been avoiding him. Multiple witnesses observed, but did not hear, conversations between Smith and Jones at the party.

The most compelling evidence was testimony from Gidron who witnessed Jones shoot Smith. He testified that he and Smith left the party in his Explorer following behind Lewis and Jones in Lewis’ SUV. According to Gidron, all four of them exited the vehicles and stood in between them casually talking to one another. Smith then told Gidron that he had some business to take care of, so Gidron went back to his vehicle and lay back in the passenger seat. Gidron testified that moments later when Smith was walking back to the vehicle Jones followed him and fired down five shots. Gidron saw Lewis who was then outside of his vehicle run to the driver’s side of his car; Jones entered the passenger side of the vehicle and the two of them drove off. Gidron left Smith at the side of the road and went to a nearby gas station for cigarettes where he noticed he had blood all over his vehicle. He unsuccessfully attempted to clean the blood off of his car.

A forensic pathologist testified that the cause of Smith’s death was the gunshot wounds to the head and the manner of his death was homicide. The pathologist also testified that he believed Smith’s injuries would have been fatal regardless of any treatment. Neither Jones nor Lewis testified at the trial.

In its closing statement, the prosecution argued that Lewis, who was then being charged with second-degree murder, could also be found guilty by the jury for accessory after the fact to a felony. The trial judge presented the jury with an accessory after the fact to a felony instruction. On July 18, 2013, Jones was convicted of second-degree murder and Lewis was found guilty as an accessory after the fact to a felony.

II. DOCKET NO. 312250

A. CHANGE OF VENUE

Defendant Jones first argues that pre-trial media publicity denied him his right to an impartial jury. After a review of the entire record, we hold that Jones has waived this issue for appellate review.

Jones filed a motion for a change of venue which was taken under advisement while the trial court attempted to seat an impartial jury. After the jury was selected, Jones expressed his satisfaction with the panel and did not renew his motion for a change of venue. “One who waives his rights under a rule may not seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). Accordingly, we consider this issue waived.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1. Exercise of Peremptory Challenges

Jones next argues that his counsel was ineffective for not using all available peremptory challenges and not renewing his motion to change venue. “A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing.” [People v Rodriguez](#), 251 Mich App 10, 38; 650 NW2d 96 (2002) citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Jones did not motion for a new trial or request an evidentiary hearing at the trial level and made an untimely request to remand for a *Ginther* hearing when he filed his brief in this case. Therefore, this issue was not preserved for appellate review.

We review an unpreserved claim of ineffective assistance of counsel for mistakes apparent on the record. *Rodriguez*, 251 Mich App at 38. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295, lv den 493 Mich 852 (2012), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *Lockett*, 295 Mich App at 187. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *People v Seals*, 285 Mich App 1; 776 NW2d 314 (2009).

Jones and Lewis were tried together and therefore were each entitled to 10 peremptory challenges. MCR 6.412(E). Jones’ counsel used six of the available ten peremptory challenges.

“[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy,” *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001), and defense counsel has wide discretion as to matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012), lv den 495 Mich 875; 838 NW 2d 149 (2013). Jones’ argument regarding ineffective assistance arising from the failure to exercise all available peremptory challenges focuses primarily on two jurors: jurors Artman and Douglas. Alternatively, he argues that it would have been pointless or unintelligent to have challenged them because of pervasive pretrial publicity.

The Artman and Douglas argument on appeal implies that both jurors should have been challenged for cause. A juror should be disqualified for service if she is biased or “has formed a positive opinion on the facts of the case or on what the outcome should be.” MCR 2.511(D)(2), (3). Juror Artman told the court that a woman with whom he worked had informed him that her daughter was going to be a witness. The trial judge inquired further, “Do you know anything about the case yourself, then?” and Juror Artman said “No.” The judge asked again, “And you haven’t heard anything at all about the case --” and Juror Artman said “No.” Likewise, Juror Douglas vaguely remembered some prosecution witnesses having ridden the school bus with her over thirty years ago. Douglas admitted that she had not spoken to the witnesses in the last thirty years and that nothing about that experience would cause her to favor or disfavor someone in this case. Therefore, there was no reason to challenge the qualifications of either juror for cause.

