STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311755 Wayne Circuit Court
TAYWON KESHAUN WILLIAMS, Defendant-Appellant.	LC No. 11-008346-FH

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, two counts of torture, MCL 750.85, two counts of unlawful imprisonment, MCL 750.349b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of life with the possibility of parole for the murder conviction,[1] 30 to 45 years each for the robbery, assault, and torture convictions, and 10 to 15 years for each unlawful imprisonment conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and for the reasons set forth below, we affirm.

Defendant's convictions arise from his participation with six other assailants in a criminal episode to rob Jeffrey Herron and William Abrams during a prearranged drug transaction, which ultimately led to the death of Abrams and the shooting assault of Herron on August 10, 2011, in the city of Detroit. Herron had known defendant and codefendants Tony Horton, Tonyea Horton, Terry Dumas, and Christopher Lewis Herron for several years from their eastside neighborhood. Herron, acting on behalf of himself and Abrams, arranged to purchase a large sum of Oxycontin pills from Tony. The next day, Tony summoned Herron to his house, claiming to have acquired the requested drugs. Herron went to the front door, leaving Abrams in the car, and Tony told Herron to have Abrams join them. After both victims were inside, Herron noticed that the pills were not visible and inquired about them. At that moment, defendant and four other assailants emerged from hiding and ambushed the victims. They were armed with

[1] Defendant was 17 years old when the crimes were committed.

firearms and wearing rubber gloves. The victims were held at gunpoint as they were robbed, ordered to the floor, and bound with rope and duct tape. Herron testified that defendant and codefendant Lewis tied him up, and that defendant put duct tape around his head to cover his mouth. Lewis testified at trial that he tied up Herron, and defendant tied up Abrams and taped both victims' mouths. Herron testified that he and Abrams thereafter remained captive for several hours, during which they were hogtied with their hands and feet fastened behind their backs, kicked, taunted, and threatened. Eventually, the victims were "wiped down," carried from the house, and placed in the rear of Herron's car. Herron testified that defendant used a rag to wipe the tape on Herron's head. Tony, accompanied by one other assailant, drove the victims from the east side to the west side of Detroit, parked Herron's car on a side street, open the backdoor, and opened fire on both victims, killing Abrams. Herron, who had been shot in the head and chest, "play[ed] dead" until Tony and his associate left the scene.

After the police responded, Herron identified defendant as a participant in the criminal enterprise. The police found defendant in the Horton house. Defendant gave statements to the police in which he admitted tightening the rope on Abrams's hands and feet and receiving $30 of an expected $250 for his part in the criminal episode. Defendant asserted, however, that the victims were already on the floor and bound when he arrived at the house, and that he left immediately after adjusting the rope on Abrams. At trial, the defense attacked the credibility of the prosecution witnesses and the police investigation.

On appeal, defendant raises three issues of ineffective assistance of counsel and argues that the trial court failed to cite objective and verifiable factors in support of its decision to depart from the sentencing guidelines ranges for the robbery, assault, and torture convictions, and that the extent of the trial court's departure is an abuse of discretion.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Because defendant failed to raise any of his ineffective assistance of counsel claims in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review of these claims is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. Defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012). "[A] reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range

of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *Id.* at 22-23.

A. COUNSEL'S FAILURE TO CHALLENGE EXPERT TESTIMONY

Defendant first argues that defense counsel was ineffective for failing to object, or move for a hearing pursuant to *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), regarding Michigan State Police forensic scientist Guy Nutter, who testified that, based on the theory of "fracture match" analysis, pieces of duct tape recovered from the victims originated from a roll of duct tape found inside the Horton house. We disagree.

"[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires "a court evaluating proposed expert testimony [to] ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012). This inquiry, however, is a flexible one and must be tied to the facts of the particular case; thus, the factors for determining reliability may be different depending upon the type of expert testimony offered, as well as the facts of the case. *Kumho Tire Co v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999); *Daubert*, 509 US at 591.

Defendant has not overcome the strong presumption that trial counsel's performance was within the range of reasonable professional conduct. *Gioglio*, 296 Mich App at 22. A witness is qualified to testify as an expert based on knowledge, skill, experience, training, or education. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986); see also *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). Nutter identified himself as a forensic scientist employed by the Michigan State Police Trace Evidence Unit. He had received specialized training in trace evidence and indicated that he has fracture match experience, involving mostly tape. Defendant has not directed this Court's attention to any Michigan case where the fracture match theory has been rejected, thereby signaling that it was objectively unreasonable for counsel not to challenge Nutter's testimony in that area. Moreover, the level of Nutter's expertise was a consideration that went to the weight of his testimony, not its admissibility. See *Whitfield*, 425 Mich at 123. Defendant's argument that Nutter's testimony was merely nonprofessional "puzzle-fitting" ignores that there were aspects of Nutter's testimony, based on his special knowledge, that helped the jury with information that an average juror does not have.

For example, average jurors do not have the benefit of microscopes, nor would most think to, or have the ability to, disassemble duct tape for comparison by removing the adhesive over the cloth scrim fabric to examine the item better. Nutter provided expertise on what constitutes a "match" and the strength of any match based on the Association Scale for Trace Evidence.

Moreover, given the ostensible minimal weight of the fracture match evidence presented at trial, no reasonable likelihood exists that defendant would not have been convicted but for defense counsel's inaction. There is no reasonable probability that the fact that duct tape recovered from the victims matched a roll of duct tape found at the Horton house caused defendant's convictions. That evidence supported an inference that the duct tape recovered from the victims originated from the Horton house. However, it did not assist the jury in determining whether *defendant* was involved in the offense or what role he may have played. The crucial evidence against defendant was the testimony of Herron and Lewis, as well as defendant's own statements. Both Herron and Lewis testified that defendant was among the group of assailants who ambushed, captured, and robbed the victims at gunpoint. Herron, Lewis, and defendant had known each other for several years, so Herron and Lewis could easily identify defendant. Herron and Lewis testified that defendant helped tie up the victims and put duct tape around their heads to cover their mouths. Herron testified that defendant continued to act in concert with his associates as the victims were confined, taunted, and threatened for several hours. Defendant then put on rubber gloves and assisted his associates in "wiping down" the victims before they were placed in Herron's car and driven to the location where they were shot. Defendant was in the house when the police executed the search warrant and gave statements that revealed his involvement in the criminal episode. Given this evidence, there is no reasonable probability that the "fracture match" testimony affected the outcome of the trial.

B. FAILURE TO REQUEST A *WALKER* HEARING

Defendant next argues that defense counsel was ineffective for failing to object to the trial court admitting defendant's statements to the police without first holding a *Walker*[2] hearing and viewing the video recording of defendant's interview. We disagree.

It is important to emphasize that defendant is not challenging the trial court's ruling, denying his motion to suppress the statements; instead, the crux of defendant's argument appears to be that the trial court denied defendant's motion to suppress his statements to the police "without [defense counsel] presenting any evidence or any argument." Despite defendant's suggestion to the contrary, the record clearly indicates that the trial court had in its possession the video recording of defendant's police interview and reviewed it. Further, the court was aware that the defense was relying on the video recording to support the motion and, based on defendant's written motion and the attached memorandum of law, the court was aware that defendant was arguing that his statements were not voluntary. On the date of the scheduled evidentiary hearing, the attorneys acknowledged in court that they had not yet viewed the video recording because of a technical difficulty, so the hearing was adjourned to give the attorneys an opportunity to view it. The trial court, though, stated that it was able to view the video and

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

offered to allow the attorneys to use its laptop computer if their technical issues could not be resolved. At the final pretrial conference, which occurred days before trial and after counsel had the opportunity to view the video recording, defense counsel suggested that he had seen the video[3] and requested only "a ruling" (and not a supplemental hearing) on the motion, seemingly as a matter of housekeeping.

Given that it was established that the trial court had reviewed the entirety of the videotaped statements already, it was reasonable for counsel to not request any additional hearings, unless other evidence were to be presented. Clearly, from defense counsel's actions, it can be inferred that he thought that no other evidence was relevant to the issue, and such decisions are matter of strategy that are given wide discretion. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Thus, defendant failed in overcoming the sound presumption that trial counsel employed reasonable trial strategy. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Further, defendant has failed to establish how the trial court would have reached a different or more favorable result if counsel had requested a supplemental or more "formal" hearing. Importantly, defendant does not identify any new evidence outside the videotapes that counsel should have been presented, had such a hearing taken place. Accordingly, defendant cannot establish that the trial court would have reached a different conclusion if it had reviewed the same videotape in an alternate hearing, which means that defendant has failed to establish the requisite prejudice needed to prove the ineffective assistance of counsel. See *Armstrong*, 490 Mich at 290.

C. FAILURE TO OBJECT TO MISSTATEMENT OF THE LAW

We also reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's statement of the law regarding aiding and abetting felony-firearm and for failing to request a curative instruction to explain the required elements of felony-firearm under an aiding and abetting theory. During closing argument, the prosecutor made the following remarks regarding defendant's culpability for felony-firearm:

> [A]s an aider and abettor you can be convicted of carrying a firearm, or in this case felony firearm[], where you helped somebody else carry a firearm. It doesn't mean you have to hold the gun for them. Remember what his role was. He was one of the two men who tied these men up.
>
> If the other ones had stood over and held them down by pointing the guns at them and had to tie them up, they'd have to put the gun down, right, so by tying them up is aiding and abetting the others in the possession of a firearm. That's how aiding and abetting works.
>
> Under the law, the Judge is going to read it to you, aiding and abetting can be as simple as encouragement. It's not mere presence. It's not just standing

[3] Defense counsel acknowledged at the May 17, 2012, pretrial conference that the technical "problem has been corrected."

> there, okay, that's not it. But, it could be as yeah, get him, go do that. It could be as simple as that. It could be as simple as one guy firing up the chain saw, and the other guy sitting on the couch grinning—encouragement, okay.

Prosecutors may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Dobek*, 274 Mich App at 66. "Under the aiding and abetting statute, MCL 767.39, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in another carrying or having possession of a firearm during the commission or attempted commission of a felony." *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (quotation marks and brackets omitted). Here, the prosecutor's theory was that, although defendant did not possess a firearm, he performed acts and gave encouragement that assisted his accomplices in possessing firearms during the criminal enterprise. The prosecutor argued his theory that as defendant's accomplices held the victims at gunpoint, defendant help tie up the victims, which encouraged and assisted his accomplices' possession of the firearms. This argument was not improper. Consequently, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Moreover, to the extent that the prosecutor's argument could be perceived as improper, an erroneous legal argument can be cured if the jury is correctly instructed on the law. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). In this case, before the presentation of any evidence, the trial court instructed the jury that the court was responsible for instructing on the law, and that the jurors must accept the law as it gave it to them. Following closing arguments, the trial court instructed the jury that the lawyers' comments are not evidence, and reminded the jurors of their oath to return "a true and just verdict based only on the evidence and [the court's] instructions on the law." The court also instructed the jury that it was the court's "duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say." The court reiterated to the jury that "your job is . . . to apply the law as I give it to you." The court thereafter instructed the jury on felony-firearm and aiding and abetting, and defendant does not dispute that the trial court properly instructed the jury on these concepts. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

II. THE TRIAL COURT'S SENTENCING DEPARTURE

In his last issue, defendant argues that the trial court failed to cite objective and verifiable factors in support of its decision to depart from the minimum sentencing guidelines range of 135 to 225 months for the armed robbery, assault, and torture convictions. In reviewing a departure from the sentencing guidelines range, whether a factor that may justify an upward departure exists is a factual determination reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Whether a factor is objective and

verifiable is reviewed de novo, while whether a factor is a substantial and compelling reason to depart from the guidelines range is reviewed for an abuse of discretion. *Babcock*, 469 Mich at 265, 273; *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). This Court also reviews the amount of the departure for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The trial court abuses its discretion when "the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

A trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3); *Babcock*, 469 Mich at 272. "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The phrase "substantial and compelling" constitutes strong language intended to apply only in "exceptional cases." *Babcock*, 469 Mich at 257-258. A reason for departure is substantial and compelling where it is "objective and verifiable" and "of considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab[s] the court's attention." *Smith*, 482 Mich at 299. A reason is "objective and verifiable" where "the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Smith*, 482 Mich at 300, 305.

In this case, the trial court's sole articulated reason for departure was that the guidelines range did not adequately account for defendant's high offense variable (OV) score. The trial court stated:

> Here the number of points in total for the offense variable is 355 points, which substantially exceeds 100 points by 255 points. So, it's more than triple, and under those circumstances I find that because the Defendant substantially exceeded the maximum allowable points in the applicable grid, 100, the Defendant's offense characteristics are given inadequate weight. That I find to be a substantial and compelling reason for departing from the guidelines, and I will depart upwardly on the armed robbery charges.
>
> So, on the armed robbery charge, the sentence will be thirty to forty-five years on each armed robbery count.
>
> Now, the other offenses, there are two other offenses, one Count of assault with intent to murder. The guidelines, the same grid for [armed robbery] applies to the assault with intent to murder, that same A Grid.
>
> Again, the score would come out the same, the minimum range, and for the same reasons as I articulated being substantial and compelling for an upward departure on the armed robbery Counts, I will also make it the [same] upward

departure, thirty to forty-five years on the assault with intent to murder, and the same for the two torture Counts.

As the trial court appropriately noted, defendant's OV score exceeded the 100-point maximum score contemplated in the sentencing grid. This fact is objective and verifiable and constitutes a substantial and compelling reason to support an upward departure. See *id.* at 308-309; *People v Stewart*, 442 Mich 937, 937-938; 505 NW2d 576 (1993).

Defendant, however, claims that the trial court failed to "justify why it chose the particular degree of departure." *Smith*, 482 Mich at 318. Our review of the record leads us to conclude otherwise. The court, in imposing a minimum sentence of 360 months, which exceeded the top end of the guidelines range of 225 months, noted that defendant's OV score of 355 was "more than triple," and 255 points over, the maximum score of 100 points contemplated on the sentencing grid. Thus, the court did not rely on the fact that defendant's score merely exceeded the 100-point maximum but, instead, noted the substantial degree that the score exceeded that maximum. The court further explained that because of the inability of the guidelines grid to consider defendant's particular OV score, his OV score consequently was given inadequate weight. Accordingly, we are satisfied that the trial court "explain[ed] why the substantial and compelling reason or reasons articulated justif[ied] the minimum sentence imposed." *Id.*

Defendant avers that, even if the trial court did not fail to justify the reason for the sentencing departure, the resulting sentence was not proportional. "[T]he key test of proportionality is not whether the sentence departs from or adhere to the recommended range, but whether it reflects the seriousness of the matter." *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997) (quotation marks omitted). Defendant argues on appeal that his sentence was not proportional because his sentences were higher than that of another codefendant. This argument misses the mark. First, defendant fails to appreciate the "seriousness" of the conduct of which defendant was convicted. It is without dispute that the conduct involved here was more heinous and serious than a garden-variety armed robbery. The conduct involved luring the victims to a house, robbing them, hogtying them, torturing them, wiping the victims down to remove evidence, throwing them in the back of a car, driving them across town, and eventually shooting them. Second, the codefendant received his sentences as a result of entering into a plea

deal with prosecutors. It is inappropriate to compare sentences between disparate defendants, when one gave assistance to the prosecution and the other did not.[4]

Affirmed.

/s/ Pat M. Donofrio
/s/ Michael J. Kelly

[4] Further, it is not apparent on this record what that other codefendant's OV and PRV scores were, which, again, makes such comparisons not appropriate. And if comparing different codefendant's sentences were appropriate, then the fact that codefendant Tony also received 30-to-45 year sentences for his robbery, assault, and torture convictions would make defendant's sentences proportional under his position.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311755 Wayne Circuit Court
TAYWON KESHAUN WILLIAMS, Defendant-Appellant.	LC No. 11-008346-FH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's decision to affirm defendant's convictions. I also agree that the trial court articulated substantial and compelling reasons justifying a departure sentence. "However, the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008) (emphasis in original). In *Smith*, the Supreme Court cautioned that

> if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id*. at 304.]

The trial court's articulation must include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311.

The trial court failed to offer an explanation for its decision to impose a minimum sentence of 360 months for the armed robbery, assault, and torture convictions. Although the trial court detailed substantial and compelling reasons warranting a departure, it neglected to offer any explanation "why the substantial and compelling . . . reasons articulated justify" the particular sentence imposed. *Id.* at 318. The sentencing guidelines envision that the top of defendant's minimum sentence range equaled 225 months. The 360-month minimum term imposed by the trial court represented a 50% departure. In pronouncing defendant's departure sentence, the trial court made no effort to justify or explain the extent of the departure. Based on the record before this Court, the trial court simply picked a number out of the air.

"[T]he Legislature's purposes in enacting the sentencing guidelines—in particular the attainment of reasonably uniform and proportionate criminal sentences—can only be achieved if the guidelines are understood to mean what they say." *Id.* at 319-320 (MARKMAN, J., concurring). While a departure sentence in this case was justified, the reasonableness of the sentence chosen depends on the trial judge's explanation for imposing an extra 11.25 years' imprisonment, as opposed to an additional 5 years. Just as this Court may not substitute its own reasons warranting a sentence departure, *People v Babcock*, 469 Mich 247 258-261; 666 NW2d 231 (2003), *Smith* prohibits appellate courts from justifying the extent of a particular departure when the sentencing court has failed to do so. 482 Mich at 304, 318. In light of the trial court's lack of explanation for selecting the particular sentence imposed, one which substantially exceeded the minimum sentence dictated by the guidelines, I would remand for resentencing.

/s/ Elizabeth L. Gleicher