

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL SMITH,

Defendant-Appellant.

UNPUBLISHED

October 22, 2002

No. 232671

Wayne Circuit Court

LC No. 00-010025

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530, and sentenced, as a fourth-habitual offender, MCL 769.12, to 48 to 150 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant challenges the sufficiency of the evidence supporting his conviction. A challenge to the sufficiency of the evidence in a bench trial requires us to "view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

Specifically, defendant contends that the evidence did not establish that he had reached a place of temporary safety before being arrested. Indeed, several panels of this Court have applied a "transactional approach" to robbery, holding that "a defendant has not completed a robbery until he has escaped with stolen merchandise." See *People v Randolph*, 466 Mich 532, 535; 648 NW2d 164 (2002). However, our Supreme Court overruled this Court's use of the "transactional approach." *Id.* at 536, 546. Our Supreme Court emphasized that a larceny is complete when the taking occurs, and that a robbery is merely "a larceny aggravated by the fact that the taking is from the person, or in his presence, accomplished with force or the threat of force." *Id.* at 543-544. Thus, a robbery is also complete when the taking occurs. Accordingly, we reject defendant's assertion that his failure to reach a place of temporary safety prevents a finding that there was sufficient evidence supporting his conviction.¹

¹ Generally, an unarmed robbery, MCL 750.530, requires three elements: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being
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Next, defendant contends that he was deprived of his constitutional right to effective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to “show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *Id.* at 423-424.

Defendant contends that trial counsel was ineffective for failing to object to the prosecutor’s attempt to impeach defendant’s testimony with evidence of a prior robbery conviction. An argument could be made that trial counsel should have objected to the evidence. However, we note that the prosecutor introduced the evidence to establish that defendant knew that there was a difference between the punishments for armed robbery and unarmed robbery. The prosecutor’s theory was that defendant had a motive to lie about whether he possessed a knife. We note that trial counsel did object to the prosecutor’s attempt to establish defendant’s motive to lie. Accordingly, we are not persuaded that trial counsel’s performance was deficient.

Even if we were to conclude that trial counsel’s performance was deficient, we would nevertheless conclude that the deficiency did not impact the outcome of the proceedings. The testimony, including defendant’s admissions, established that the victim was robbed. The essential factual question was whether defendant was armed during the robbery. Despite the prosecutor’s attempt to demonstrate defendant’s motivation to lie about the knife, the trial court found that defendant was unarmed. As such, the evidence of defendant’s prior conviction did not appear to have had any impact on the trial court’s findings. Thus, there is an alternate basis for concluding that defendant was not deprived of his constitutional right to effective assistance of counsel. *Snider, supra* at 423-424.

Defendant also contends that the trial court plainly erred in vacating a validly imposed sentence that was not enhanced, and then imposing a sentence that was enhanced by MCL 769.12. We note that defendant did not raise this issue below. Accordingly, this issue is forfeited for appellate review. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Thus, defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *Id.*

Generally, a trial court has only limited authority to resentence a defendant. *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981). However, the trial court may resentence a defendant if the previously imposed sentence is invalid. *Id.* “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 when it conforms to local sentencing policy

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unarmed.” *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Here, the victim testified that defendant used physical force to take her wallet. Her testimony was supported by the testimony of two witnesses. Accordingly, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant’s unarmed robbery conviction. *Nunez, supra* at 615.

rather than individualized facts.” *People v Miles*, 454 Mich 90, 96; 559 Mich 299 (1997). A sentence is also invalid if it is based on inaccurate information. *Id.* In more general terms, we have recognized that an invalid sentence is one that is legally flawed or based on a “‘tangible legal or procedural error.’” *People v Thenghkam*, 240 Mich App 29, 70; 640 NW2d 571 (2000), quoting *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997).

Here, although the prosecutor had filed an habitual offender notice, the trial court sentenced defendant to 48 to 150 months’ imprisonment, without mentioning defendant’s habitual offender status. After the prosecutor reminded the court of this fact, the court vacated the original sentence, and resentenced defendant as a fourth habitual offender, MCL 769.12, to the same term. Accordingly, the record indicates that the trial court erroneously failed to consider defendant’s habitual offender status when imposing the original sentence. The trial court’s error could be characterized as either a misconception of the law (failing to apply MCL 769.12) or sentencing based on inaccurate information (failing to recognize that the prosecutor filed a timely notice of its intent to seek enhanced sentencing). *Miles*, *supra* at 96. Alternatively, the trial court’s error could be characterized as a legal flaw, legal error, or procedural error. *Thenghkam*, *supra* at 70. Accordingly, we conclude that defendant’s original sentence was invalid.² Thus, the trial court did not plainly err in vacating the original sentence and resentencing defendant.³ *Carines*, *supra* at 763.

Finally, defendant contends that the trial court erred in sentencing him as a fourth habitual offender because the record failed to establish that defendant had three prior felonies. MCL 769.13(5) provides as follows:

The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) Information contained in a presentence report.

² Because the original sentence was invalid, defendant’s contention that he was subjected to double jeopardy is also without merit. See *Thenghkam*, *supra* at 69-70. Similarly, we reject defendant’s contention that the resentencing violated his due process rights. See *id.* at 72-73.

³ Defendant also contends that trial counsel was ineffective for failing to raise this issue below. However, defense counsel was not deficient for failing to object to the trial court’s proper attempt to correctly apply MCL 769.12. Moreover, because the trial court ruled that it was not going to increase defendant’s sentence because of the enhanced sentencing it does not appear that trial counsel’s failure to object had any impact on the proceedings. Therefore, defendant was not deprived of his constitutional right to effective assistance of counsel. *Snider*, *supra* at 423-424.

(d) A statement of the defendant.

Here, the presentencing investigation report (“PSIR”) indicated that defendant had five prior felonies. In fact, not only did defendant not challenge the accuracy of the PSIR below, but he does not contend on appeal that it is inaccurate. Accordingly, the trial court properly sentenced defendant as a fourth habitual offender, MCL 769.12.

However, defendant contends that he should not have been sentenced as a fourth habitual offender because the prosecutor’s notice, pursuant to MCL 769.13, listed a conviction that was not listed in the PSIR. Again, defendant does not challenge the accuracy of the prosecutor’s notice, nor does he challenge the accuracy of the PSIR.⁴ We note that MCL 769.13(2) provides in pertinent part: “A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement.” Because the prosecutor need only list convictions that “may be” relied upon, our Legislature has given the prosecutor some leeway in the accuracy of the notice. The purpose of the notice is merely to let the defendant know that the prosecutor intends to seek sentencing enhancement. See *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987). Indeed, the prosecutor’s notice is not “evidence” of defendant’s status. See MCL 769.13(5).

Moreover, defendant’s reliance on *People v Ellis*, 224 Mich App 752; 569 NW2d 917 (1997) is misplaced. The *Ellis* decision merely prevents the prosecutor from filing an initial notice, and then seeking to amend that notice to *increase* the level of sentencing enhancement. *Id.* at 756-757; see *People v Hornsby*, 251 Mich App 462, 469-473; 650 NW2d 700 (2002). Instead, this case is more analogous to *Manning*, where we held that the trial court did not err in allowing the prosecutor to file an amended information that corrected the convictions underlying the defendant’s status as a fourth habitual offender. *Manning, supra* at 644-645. Like the defendant in *Manning*, defendant in this case was provided sufficient notice of the prosecutor’s intent to seek sentencing enhancement, thereby satisfying the primary purpose of MCL 769.13(2). Consequently, we find no error.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens

⁴ In fact, trial counsel indicated that the PSIR did not require corrections.