We measure counsel’s performance against an objective standard of reasonableness and without the benefit of hindsight. *Bell v Cone*, 535 US 685, 698; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009), lv den 486 Mich 925 (2010). Jones’ counsel’s strategy in voir dire cannot be faulted. He excused six jurors and objected to the racial make-up of the jury after it was seated. There were no apparent mistakes on the record that indicated Jones’ counsel’s performance was objectively unreasonable. This Court “will not second-guess strategic decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013). After a review of the record, we cannot find any apparent mistakes that would support Jones’ counsel being ineffective.

2. Change of Venue

Alternatively, Jones argues that his counsel was ineffective for not renewing his motion to change venue. Once again, we disagree. A motion for a change of venue can be granted for either party when there is good cause shown. MCL 762.7. We acknowledge that two articles had been published fairly immediate to the trial in the small community of Lake County, one in the *Pioneer* and the other in the *Lake County Star*, which featured Jones and Lewis as accused murderers. There was also at least one news broadcast about the case.

The trial court afforded counsels the opportunity for vigorous voir dire in this case. “The purpose of voir dire is to give counsel the opportunity to develop a rational basis for exercising both challenges for cause and peremptory challenges.” *People v Furman*, 158 Mich App 302, 322; 404 NW2d 246, 255 (1987). The jury was screened for taint regarding pretrial publicity and those eventually seated had no information regarding the case beforehand. Therefore, it would have been futile for Jones’ counsel to renew his motion to change venue. Attorneys are not

required to make futile objections to the court. *People v Wilson*, 252 Mich App 390, 397; 652 NW2d 488 (2002). We do not find counsel ineffective for failing to make an objection that would have been pointless.

C. HEARSAY

Jones' final argument is that he was denied a fair trial by the admission of inculpatory hearsay statements from a non-testifying co-defendant. He contends that his case is similar to that of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 LEd2d 476 (1968). He argues that statements made by Lewis were admitted against him without the opportunity for cross-examination. Jones asserts his right to confrontation was denied and his conviction should, therefore, be reversed. Jones further contends that the statements from Lewis were testimonial and were admitted in violation of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 LEd2d 177 (2004) and that reversal is warranted on this ground as well. We disagree that Jones was denied a fair trial because we find that the statements made by Lewis were admissible.

Jones did not preserve his claims of constitutional error at trial therefore our review is for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear and obvious, 3) and the plain error affected substantial rights". *Id.* at 763.

Statements made by Lewis, a non-testifying co-defendant, were admitted at Jones' joint trial with Lewis. Jacalyn Roberts testified at trial that Lewis told her "I ain't [sic] do it" and "[e]verything just happened so fast, I couldn't do anything." Jeffrey Davenport, Roberts' fourteen year old son, also testified that when Lewis was in the backseat of his mother's car he kept saying "stupid motherfucker" over and over again. Neither counsel for Jones or Lewis objected to these statements from Roberts or Davenport.

Neither statement qualified for protection under *Bruton* because neither statement facially implicated Jones in a crime. *Bruton*, 391 US at 136-137. Neither witness indicated that Lewis' statements were responsive to any question, mentioned anyone's name or were the subject of further inquiry. On their face the statements do not implicate anyone. The only person mentioned in the Roberts statement was Lewis himself. When Roberts was asked on the stand what she thought Lewis was talking about, she stated she thought he was referring to not having been the one who was driving the car that crashed. The statements to Davenport included no pronoun, only a scatological descriptor. Davenport was not asked what he thought Lewis' statements were referring to, but he was asked about Lewis' demeanor while making the statements and answered that Lewis appeared intoxicated and "very, very mad." Given the context in which the statements were made they were not incriminating as against Jones. Therefore, the protections in *Bruton* are not applicable here.

Crawford is likewise inapplicable to the two statements admitted through Roberts and Davenport. The *Crawford* Court prohibited out-of-court "testimonial" statements from being admitted unless the defendant had a prior opportunity to cross-examine the declarant and the declarant was unavailable. *Crawford*, 541 US at 59, 68. Testimonial statements include those said to police during interrogations, those made previously under oath, those expected to be used

later in trial, and *ex parte* materials. *Crawford*, 541 US at 51-52. By contrast non-testimonial statements would include a “casual remark to an acquaintance[.]” *Id.* at 51. Here, the statements were made to acquaintances and friends of Lewis under circumstances that would not lead to a reasonable expectation by the hearer or the speaker that they would be used at trial. The statements made by Lewis were non-testimonial and are therefore are not barred by *Crawford*. .

The trial court did not commit plain error in admitting Lewis’ statements. “Stupid motherfucker” spoken in the backseat within hours of the incidents, and “I ain’t [sic] do it.”, uttered spontaneously later that same day, are each reviewed for plain evidentiary error affecting substantial rights. The People argue that the statements were admissible hearsay, Jones disagrees. The arguments made at trial and on appeal do indicate that the statement, “I ain’t [sic] do it” was offered to prove its truth, that Lewis denied culpability. However, given the conflicted, conflated and confusing record as a whole, that singular remark does not appear to have substantially affected Jones’ rights or been a significant factor in the cases’ outcome. The other statement even if offered for its truth is no more than a statement of low opinion of someone, made closer in time to startling events and is not inadmissible hearsay.

We hold that *Bruton* and *Crawford* do not apply to the facts in this case. Further, that the trial court did not plainly err by admitting Lewis’ statements when they were also not outcome determinative and did not otherwise affect Jones’ substantial rights.

Finding no error at the trial court level, we affirm the conviction and sentence of Jones.

III. DOCKET NO. 312288

A. DUE PROCESS

Defendant Lewis first claims that his right to due process was violated because he lacked notice of the charges against him. We agree. While sustained by sufficient evidence to support a conviction, the amendment of the information to add the charge of accessory after the fact to a felony violated Lewis’ right to a fair trial. He was not given notice of the charges against him sufficient to afford him an opportunity to defend against them.

The felony indictment against defendant Lewis charged him with open murder, first-degree. At trial, the prosecutor argued in opening statement that Lewis was a direct participant in the murder. It was only during closing statement that the prosecutor argued that defendant Lewis could also be found guilty of accessory after the fact to a felony. Trial concluded July 18, 2012, with the defendant having exercised his right to decline to testify. The prosecution did not move to amend the charge in this case until after the close of its proofs and after Lewis rested without calling any witnesses. While the grand jury return did allude to acts after the murder, the information read to the jury did not. At Lewis’ Final Conference and Motion for a Change of Venue, on July 5, 2012, the prosecution explained that Lewis was previously offered a plea of accessory after the fact to a felony and had rejected it. The prosecution did not address any theory of accessory after the fact in its opening statement. Voir dire and preliminary jury instructions, also, did not address the issue of the accessory charge which is, as the parties agree, not a lesser included offense of the open murder charge. No formal Motion to Amend was filed

by the prosecution nor was any motion filed by Lewis in this regard. The amendment was instead made within the context of requests for final jury instructions.

We review claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). However, when the instructional error has not been preserved at the trial level, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *Id.* at 764, 774. Plain error review "requires a defendant who has forfeited his claim of error to prove (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 663-664, 821 NW2d 288, 302 (2012) (citation omitted).

MCR 2.512(C) discusses the process for objecting to instructions that are given to the jury in order preserve them for appeal. The rule specifically reads,

A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

The lower court record did not contain any record of argument concerning the jury instructions nor the court's reasons for giving the accessory instruction. There was reference to a discussion that may have occurred in chambers, but no objection was captured by the record before the instructions were given to the jury. Lewis also did not resurrect the issue of the additional charge before the proceedings closed that day on July 17, 2012. Lewis' counsel objected to the change on the record on August 7, 2012 at a hearing on the prosecutor's notice that an enhanced sentence would be sought based on Lewis' habitual offender status. Because there is no record evidence of a timely objection and no affidavit from trial counsel that an objection was made, a plain error analysis is appropriate. See *People v Vaughn*, 491 Mich 642, 655; 821 NW2d 288 (2012) (A defendant's failure to preserve a Sixth Amendment claim does not forfeit all relief, but rather makes the claim reviewable for plain error.)

At a minimum, due process requires a defendant receive reasonable notice of the charges against him and an opportunity to be heard on those charges. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). Still, to establish a due process violation Lewis must prove prejudice. *People v Darden*, 230 Mich App 597, 602-603; 585 NW2d 27 (1998). Lewis contends that he was deprived his Sixth Amendment due process right to notice because he was surprised and prejudiced by the alternative charge of accessory after the fact and consequently was not prepared to defend against it. The issue of whether such a late amendment causes unacceptable prejudice, such as unfair surprise, inadequate notice or inadequate opportunity to defend is analyzed within the context of each particular case. *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993).

Lewis cites *People v Adams*, 202 Mich App 385; 509 NW2d 530 (1993), in support of his position. There our Court found the trial court committed reversible error when it granted the prosecutor's request to add an instruction after the close of proofs. In *Adams* the defendant was originally charged with breaking and entering a building with intent to commit a larceny therein. MCL 750.110. The prosecutor later requested the jury be instructed on receiving or concealing stolen property valued over \$100. MCL 750.535. This Court held that the instruction was given in error. Quoting the case of *People v Quinn*, 136 Mich App 145; 356 NW2d 10 (1984), this Court held

A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. The notice is adequate if the latter charge is a lesser included offense of the original charge. A trial court may not instruct a jury on a cognate lesser included offense unless the language of the charging document gives the defendant notice that he could face a lesser offense charge.

Id. at 147 (internal citations omitted). In that case, as here, the direct request to amend the charge was not made until after the close of all proofs and the latter charge was not a lesser included offense of the original charge. The offenses of second-degree murder and accessory after the fact to a felony do not contain any similar elements. This is a close question and the absence of a record on the issue before the trial court compounds its difficulty. A review of the trial record reveals vigorous examination of all 32 witnesses by Lewis' counsel. While appellate counsel does not offer any suggestions as to how the focus of that examination might have changed if the amendment had been made earlier it is noteworthy that the defendant's decision not to testify was made in the context of a charge of open murder. Defendant Lewis' pre-trial statements indicated a high level of intoxication, confusion and shock. He was quoted as saying, "It all happened so fast I couldn't do anything." His testimony on his state of mind after the shots were fired may have been material to the charge of accessory and he and his counsel should have had the opportunity to consider whether he should testify within the context of the final charges. Additionally, the prosecution offers no explanation for why they delayed the request until the close of proofs or how anything in the case as tried gave notice that Lewis was being tried as an accessory after the fact and not an active participant in the murder. Given that this is a constitutional, not a procedural protection, Lewis' right to adequate notice appears to have been disregarded.

Therefore, we find that Lewis was denied his Sixth Amendment due process right to notice when the alternative charge of accessory after the fact was added in closing arguments by the prosecution and the trial court committed plain error in instructing the jury on the alternative charge. "Lack of adequate notice violates a defendant's right to due process and mandates reversal." *Darden*, 230 Mich App at 601. Accordingly, we vacate defendant Lewis' conviction and sentence for accessory after the fact to a felony.

B. SUFFICIENCY OF THE EVIDENCE

Defendant Lewis next argues that there was insufficient evidence to convict him of accessory after the fact to a felony. We disagree.

An evidentiary issue is preserved for appeal when it was raised before, addressed by, and decided by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Lewis failed to challenge the evidence in his case by way of a motion for a new trial or directed verdict, therefore it is not preserved. Where the claim of error is not preserved, review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774. An error affects substantial rights if it caused prejudice that affected the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

In this case, where defendant Lewis was originally charged with open murder, the prosecution called an eye-witness to the murder to testify. Witness Gidron testified to having seen Jones shoot Smith and to Lewis running to the driver's side of his vehicle, then Jones getting in the passenger side and the two of them driving off. Despite Lewis' attempts to reveal inconsistencies in Gidron's testimony, the jury made the final call as to whether Gidron was believable or not. This Court should not interfere with the fact finder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229, lv den 493 Mich 918 (2012).

