STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
v	No. 242359 Oakland Circuit Court
DARRYL LAMARR APPLEWHITE, Defendant-Appellant.	LC No. 2001-180618-FC

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to murder, MCL 750.83. Defendant was sentenced to thirty-five to sixty years' imprisonment for the assault with intent to murder conviction. We affirm.

Ramona Applewhite testified that, after discussing a divorce,[1] defendant put a pillow over her head while she was sleeping and started pouring hot grease on her. Ramona Applewhite also testified that she thought defendant was busting bubbles on her skin caused from the hot oil, but was actually stabbing her with a knife. Defendant claims that Ramona Applewhite went to the kitchen and got a knife, that he also got a knife, and that they were running around the house trying to stab each other. Defendant further claims that Ramona Applewhite came back to the room with a pot in her hand and that he pushed the liquid on her.

Officer Rakaman Upshaw, Lathrup Village Police Officer, testified that defendant indicated that he was not injured, but that there were some cuts on his arms. An oily substance was found on the headboard of the bed and there was blood found in the bed. William Russette, a paramedic/firefighter with the Southfield Fire Department, testified that Ramona Applewhite had second and third-degree burns on her face and upper body, and stab wounds. Dr. Patrick Pettengill, an emergency medic with William Beaumont Hospital in Royal Oak, explained that there were significant burns to Ramona Applewhite's face, neck and chest, and that fifteen to twenty percent of her total body surface was burned.

[1] Apparently, defendant and Ramona Applewhite were actually divorced in 1997, but they were living together and Ramona Applewhite thought they were still married.

Defendant's first issue on appeal is that the trial court violated his due process right by refusing him the opportunity to present evidence that would have established that the victim previously used hot water on another individual during an argument. This could have been used as evidence to show a plan or scheme of using of hot liquids by the victim pursuant to MRE 404(b). We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888, on second remand 242 Mich App 656; 620 NW2d 19 (2000). A preliminary issue of law regarding admissibility based upon construction of a constitutional provision, rule of evidence, court rule or statute is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a), *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Thus, reversal is required only if the error was prejudicial. *People v McLaughlin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234433, issued 9/25/03) slip op p 7. An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), remanded 465 Mich 928; 639 NW2d 255 (2001), clarified on remand 249 Mich App 728; 643 NW2d 607 (2002).

Defendant argues that trial court should have admitted evidence that Ramona Applewhite had used hot water in a prior dispute because it evidenced a plan or scheme of using hot liquid, supporting defendant's theory that Ramona Applewhite had initially assaulted him. During the trial, after the prosecution closed its case, defendant raised the issue of additional evidence. Specifically, defense counsel stated:

> There was an additional factor that I thought would merit some discussion with the Court and my adversary as it relates to the defense, and that is, during the course of the break I learned from Tameka Applewhite, the sister of defendant, that there had been an occasion back in '97 or '98 where she was indeed visiting and staying with the complainant, Ms. Applewhite.
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> And on this particular visit, a young lady by the name of Nina was there, and there was a heated exchange between Nina and Ms. Applewhite regarding Nina's alleged relationship with Mr. Applewhite, Nina being an extremely close friend of Ramona Applewhite.
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> During the course of the altercation it became more exacerbated or more intense, resulting in allegedly Ramona Applewhite heating some water and throwing that water on that particular female, Nina.

> I make, as an offer of proof, that particular protestation, Judge, relying upon, indeed, the theory that if in fact the witness, Ms. Applewhite, cannot recall the circumstances under which the particular oil or heated substance was thrown on her, that it may be that that oil had been in her hand first, since she can't recall, and ultimately into his hand, and therefore and thereby ultimately spilled or thrown on her.

