STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2006
v	No. 260727 Ionia Circuit Court
HALBERT CROMPTON, Defendant-Appellant.	LC No. 04-012744-FC

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of attempted armed robbery, MCL 750.92; MCL 750.529, and possession of marijuana, MCL 333.7403(2)(d). According to the judgment of sentence ultimately entered in this case, defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 15 to 60 years on the attempted armed robbery conviction[1] and 224 days on the marijuana possession conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Defendant first claims there was insufficient evidence to satisfy the "armed" element of his attempted armed robbery conviction. We disagree. To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, and decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

At the time of the offense[2], the elements of armed robbery included "(1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) defendant was armed with a weapon as described in [MCL 750.529]." *People v Allen*, 201 Mich App 98, 100; 506 NW2d 869 (2003). MCL 750.529 then included in the scope of "being armed" having "any

[1] As will be addressed below, the trial court actually stated at the sentencing hearing that it was sentencing defendant to 15 to 30 years on the attempted armed robbery conviction.

[2] MCL 750.529 was amended by 2004 PA 128 effective July 1, 2004, two days after the commission of this offense.

article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon[.]" Although defendant was convicted of *attempted* armed robbery, his argument effectively presumes that he must have been "armed" within the meaning of the armed robbery statute at the time of the incident to be guilty of that crime. We assume, without deciding, that this is accurate. Nevertheless, a concealed hand held so as to resemble a pistol may satisfy the "armed" element of armed robbery. *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985). Such a concealed hand is especially relevant to that element where its claimed character as a weapon is further supported by gestures or verbal indications or threats. *People v Jolly*, 442 Mich 458, 469-470; 502 NW2d 177 (1993). But a jury must be cautioned that the subjective belief of a victim that a robber is armed is insufficient on its own, because "that belief must be induced by the use or fashion of 'any article' with which the assailant is armed." *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981).

Defendant in this case not only held his hand in his pocket in such a fashion to suggest that he could have a gun, but also announced that he was engaged in a "holdup," a term commonly associated with armed robbery using a gun. Clearly, where one places a hand in a pocket in such a manner that suggests he has a gun and further reinforces that notion with an announcement of an intention to commit an armed robbery, sufficient evidence exists to consider that person to be armed. *Jolly*, *supra* at 469-470. Therefore, there was sufficient evidence to establish any "armed" element of attempted armed robbery.

Defendant also argues that the trial court's jury instruction regarding the armed element misstated the law. We disagree. The trial court instructed the jury that satisfaction of this element required: "That at the time of the assault the defendant was armed with any object used or fashioned in a manner to lead [the victim] to reasonably believe it was a dangerous weapon." This is an almost verbatim recital from the language of the statute itself (with the victim's name inserted), which includes in the definition of "being armed" having "any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon[.]" MCL 750.529. Therefore, it does not require reversal because it correctly stated the law, was not misleading, and "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant further vaguely argues that certain prosecutorial argument related to this matter incorrectly stated the law. However, this claim is not properly presented for review because it is not within the scope of defendant's statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Further, defendant's argument, consisting of a conclusory assertion that the prosecutor's remarks incorrectly stated the law, constitutes an abandonment of the question by failing to properly argue its merits. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). In any event, the prosecutorial argument in question essentially amounted to emphasizing that defendant did not have to actually be armed with a weapon to be guilty of attempted armed robbery, which is legally correct for the reasons discussed above.

Defendant next argues that the trial court abused its discretion, *People v Babcock*, 469 Mich 247, 265-266; 666 NW2d 231 (2003), with regard to its upward departure from the sentencing guidelines in sentencing him for the attempted armed robbery. We disagree.

If a sentence departs from the guidelines without a substantial and compelling reason to do so, this Court must remand for resentencing. MCL 769.34(11); *Babcock, supra* at 266.

> [Additionally,] the words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence. [*People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).]

However, a factor already part of the sentencing guidelines calculations can be used as a basis for departing from the guidelines if the trial court finds that the factor has been given inadequate or disproportionate weight. *Babcock, supra* at 272. If the trial court departs from the guidelines and "the sentence is not proportionate to the seriousness of defendant's conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing." *Id*. at 273.

The relevant sentencing guidelines as scored by the trial court provided a minimum sentence range of 14 to 58 months. However, at the sentencing hearing, the trial court stated that it was departing from the sentencing guidelines and imposing a 15 to 30 year prison sentence for defendant's attempted armed robbery conviction. The trial court's stated rationale for departing from the guidelines at the sentencing hearing and in its written departure evaluation form emphasized defendant's extensive prior offense record, including his "violent past."

First, while the prior record variables (PRVs) of the guidelines consider a defendant's prior offense record to a substantial extent, as noted above, a trial court may exceed the guidelines based on factors already considered by the guidelines if it finds that those factors have been given inadequate weight. *Babcock, supra* at 272. Defendant's PRV score was 130 points (Sentencing information report). Attempted armed robbery is a class E offense.[3] Under the guidelines sentencing grid applicable to class E offenses, any PRV score of 75 points or higher places an offender in the highest possible PRV level, i.e., Level F. MCL 777.66. Defendant's total PRV score being close to twice the floor of the highest PRV level is a substantial indication that his prior offense record is of such gravity that it is not adequately weighed by the guidelines. Put simply, it was sensible for the trial court to effectively conclude that such an extreme prior record was not within the reasonable contemplation of the guidelines.

Also instructive is this Court's decision in *People v Solmonson*, 261 Mich App 657, 668-672; 683 NW2d 761 (2004), upholding a departure from the sentencing guidelines based on a defendant's prior offense record. In *Solmonson*, the defendant received a prison sentence for operating a motor vehicle while under the influence of intoxicating liquor, third offense. *Id*. at

---

[3] Armed robbery is a class A offense. MCL 777.16y. Accordingly, because attempted armed robbery is an attempt to commit a class A offense, it is classified as a class E offense. MCL 777.19(3)(a).

659. This constituted a departure from the guidelines, which called for an intermediate sanction, i.e., a lesser punishment than a prison sentence. *Id*. at 669 & n 2. The trial court's departure in that case was predicated on the defendant having an "extensive record of drinking-and-driving convictions," specifically a total of eight such convictions. *Id*. at 669-670. This Court noted that it must provide deference to the trial court's familiarity with the facts and experience in sentencing, and that "the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Id.* at 671, quoting *Babcock, supra* at 268-269. This Court concluded that the guidelines departure at issue in *Solmonson* did not constitute an abuse of discretion based on the trial court's familiarity with the facts and experience in sentencing and the "defendant's extensive criminal history reflecting that past sentences of probation, jail, and prison had not deterred him, and the trial court's legitimate concern for the protection of society." *Id*.

Quite analogously to *Solmonson*, the trial court in the present case predicated its departure on defendant's extensive prior offense record, particularly emphasizing the violent nature of many of the offenses. Defendant unquestionably has an extensive offense record. He has eight prior felony convictions. In addition, he was adjudicated of seven offenses as a juvenile. The trial court also reasonably characterized defendant as having a violent past, given the substantial number of these prior offenses that constituted offenses against the person. Specifically, defendant's juvenile adjudication record included three assault and battery offenses and one second-degree criminal sexual conduct offense. His prior adult felony record includes one conviction for larceny from the person and four counts of armed robbery. It is apparent that defendant's extensive prior juvenile and criminal punishments did not deter him from committing the crimes in this case and that the trial court was reasonably concerned with protecting society from further violent conduct by defendant. Notably, defendant had previously received three distinct periods of juvenile detention, a jail sentence, and two distinct periods of imprisonment. Thus, the trial court's decision to depart from the sentencing guidelines did not constitute an abuse of discretion because it was "within the range of principled outcomes." *Id*. See also *People v Schaafsma*, 267 Mich App 184, 186-187; 704 NW2d 115 (2005) (holding that a trial court articulated a substantial and compelling reason for departing from the sentencing guidelines based on a defendant having "ten felony convictions, thirty-one misdemeanor convictions, and [having] served five prison terms and numerous jail sentences").

Further, the extent of the trial court's departure did not constitute an abuse of discretion because it is apparent that defendant's sentence was proportionate to the gravity of his offense and prior offense record. See *Babcock, supra* at 262 (explaining that whether a guidelines departure is justified is to be determined by whether the sentence is proportionate to the seriousness of the defendant's conduct and the defendant's prior record). On its face, it seems apparent that a 15-year minimum prison sentence as was imposed in this case is proportionate for defendant's commission of attempted armed robbery as a fourth habitual offender in light of his extensive prior offense history. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) ("a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society").

Lastly, defendant claims that his signed judgment of sentence of 15 to 60 years, which exceeded the 15 to 30 year sentence he was told he would be given at his sentencing hearing, was an improper alteration of his sentence. We agree. Because this issue was not raised below, we review it for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

We conclude that, although inadvertently, the trial court plainly erred by providing in the judgment of sentence that defendant's attempted armed robbery sentence was 15 to 60 years when it actually imposed a sentence of 15 to 30 years for that crime at the sentencing hearing.

To facilitate appellate review, a trial court must articulate on the record the reasons for a sentence it imposes. *People v Pena*, 224 Mich App 650, 661; 569 NW2d 871 (1997). It is inherent in this principle that a trial court cannot impose a sentence without providing any rationale for doing so. In this case, the trial court at the sentencing hearing only provided a rationale for imposing a 15 to 30 year sentence on defendant's attempted armed robbery conviction. Thus, the judgment of sentence is plainly in error by imposing a more severe 15 to 60 year sentence where the trial court has not provided any articulation of reasons for this more severe sentence.

We also consider it manifest that the reference to a 60-year maximum sentence in the judgment of sentence is simply a clerical error. At the sentencing hearing the trial court indicated that it believed the recommendation of the Department of Corrections as to the attempted armed robbery sentence was "a correct one." That recommendation was for a 15 to 30 year sentence, which the trial court stated it was imposing for that crime. Given this and the well-established practice of a trial court orally pronouncing sentence at a sentencing hearing, we consider it obvious that the reference to a 60-, rather than a 30-, year maximum sentence in the judgment of sentence was simply a clerical error. Accordingly, we remand this case for correction of the judgment of sentence to provide that defendant's attempted armed robbery sentence is 15 to 30 years. See MCR 7.216(A)(7) (authorizing this Court to enter any order or grant further or different relief as a case may require).

We affirm defendant's convictions, but remand this case to the trial court for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray