

Order

Michigan Supreme Court
Lansing, Michigan

December 23, 2019

Bridget M. McCormack,
Chief Justice

159076

David F. Viviano,
Chief Justice Pro Tem

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 159076
COA: 339452
Berrien CC: 2017-015214-FC

MICHAEL SCOTT BARBER,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the November 27, 2018 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III of the Court of Appeals judgment, which did not address the defendant's argument that the Legislature did not intend for a single act to result in convictions for both assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), and assault by strangulation, MCL 750.84(1)(b). We REMAND this case to the Court of Appeals for reconsideration in light of *People v Miller*, 498 Mich 13, 19 (2015). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 23, 2019

Handwritten signature of Larry S. Royster in black ink.

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 27, 2018

v

MICHAEL SCOTT BARBER,

Defendant-Appellant.

No. 339452
Berrien Circuit Court
LC No. 2017-015214-FC

Before: MURPHY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant, Michael Scott Barber, appeals as of right his jury trial convictions for assault by strangulation, MCL 750.84(1)(b), third-degree fleeing and eluding, MCL 257.602a(3), assaulting and obstructing a police officer causing a bodily injury requiring medical attention, MCL 750.81d(2), attempt to disarm a police officer, MCL 750.479b(2), receiving and possessing a stolen vehicle, MCL 750.535(7), and assault with intent to commit great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a). We affirm.

I. FACTS AND PROCEDURAL HISTORY

On February 20, 2017, Michigan State Police Trooper Garry Guild observed Barber driving a motorcycle, which was later determined to be stolen, on US-31 at a speed of 92 miles per hour. When Trooper Guild turned on his emergency lights to make a traffic stop, Barber looked back at the police cruiser, put on his turn signal, moved into the right lane, pulled onto the shoulder of the highway, and slowed to approximately 60 miles per hour. Barber did not stop, however, and he quickly accelerated back onto the highway. Trooper Guild notified police dispatchers that the motorcyclist was fleeing from a traffic stop, and the trooper activated his siren in addition to his emergency lights. Barber twice drove onto exit ramps as if leaving the highway, but he veered back toward the highway and continued his flight from the state police trooper. Barber ultimately lost control of the motorcycle and crashed in the grass next to the highway, throwing Barber several feet from the motorcycle onto the ground.

Trooper Guild got out of his vehicle, pulled his firearm out of its holster, and yelled at Barber to stay back and get down on the ground. Barber failed to comply with the trooper's commands. Instead, Barber got up off the ground and staggered toward the trooper. Trooper Guild was concerned that Barber had a weapon and that Barber might have been injured. Because the trooper did not see anything in Barber's hands, he determined that Barber did not

have a weapon and decided to holster his firearm. Barber advanced toward Trooper Guild so quickly that the trooper did not have a chance to fully holster the firearm.

Trooper Guild put out his left hand and pushed Barber away from him. Barber fell backward, and the two men fell on the ground. Trooper Guild attempted to handcuff Barber, who continued to struggle with the trooper. At some point during the scuffle, the trooper's firearm ended up on the ground. While the trooper was struggling to handcuff the noncompliant Barber, a vehicle pulled off the side of the highway, and an occupant of that vehicle threw a soda bottle at Trooper Guild. An individual, later identified as Barber's brother, Travis Wise,¹ got out of the car and attempted to push the trooper off of Barber. Wise then wrapped his arm around the trooper's neck, choked him, violently pulled him back several feet, and yelled at Barber to run. Trooper Guild felt his breathing getting heavy and heard himself struggling to breathe while he fought to maintain an airway. Barber began to run, but he returned to where Wise was still choking the trooper. Barber then reached toward the trooper's firearm holster on the right side of his utility belt and began tugging at the holster. Trooper Guild instinctively put his hand down to try to prevent removal of the firearm from the holster. At that moment, Trooper Guild did not know that his firearm was not in its holster. While the trooper struggled to breathe, he believed that he was balancing the risk of being choked to death against the risk of being shot to death with his own firearm. Trooper Guild testified that Barber punched him twice in the jaw, causing him to feel stunned. Trooper Guild believed that he was going to lose consciousness in a matter of seconds, and he thought he was going to die.

At that point, two bystanders pulled Wise off of the trooper and held him to the ground. While the bystanders fought with Wise, Trooper Guild tased Barber before he was able to handcuff him. The trooper retrieved his firearm that had fallen on the ground several feet from where he struggled with Barber. While the trooper took Barber to the patrol cruiser, Barber continued to struggle, attempting to pull away and run away. After Barber was placed in the backseat of the patrol cruiser, he opened the rear door and started running away. One of the bystanders ran after Barber and recaptured him. Barber was finally secured in a second police officer's cruiser.

II. MOTION FOR A DIRECTED VERDICT

Barber argues that the trial court erroneously denied his motion for a directed verdict on the charges of assault by strangulation and assault with intent to murder (AWIM). We disagree. This Court reviews de novo a trial court's ruling on a motion for a directed verdict "to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

¹ Wise was charged with assault by strangulation, assaulting a police officer causing a bodily injury requiring medical attention, attempting to disarm a police officer, obstruction of justice, AWIGBH, and AWIM. Wise pleaded guilty to AWIM a few months after the trial court sentenced Barber in this case.

In this case, the prosecution charged Barber with both assault by strangulation and AWIM, including the lesser offense of AWIGBH, under an aiding and abetting theory. The aiding and abetting statute punishes anyone “concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission . . . as if he had directly committed such offense.” MCL 767.39. To convict a defendant under this theory, the prosecution must show that:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation marks and citation omitted; alteration in original).]

“The requisite intent for conviction of a crime as an aider and abettor is that necessary to be convicted of the crime as a principal.” *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001) (quotation marks and citation omitted). “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). “Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show that a defendant entertained the requisite intent.” *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010).

A. ASSAULT BY STRANGULATION

Barber argues that the trial court erroneously denied his motion for a directed verdict on the assault by strangulation charge because the prosecution failed to introduce sufficient evidence that Barber intended for Wise to strangle Trooper Guild. Assault by strangulation entails “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.” MCL 750.84(2). Barber does not contest that Wise choked Trooper Guild, blocking his airway, and that Barber twice punched the trooper while Wise held the trooper in a chokehold. This evidence was sufficient to allow a rational trial of fact to conclude beyond a reasonable doubt that Barber knew that Wise intended to impede the trooper’s normal breathing by applying pressure on the trooper’s throat or neck. Therefore, the trial court did not err when it denied Barber’s motion for a directed verdict on the assault by strangulation charge.

B. ASSAULT WITH INTENT TO MURDER

Barber argues that the trial court erroneously denied his motion for a directed verdict regarding the AWIM charge because the prosecution did not introduce sufficient evidence of his

intent to harm Trooper Guild.² The elements of AWIM, MCL 750.83, are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (quotation marks and citation omitted). “The intent to kill may be proven by inference from any facts in evidence.” *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). For example, intent to kill may be inferred “from the use of a dangerous weapon.” *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993).

The prosecution produced evidence that Barber attempted to remove Trooper Guild’s firearm from his holster. At that instant, Trooper Guild believed that the firearm was in the holster and that he faced the risk of being shot with his own firearm if Barber was successful in removing it from its holster. Because the firearm was not in the holster, Barber was not successful in obtaining the weapon. Viewed in the light most favorable to the prosecution, this evidence was sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that Barber grabbed at Trooper Guild’s firearm holster with the intent of obtaining the firearm and shooting the trooper while Wise choked the trooper.

Furthermore, even if Barber’s attempt to obtain Trooper Guild’s firearm was not sufficient to support a conviction of AWIM, Barber punched the trooper twice while Wise was choking the trooper. Although Barber argued that he only punched the trooper in the chest, the trooper testified that Barber punched him in the face. Regardless of which version of the facts the jury believed, it was undisputed that Barber punched the trooper while he was being choked. A forensic pathologist testified that punching someone in the face would make that person more susceptible to the effects of choking or strangulation. The pathologist further testified that Trooper Guild would have likely died if Wise had continued to choke him for only two minutes and that Barber increased the likelihood of the trooper’s death by punching him in the face while he was being choked. The jury could have accepted the trooper’s testimony that Barber punched him in the face while he was being strangled and could have reasonably viewed this action as an attempt by Barber to assist Wise in killing the trooper by strangulation. For these reasons, the trial court did not err when it denied Barber’s motion for a directed verdict.

III. DOUBLE JEOPARDY

Barber argues that his convictions for assault by strangulation and AWIGBH violate the constitutional prohibition against double jeopardy. We disagree. Barber did not raise this issue at trial, so he has failed to preserve it. See *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). Accordingly, we review this unpreserved constitutional issue for plain error affecting substantial rights. See *id.* at 360.

The Double Jeopardy Clauses of the United States Constitution and Michigan Constitution protect against multiple punishments for the same offense. *People v Ford*, 262

² In his brief on appeal, Barber analyzes this issue as if the trial court decided a motion for directed verdict on the charge of AWIGBH. However, the actual issue before the trial court was whether Barber was entitled to a directed verdict on the charge of AWIM.

Mich App 443, 447-448; 687 NW2d 119 (2004). In deciding whether two convictions violate the constitutional protections against double jeopardy, the reviewing court must examine whether the two offenses involve the same elements. *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007). A defendant's conviction of two criminal offenses does not violate the constitutional protection against double jeopardy if each statute requires proof of an element that the other does not. *People v Ream*, 481 Mich 223, 236-240; 750 NW2d 536 (2008). This test focuses on the statutory elements of the crimes, not the particular facts of the case. *Id.* at 238.

Subdivision (a) of MCL 750.84(1) prohibits assault with intent to do great bodily harm less than murder, while subdivision (b) of MCL 750.84(1) prohibits assault "by strangulation or suffocation[.]" which is defined in MCL 750.84(2). A defendant may be guilty of AWIGBH without also being guilty of assault by strangulation. AWIGBH does not require strangulation, and strangulation is not the only way to assault another person. Therefore, the offenses require proof of an element that the other does not. Barber's convictions of both assault by strangulation and AWIGBH do not violate the constitutional protection against double jeopardy.

IV. VOIR DIRE

Barber argues that he is entitled to a new trial because the trial court allowed open voir dire of jurors regarding their opinions of a video of the incident that some potential jurors viewed in the news and on social media before trial. Because Barber waived appellate review of this issue, we decline to address it. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). "Where a party fails to object to the method of jury selection at trial, he has waived the issue on appeal." *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998), abrogated on other grounds by *People v Bell*, 473 Mich 275, 292-293; 702 NW2d 128 (2005). "An expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn." *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996), overruled on other grounds by *People v Harris*, 495 Mich 120, 139; 845 NW2d 477 (2014). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter*, 462 Mich at 215 (quotation marks and citation omitted). Barber expressed satisfaction with the jury that was seated, so he has waived his right to challenge on appeal the manner in which voir dire was conducted.

V. SENTENCING

Lastly, Barber challenges the trial court's sentencing decision. The trial court sentenced Barber to 10 to 15 years' imprisonment each for the assault by strangulation and AWIGBH, while the minimum sentence range for each offense is 38 to 95 months' imprisonment. The trial court sentenced Barber to 60 to 90 months' imprisonment for third-degree fleeing and eluding, whose minimum sentence range is 22 to 47 months. The trial court sentenced Barber to 60 to 90 months' imprisonment for receiving and possessing a stolen vehicle, an offense for which the minimum sentence range is 19 to 47 months. The trial court sentenced Barber to 48 to 72 months' imprisonment for assaulting and obstructing a police officer causing a bodily injury requiring medical attention, for which the minimum sentence range is 14 to 36 months. The trial court sentenced Barber to 24 to 36 months' imprisonment for attempt to disarm a police officer,

an offense whose minimum sentence range is 5 to 21 months' imprisonment. The trial court ruled that each of these sentences would be served consecutively to any sentence then being served by Barber, who was on parole when the events in this case occurred. The trial court further ruled that Barber should serve the sentence for the conviction for assaulting and obstructing a police officer causing a bodily injury requiring medical attention and all remaining sentences concurrent to each other but consecutive to the sentence on the conviction for assaulting and obstructing a police officer.

Barber argues that the trial court abused its discretion when it imposed upward departure sentences. We disagree. When a trial court departs from the sentencing guidelines, this Court reviews the departure sentence for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). When reviewing a sentence for reasonableness, this Court applies an abuse of discretion standard. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Barber argues that the trial court abused its discretion by imposing sentences that were neither reasonable nor proportionate. Barber notes that each upward departure sentence was the maximum allowed under *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), which provides that a minimum sentence cannot exceed two-thirds of the statutory maximum. Barber cites no authority for the proposition that a sentence that complies with *Tanner* is unreasonable and disproportionate simply because the minimum sentence imposed was two-thirds of the maximum sentence permitted by law. Rather, the key test in evaluating an upward departure sentence "is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Steanhouse*, 500 Mich at 472 (quotation marks and citation omitted). The trial court need only "provide adequate reasons for the extent of the departure sentence imposed" *Steanhouse*, 500 Mich at 476. "[R]elevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (citations omitted).

Barber had been convicted of ten felonies by the age of 21 and had two juvenile adjudications. Barber served prison time for a 2013 conviction of second-degree home invasion. Barber was allowed to complete boot camp for the 2013 home invasion conviction. Barber absconded from parole after completing boot camp, and he committed new criminal acts in Indiana, causing Michigan to revoke his parole and send him to prison. Barber was later paroled from that prison term and placed on parole under the supervision of Indiana authorities. Less than four months later, Barber committed the offenses in this case while still on parole. At the time of trial in this case, Barber had numerous charges pending against him, and there were several warrants for his arrest out of other jurisdictions, including an active arrest warrant out of Indiana for operating a vehicle without receiving a license. Barber was also awaiting sentencing in Indiana on a burglary conviction. The trial court considered this history, including how quickly Barber accumulated an extensive criminal record by the age of 21, as well as Barber's lack of rehabilitation, demonstrated by the ineffectiveness of prior penalties in discouraging Barber's repeated decisions to reoffend. The trial court also addressed the seriousness of the

crimes, stating that Barber committed crimes of “true brutality,” that he was “viciously attacking” the trooper, and that he showed a disrespect not only for law enforcement, but for human life. Thus, the trial court considered the seriousness of the crime and factors not considered or inadequately considered by the guidelines, and it provided adequate reasons for the extent of the departure sentences.

Barber also argues that the trial court abused its discretion when it imposed sentences consecutive to Barber’s sentence for assaulting a police officer causing injury requiring medical attention. “Whether a consecutive sentence may be imposed is a question of statutory interpretation that we review de novo.” *People v Parker*, 319 Mich App 410, 414; 901 NW2d 632 (2017). When the decision to impose a consecutive sentence is left to the trial court’s discretion, our review of that decision is for an abuse of discretion. *People v Norfleet (After Remand)*, 321 Mich App 68, 70; 908 NW2d 316 (2017).

In Michigan, “concurrent sentencing is the norm. A consecutive sentence may be imposed only if specifically authorized by statute.” *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996) (citation omitted). The statute that prohibits assaulting a police officer allows a sentencing court to impose a sentence that runs consecutively to any other sentence imposed for other offenses arising out of the same transaction. MCL 750.81d(6). Therefore, the trial court was authorized by statute to impose sentences for the remaining offense to run consecutive to the sentence for the conviction of assaulting a police officer.

Barber simply posits that “the trial court, quite literally, can never levy a more severe sentence.” However, the test is not whether some other offender could conceivably commit an offense that is worse in some regard than the criminal offenses committed by Barber. Rather, the test is whether the sentences imposed by the trial court constituted an abuse of discretion. *Babcock*, 469 Mich at 269. The trial court articulated sufficient reasons to impose consecutive sentences, including the reasons justifying the upward departure sentences. The trial court also noted that Barber successfully escaped Trooper Guild, returned to where the trooper was being strangled and was struggling to breathe, attempted to disarm the trooper of his firearm, and punched the trooper twice while he was being choked by Wise. In short, the trial court did not abuse its discretion when it imposed consecutive sentences in this case.

We affirm.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Jane M. Beckering