From the facts surrounding the incident of Smith's shooting, the prosecution chose to add the charge of accessory after the fact against Lewis. Gidron had testified that Lewis ran to his vehicle. The testimony elicited was that Lewis did not help Smith, see if he was okay, or call 911 after he was shot by Jones. Also, that Lewis got to the vehicle first, but did not drive away until Jones was in the car. Even after Lewis had separated from Jones he did not attempt to go back to the scene or notify rescue personnel or law enforcement of what had just happened. Officers testified that Lewis lied about his involvement with Jones which helped in deferring Jones' arrest. Other witnesses placed Jones and Lewis together at the Idlewild Lot Owner's party, testified that they were drunk and belligerent and that Jones had a gun. Also, that one of them, Jones or Lewis, made a loud threat that they were going to harm anyone who owed them money. The jury was allowed to infer from this evidence that Jones and Lewis were working together and that Lewis' actions more importantly, after Smith's murder, assisted Jones by hindering his detection, arrest, trial, and punishment. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013), lv den 493 Mich 918 (2013). In this present case, sufficient evidence was submitted to convict Lewis of accessory after the fact to a felony. No error occurred that would require this Court to reverse.

Although we find there was sufficient evidence to convict Lewis of the charge of accessory after the fact to a felony, as previously noted, there was inadequate notice of the charge.

C. SENTENCING

Defendant Lewis' last assertion is that he is entitled to resentencing because the trial court abused its discretion when it failed to articulate substantial and compelling reasons for departing upward from the sentencing guidelines. Our review of the record leads us to conclude otherwise.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012), lv den 493 Mich 955 (2013). Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012). “A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and offender.” *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003).

Defendant Lewis’ sentencing guidelines range was between 7 months and 46 months. The trial judge upwardly departed, sentencing Lewis to 72 months to 20 years. The trial judge found that this case was “not a typical accessory after the fact type of case.” He noted that it was a homicide, a fact that is objective and verifiable and not taken into account by the offense variable score. He also noted that Lewis drove the escape vehicle. This, while objective and verifiable is the essence of the crime of which Lewis was convicted, giving materials to aide after a crime of which he was aware. The judge stated, “And he (Lewis) continued to hide the defendant even after the incident—after the subsequent accident, that also helped him escape, down there”. Assuming the court alluded to the fact that Lewis and Jones fled to the scene of the accident that occurred as a part of the initial escape for the murder scene, this is an objective and verifiable fact, but, also part of the aiding and abetting. The judge noted that Lewis did not call 911. This is another objective and verifiable fact, albeit one that the court, itself noted would have made no material difference in the outcome of the victim. The court in its sentencing allocution made note of the location of the murder. This while true and verifiable, is a choice made prior to the murder and since Lewis was not convicted as an aide or abettor, it is not a fact attributable to him. Therefore, of the factors articulated as the basis for a more than 10 fold increase in the sentence guidelines under habitual fourth, those that are objective, verifiable, and not taken into account by the elements of the offense or the offense variables are: that the underlying crime was a homicide and that a futile 911 call which he had no duty to make was not made. Therefore, the essence of this departure is to address the homicide.

The defendant asks this court to find that the departure violates the legislative prerogative to have created a range of punishments for the crime of accessory after the fact as it did with perjury. While it is true that the legislature is presumed to have known that it possessed the authority to create such a range, it is also presumed to have known that it possessed the authority to limit the factors to be considered in sentencing or to create hard minimums for the crime. The legislature did none of these. Consideration of the nature of the offense was not prohibited. See *People v Lowery*, 258 Mich App 167, 171; 673 NW2d 107 (2003) (“Injury to a victim as a result of being shot is in fact a substantial and compelling reason to depart from the guidelines[.]”) The one objective, verifiable fact that keenly rivets the attention of an evaluator is that a death occurred. A guidelines range sentence would not have been outside the range of principled outcomes. The trial judge did not abuse his discretion in exceeding the guidelines by over ten fold.

We affirm Jones' conviction and sentence for second-degree murder. We vacate Lewis' conviction and remand for further proceedings consistent with this opinion.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens