

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JAMES STADLER,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 210403

Saginaw Circuit Court

LC No. 95-011406-FH

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of arson of a dwelling house, but mentally ill. MCL 750.72; MSA 28.267, MCL 768.36; MSA 28.1059. The trial court initially sentenced defendant to five years' probation, to be served at a secure care facility under the supervision of the Department of Mental Health. However, the court later resentenced defendant to six to twenty years' imprisonment after no facility could be found to house him. Defendant appeals as of right. We affirm.

In 1994, the statute regarding the insanity defense was amended to shift the burden of proving this mental state to criminal defendants. MCL 768.21a; MSA 28.1044(1). *People v McRunels*, 237 Mich App 168, 173; 603 NW2d 95 (1999). In light of this burden of proof, defendant initially argues that the trial abused its discretion in failing to allow him the opportunity for surrebuttal argument on the issue of insanity pursuant to MCR 2.507. The trial court's rulings regarding closing arguments are reviewed for an abuse of discretion. MCR 6.414(E); MCL 768.29; MSA 28.1052; *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Bahoda*, 448 Mich 261, 289 n57; 531 NW2d 659 (1995). We conclude that the trial court did not abuse its discretion in denying defendant's request for surrebuttal argument on the issue of insanity.

Contrary to defendant's position, the conduct of closing arguments in criminal trial is governed by MCR 6.414(E) which provides:

(E) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable limits on the closing arguments.

While the civil procedure rules include a similar provision regarding final arguments in civil cases, that provision does not apply in this matter because the criminal rule provides a like procedure. See MCR 6.001(D)(3). Accordingly, defendant's reliance on MCR 2.507 is misplaced and, instead, MCR 6.414(E) governs this matter. Because the criminal procedure rule specifically references only the prosecutor's ability to make rebuttal argument, it cannot be said that the trial court abused its discretion in denying defense counsel's request for surrebuttal argument. Further, defendant failed to preserve any error in the prosecution's closing argument, by failing to object. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Next, defendant argues that the trial court erred in resentencing him. The trial court's jurisdiction to order resentencing is a question of law and is reviewed de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997); *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). We conclude that the trial court did not err in resentencing defendant because the initial probationary sentence was invalid. This initial sentence was based on inaccurate information, specifically a mistake of fact about the availability of placement at a secured facility.

Generally, a court may not modify a valid sentence. *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). However, a court is free to change a sentence that is invalid for some reason. MCR 6.429(A); *People v Catanzarite*, 211 Mich App 573, 582-583; 536 NW2d 570 (1995). A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

A mistake of fact, such as a mistaken belief that a secured care facility is available, creates a sentence based on inaccurate information and is sufficient to justify resentencing. In *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997), for example, the defendant was convicted of possession of cocaine under the name Chris Thomas. *Id.* at 598. The court later discovered that defendant was not Chris Thomas, but an escaped felon subject to consecutive sentencing. *Id.* The court resentenced defendant on the prosecution's motion. *Id.* at 599. This Court ruled that the inaccurate information regarding defendant's identity made the earlier sentence invalid and permitted resentencing. *Id.* at 600. While the court did not refer to this as a mistake of fact, that is the nature of the inaccuracy. See also *Miles*, *supra* at 93, 96.

Here, the court indicated that defendant would either have to be placed in a secure facility or in prison. It is clear from the court's statements at the time of the original sentencing that the probationary sentence was premised on the belief that defendant would be sent to such a secure facility immediately. The inaccurate information on which the trial court based its probationary sentence justified resentencing.

Lastly, defendant argues that the resentencing resulted in a disproportionate term that exceeded the recommendation of the guidelines. A trial court's sentence is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990); *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality. *Milbourn*, *supra* at 635-636. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The key test of proportionality is not whether the sentence departs from or adheres to the recommended guidelines' range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Although departures from the guidelines are permitted, they are suspect and subject to careful scrutiny on appeal. *Milbourn*, *supra* at 656-657; *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). The court may consider a juvenile record when sentencing an adult. *People v Smith*, 437 Mich 293, 304; 470 NW2d 70 (1991); *People v Kreger*, 214 Mich App 549, 553; 543 NW2d 55 (1995).

In this case, the guidelines recommended a minimum sentence of six to thirty-six months and the court sentenced defendant to six to twenty years. Noting its reasons for departure on the record, the court cited defendant's predilection for setting fires, his inability to control his impulses, and his statements at the presentence interview indicating that he had planned on setting this fire at the adult foster care facility where he lived. Ultimately, the court stated that the basis for departure was its concern that the community be protected from the risk posed by defendant.

A court may justify an upward departure from the guidelines by referencing the factors considered under the guidelines or legitimate factors not considered by the guidelines. *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998); *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). Certainly, defendant's inability to control his actions, his pattern of fire setting, and his admission that this latest fire was planned could be taken into consideration at sentencing. The court did not abuse its discretion in sentencing defendant beyond the guidelines range because given defendant's past conduct and the seriousness of this offense his sentence was not disproportionate. See *People v Nantelle*, 215 Mich App 77, 83-84; 544 NW2d 667 (1996).

Finally, while the trial court failed to indicate its reasoning for departing from the guidelines in writing, remand for that purpose is unnecessary in light of our affirmance of the sentence.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White