The prosecution responded that the testimony from Ramona Applewhite was that defendant took a pillow off of her head and poured oil on her and that whether she heated water three or four years prior in a dispute with another individual is a collateral matter that is not relevant. Then, defense counsel responded that the evidence was relevant to defendant's claim of self-defense. The trial court denied admission of the evidence, at the time, stating:

> At this time I feel the matter is totally collateral and not relevant. She did not throw it on the defendant or attack him, but apparently and allegedly in a jealous rage. So I would not allow that testimony at this point in time. . . . If necessarily we need rebuttal and sur rebuttal, we'll have to do whatever occurs, however the testimony breaks down. . . . If it ultimately develops in the testimony, then that's different.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin, supra* at 58. A party seeking admission of excluded evidence is obliged to make an offer of proof to provide the trial court with an adequate basis on which to make its ruling and to provide this Court with the information it needs to evaluate the claim of error. MRE 103(a)(2). Defendant made an offer of proof sufficient for us to evaluate the claim.

Defendant argues that testimony regarding Ramona Applewhite's behavior of using hot liquid during an argument is admissible under MRE 404(b)(1) because it evidenced a plan or scheme and would have helped the jury to understand how she might come to have a pot of boiling oil during an argument with defendant. MRE 404(b) governs admission of evidence of bad acts, and provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

> crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The rule is not limited to a criminal defendant's acts, as it includes the acts of any person, including the victim. See, generally, *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). The court may delay its ruling on the admissibility of bad acts evidence until the presentation of proofs, to enhance its ability to assess the pertinent considerations. See *Sabin, supra* at 58.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *Starr, supra* at 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *Crawford, supra* at 383.

We find that the trial court did not abuse its discretion in denying admission of the testimony regarding an alleged prior instance of Ramona Applewhite pouring hot water on another individual.[2] Evidence that several years earlier, Ramona Applewhite had poured hot water on an individual other than defendant, prior to defendant's testimony, is at best marginally relevant. There must be such a concurrence of common features so that the act in question and the other prior acts are logically seen as part of a general plan, scheme, or design. See, generally, *Sabin, supra* at 63-66. There is no indication of any kind of manifestation of a common plan or scheme by Ramona Applewhite. We find the offer of proof insufficient to support an inference of a common scheme or plan by Ramona Applewhite. Further, when defense counsel attempted to admit this evidence, defendant had not yet testified. The trial court seemed to indicate that if defense counsel better developed a plan or scheme, he may admit the evidence. After defendant testified, defense counsel affirmatively indicated to the trial court that he had no further witnesses. Then, after the prosecution's rebuttal, the trial court asked if defendant had sur

[2] We note that prior acts of violence by the victim may be relevant to a claim of self-defense. *Rockwell, supra* at 408-410. The prior acts of violence are relevant to the defendant's ability to present important evidence regarding his motive and intent. MRE 404(b); *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). The trial court may exercise its discretion under MRE 403 in deciding how much of this evidence to admit. *Id*. However, as with other forms of evidence, the party introducing prior bad acts evidence must have "personal knowledge of the matter." MRE 602. There is no indication in the offer of proof that defendant had personal knowledge, and the record indicates otherwise. The trial court informed defense counsel that if he witnessed Ramona Applewhite throwing water it would be valid because it would go to his state of mind, but if he did not witness it, the statement would be hearsay. Defense counsel did not ask if defendant witnessed Ramona Applewhite throwing water on an individual. In addition, we need not address this issue as defendant does not raise this argument on appeal. See, generally, *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

rebuttal and defendant again indicated that he did not. There is only a general similarity between Ramona Applewhite's prior act and the current act alleged by defendant and not enough to establish a common plan, scheme, or system. See *Sabin, supra* at 63-64. The trial court did not abuse its discretion in denying admission of testimony that Ramona Applewhite had poured water on an individual a few years prior to the incident in question.[3]

Defendant's final issue on appeal is that the trial court violated his due process rights by upwardly departing the sentencing guidelines range based on characteristics already taken into account in determining the appropriate sentence range. We disagree.

The guidelines, set forth at MCL 777.1 *et seq*., apply to enumerated offenses committed on or after January 1, 1999, and, thus, apply to the offense in question that occurred in September 2001. MCL 769.34(2); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000) (*Babcock I*), after remand 250 Mich App 463; 648 NW2d 221 (2002) (*Babcock II*), reversed on other grounds 469 Mich 247; 666 NW2d 231 (2003) (*Babcock III*), on second remand __ Mich App __; __ NW2d __ (Docket No. 235518, issued September 25, 2003) (*Babcock IV*). The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock III, supra* at 259 n 13, 272. The record reveals that defendant's sentencing guidelines range for assault with intent to murder conviction was 126 months to 210 months' imprisonment. The trial court upwardly departed and sentenced defendant to thirty-five to sixty-years' imprisonment.

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, appearance in propria persona, or religion. MCL 769.34(3); *Babcock III, supra* at 258 n 12. Nor may a court base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. *Id.* Factors meriting departure must be objective and verifiable, must keenly attract and irresistibly hold the court's attention, and must be of considerable worth. *Babcock III, supra* at 257-258. A substantial and compelling reason "exists only in exceptional cases." *Id.* at 258, quoting *Fields, supra* at 62, 67-68. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock III, supra* at 264. If the sentence constituted a departure from the guidelines range and the reasons were not articulated, this Court may not independently determine that a

[3] Moreover, even if there was error, examining the nature of the error in light of the weight and strength of the untainted evidence, we conclude that it does not affirmatively appear that it is more probable than not that the error was outcome determinative. See *Smith, supra* at 680.

sufficient reason exists, but must remand for rearticulation or resentencing. *Id.* at 258-259. If the reasons articulated by the trial court are partially invalid and this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent regardless of the invalid factors, it must remand for rearticulation or resentencing. *Id.* at 260.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination by the trial court subject to review for clear error and the determination that the factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* at 264-265; *Abramski, supra* at 74. The determination that the factor or factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion and the extent of the departure is reviewed for an abuse of discretion. *Id.* In terms of sentencing departure review,"[a]n abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock III, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The trial court, on the record, stated the following reasons for its upward departure from the guidelines:

> The statute does allow the Court pursuant to MCL 769.34(3), that I may in fact have a significant upward departure as provided for.
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> The Court is always extremely hesitant in entering into that, primarily because I generally rely upon the guidelines and sentence within the guidelines. I've departed the guidelines below the guidelines when I felt they were wrong; I have departed guidelines when they didn't fully cover the circumstances of a particular case.
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> Now, as a very practical matter, in connection with this circumstance, I think the arguments made by [the prosecution] are very cogent, in the sense that there are a number of factors that do not really contemplate the severity of this particular crime that was committed.
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> The concept, by the way, of perjury, I will not consider. I don't think it [sic] relevant that the jury chose not to believe him. It was a defense and they chose not to believe it, but in fact believed the prosecution's case.
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> But there are factors that bothered me. The stabbing in connection with this. This was not just one stab, which is an impulse stab, it was multiple stabs. I don't think the guidelines fully contemplate that particular fact.
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> I think the injuries sustained by the complainant are horrendous, and they will in fact be with her the rest of her life. I think that when this act occurred, and I have great empathy for you, Mr. Applewhite, that you, in this one act of an evening, which you had every intent to do, in fact destroyed a family. It destroyed your mother and her relationship, your family. It destroyed the victim in connection with this matter. And the children will always, throughout their life, be affected by what occurred on this particular evening.

> This simple act, as pointed out by [the prosecution], and this is said without any rancor or any attempt to have any emotion, of taking the time to boil oil and then subsequently pour it on another person, is totally beyond the concept that this Court can say. If you were angry over something, the manner in which you expressed it is perhaps one of the most vicious acts this Court has witnessed during its 28 years as a judge.
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> I am satisfied that the logic, and Ms. Peters [of the probation department] constantly chastises this Court for failing to follow guidelines in connection with recommendations, but the wisdom that was exhibited by the recommendation of the Probation Department, I feel has logic, and fall into substantial and compelling.
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> The guidelines stop, really, at 100. That's the max which you would use in contemplating. In this case they arrived at a total of 200. The sentence would have been 17 and a half years. The suggestion is that the minimum - - that would be the minimum - - the maximum sentence under the minimum should be 35 years.
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> I can understand the logic of it. I am going to sentence him to the minimum of 35 years, to a maximum of 60 years in prison, feeling that there are substantial and compelling reasons to exceed the guidelines for the reasons the Court has stated on the record.

Our Supreme Court in *Babcock III, supra*, provides that, "[a] trial court must articulate on the record a substantial and compelling reason for its particular departure, and explain why this reason justifies that departure." *Id.* at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000). A majority of justices in *Babcock III, supra*, also held that:

> [I]t is not enough that there exists some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure.
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> * * *
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> Further, the trial court must go beyond articulating a substantial and compelling reason for some departure. Rather, the trial court can depart from the guidelines range only "if the court has a substantial and compelling reason for *that* departure. . . ." MCL 769.34(3) (emphasis added). [*Id*. at 258-259.]

This Court is responsible for determining whether the trial court articulated a substantial and compelling reason to justify its departure from the guidelines range. *Id*. at 261-262.

We find that the trial court adequately articulated substantial and compelling reasons for its departure and adequately explained its reasons for the particular departure. See *Babcock III, supra* at 272. In addition, we are satisfied that the majority of the factors articulated by the trial court are objective and verifiable, and that the trial court departed to the extent it did based upon these objective and verifiable factors. See *id*. at 258-260, 272. The trial court recognized, and stated as a reason for departure, that the guidelines did not fully take into account the multiple stabs, which is objective and verifiable factor.[4] The trial court also recognized, and stated as a reason for departure, that the guideline factors did not adequately take into account the injuries sustained by Ramona Applewhite, which were objective verifiable.[5] And, the trial court recognized, and stated as a reason for departure, that defendant had an OV score that was double the highest score recognized.[6] These factors "keenly" and "irresistibly" grab our attention and they are of "considerable worth" in deciding the length of the sentence. *Id.* at 272. We note that there may have been subjective factors taken into account that were not objective and verifiable.[7] Nevertheless, after reviewing the record in this case and examining the sentencing transcript, we are certain the trial court would have departed from the guidelines range by the amount that it departed on the basis of the objective and verifiable factors alone. See *id*. at 258-260.

The trial court does upwardly depart from the guidelines, in part, for reasons already taken into account by the sentencing guidelines. But a trial court may base a departure on an offense characteristic that is already taken into account, if it finds that the characteristic has been given inadequate or disproportionate weight. *Id*. at 267-268. The trial court specifically found, in the present case, that the guidelines did not adequately take into account certain characteristics of the offense. The Legislature has clearly authorized sentencing judges to find that a reason already accounted for in the guidelines has been given inadequate or disproportionate weight and, therefore, these factors can be considered a substantial and compelling reasons to depart from the recommended guidelines range. *People v Lowery*, 258 Mich App 167; ___ NW2d ___ (2003); *People v Deline*, 254 Mich App 595, 598; 658 NW2d 164 (2002).

In applying the *Babcock III* standard of review, we conclude that the trial court did not clearly err in its factual determinations, its decision to upwardly depart from the guidelines was

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[4] Twenty-five points is scored under OV 1 if a victim is stabbed with a knife, but this offense variable does not take into account multiple stabs. See MCL 777.31.

[5] We note that the physical and psychological injuries sustained by Ramona Applewhite were taken into account in scoring OV 3 and OV 4, but also note that the trial court recognized that the sentencing guidelines factors did not contemplate the severity of this particular crime. See MCL 769.34(3); *Babcock III, supra* at 258 n 12.

[6] For a Class A offense, such as assault with intent to murder, MCL 750.83, the maximum offense level, OV IV, is for offense variable scores of one hundred points and above. See MCL 777.62. Defendant's OV score was two hundred.

[7] The trial court mentions some subjective factors when it discusses its reasons for departure, but does not seem to be stating those reasons as the basis for its upward departure.

based on objective and verifiable factors, and it did not abuse its discretion in concluding that the totality of the circumstances in the present case were not adequately incorporated into the guidelines and, thus, constituted substantial and compelling reasons to depart upward from the sentencing guidelines. Each of the objective and verifiable reasons stated by the trial court on the record, given the facts of this case, " keenly" and "irresistibly" grab our attention and are of "considerable worth" in deciding the length of the sentence. See *Babcock III*, *supra* at 272. Lastly, based on the facts and circumstances of the crime, the sentence was proportionate to defendant's conduct and criminal history. See *id*. at 263-264.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell