

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WAYNE ANNABEL, II,

Defendant-Appellant.

UNPUBLISHED

September 30, 2004

No. 249238

Jackson Circuit Court

LC No. 03-000283-FH

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of attempted first-degree home invasion MCL 750.92, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12 to ten to thirty years' imprisonment. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts

The victim owns and operates a scuba diving retail business. Although the building outwardly appears to be a commercial establishment, it contains both the dive shop and the victim's residence. In the early morning of March 2, 2003, at approximately 2:30 a.m., the victim awoke to a "banging sound." Upon investigation, he noticed a flashlight shining into his bathroom. When the victim yelled out, the person with the flashlight ran away.

Outside the building, the victim found fresh footprints in the snow that started at the back gate, circled around the shed, and led up to the doors of the building. He also observed that the outside door handle to his granddaughter's bedroom was bent and there was a piece of wood lying nearby. Police responding to the scene followed the footprints leading away from the premises. They eventually located defendant and took him into custody. When defendant was told that he would be charged with attempted breaking and entering a dwelling, he apologized, but maintained that he was unaware that the building was inhabited. Defendant later admitted that he achieved entry through the back fenced area and was looking for items of value.

II. Analysis

A. The Charge

Defendant contends that the prosecutor erred in charging him with first-degree home invasion rather than breaking and entering, MCL 750.110.

We “review a charging decision under an ‘abuse of power’ standard, questioning whether a prosecutor has acted in contravention of the constitution or the law.” *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). The prosecutor is a constitutional officer with discretion to decide whether to initiate charges and what charges to bring. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998); *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996). The principle of separation of powers restricts judicial interference with the prosecutor’s exercise of this executive discretion. *Herrick*, *supra* at 598. This discretion over what charges to file “will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification.” *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993).

Defendant has not asserted that the prosecutor charged him with first-degree home invasion for reasons that were “unconstitutional, illegal, or ultra vires.” Therefore, there is no basis for this Court to conclude that the prosecutor abused his power.

B. Trial Court’s Findings of Fact

Defendant also argues that the trial court erred in finding that (1) the building was a residence and (2) defendant had the specific intent to commit home invasion because these facts were not supported by the evidence.

A trial court's findings of fact in a bench trial are reviewed for clear error, giving regard “to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). A finding of fact is clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

After reviewing the record, we are not left with a definite and firm conviction that the trial court made a mistake in finding that the building was a dwelling. MCL 750.110a(1)(a) defines “dwelling” as “a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.” The victim testified that the building served the dual purpose of business and residence. When defendant attempted to enter the building at 2:30 a.m., the victim was sleeping in his bedroom in the building. Because there was evidence that the building was used as a place of abode, there was no clear error in the trial court’s finding that the building was a dwelling within the context of first-degree home invasion.

We also conclude that the trial court did not err in finding that defendant had the required intent. A defendant's intent may be proved by the nature, time, and place of the defendant's acts before and during the breaking and entering, by what he said, what he did, and how he did it, and by any other facts and circumstances in evidence. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). An attempt “consists of (1) an attempt to commit an offense prohibited by

law, and (2) any act towards the commission of the intended offense.” *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). Contrary to defendant’s argument, MCL 750.110a(2) does not require knowledge that a building is used as a residence; rather, it requires that one “breaks and enters a dwelling with intent to commit a felony” At trial, there was testimony that defendant admitted to the police that he attempted to enter the building to look for items of value. There was also evidence that defendant broke a door handle in his effort to enter the building. This evidence is sufficient to support the trial court’s finding that defendant had the requisite intent to commit the crime charged.

C. Sentence

Defendant states that his sentence is disproportionate to the offense and the offender. But despite framing the issue in this way, defendant does not properly present a proportionality argument. Defendant does not set forth any standard of review. Nor does he cite any case law in support of a proportionality argument, other than *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The statutory guidelines apply in this case, yet defendant does not even reference the guidelines or any case law interpreting them.¹ What defendant provides instead are four separate arguments.

Defendant first argues that he was improperly sentenced by reiterating that he was prosecuted under the wrong statute. But, as discussed above, there is no merit to this claim.

Defendant also argues that his presentence information report (PSIR) is inaccurate. Because defendant did not raise the claimed inaccuracy² in the PSIR at or prior to sentencing and does not claim that he raised this issue as soon as the inaccuracy could reasonably have been discovered, this issue is not preserved for our review, and we decline to address it. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Defendant also states, but presents no argument, that the trial court should not have relied on defendant’s prior convictions in sentencing him because he “had a right under the Sixth Amendment to counsel, and there was no information in the PSIR from which one could conclude that the convictions were either counseled, or the right to counsel was properly waived.”

A defendant who collaterally challenges a prior conviction for lack of counsel or a proper waiver of counsel, bears the initial burden of proof. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994); *People v Haywood*, 209 Mich App 217, 231; 530 NW2d 492 (1995). In order to satisfy this burden, a defendant “must present prima facie proof that a prior conviction violated [his right to counsel], or present evidence that the sentencing court either ‘failed to

¹ To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). The argument must also contain a statement of the applicable standard of review. MCR 7.212(C)(7).

² Defendant raised other inaccuracies which the trial court addressed.

reply' to a request for or 'refused to furnish' requested copies of records and documents." *Carpentier, supra* at 32.

Defendant did not argue this point in the trial court at sentencing though he did raise other concerns and had ample opportunity to discuss the PSIR with the trial court. Nor has defendant submitted any proof on appeal that his Sixth Amendment rights were violated. The only proof defendant relies on to show that his prior convictions were invalid is the fact that the PSIR states "unknown" with regard to whether defendant had counsel. Because defendant has not met his burden of proof, we find this claim without merit.

Defendant finally argues that the trial court should have considered several mitigating factors. But, because this claim is not presented in the context of a fully argued sentencing issue, it provides no basis for our review.

Despite defendant's failures in properly presenting his proportionality issue on appeal, we have reviewed the sentence and conclude that it was not disproportionate. The legislative sentencing guidelines control in this case because the charged offense occurred after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). According to these guidelines, the trial court must impose a minimum sentence within the guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). A court may depart from the guidelines if it has substantial and compelling reasons for that departure and states the reasons on the record. MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Any factor relied on by the trial court in departing from the statutory sentencing guidelines must be objective and verifiable. This Court reviews the trial court's determination of the existence of any such factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether a particular factor is objective and verifiable is reviewed as a matter of law. *Id.* The trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 264-265. Substantial and compelling reasons justifying departure should "keenly" and "irresistibly" grab the court's attention, must be "of considerable worth" in determining the length of a sentence, and "exist only in exceptional cases." *Id.* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). A sentence that departs from the guidelines' range must also be proportionate to the defendant's conduct and his criminal record. *Id.* at 261-264.

Defendant was sentenced as a fourth habitual offender. Under the sentencing guidelines act, the sentence of a habitual offender is subject to an increased minimum sentence range. MCL 777.21(3); *People v Houston*, 261 Mich App 463, 474; ___ NW2d ___ (2004). In this case, the guidelines' minimum sentence range is fourteen to fifty-eight months in prison. The trial court departed upward sentencing defendant to ten to thirty years in prison. On the sentencing departure evaluation form, the trial court listed three reasons for departing from the sentencing guidelines:

1. Guidelines do not accurately reflect the 8 adult felonies of defendant, nor his 10 felony adjudications as a juvenile.
2. Defendant has been convicted of felonies in 4 states and is only 22 years old.
3. Defendant shows no remorse and will not conform his behavior to the law.

With regard to the first factor, the sentencing guidelines take into account a defendant's prior record. In the prior record variables, defendant received the maximum score for adult felonies because he has "four or more" prior low severity adult convictions. Defendant received the maximum score for having "three or more" high severity juvenile adjudications. Defendant also received fifteen points for having five prior low severity juvenile adjudications. Although the guidelines consider the number of defendant's prior adult and juvenile felonies, the guidelines do not "accurately" reflect the number of felonies in defendant's history. Because the guidelines set the highest scores for "four or more" prior low severity adult convictions and "three or more" high severity juvenile adjudications, they do not reflect the actual number of defendant's prior felonies. The trial court properly considered the exact number of defendant's prior felonies in departing from the guidelines. This factor is objective and verifiable because it is contained in defendant's PSIR. MCL 769.13(5)(c).

The guidelines do not take into account the fact that the felonies took place in four states or that defendant has such an extensive criminal record at only twenty-two years of age. Nor do the guidelines take into account the fact that defendant shows no remorse and will not conform his behavior to the law. With regard to this last factor, defendant actually stated this on the record. Therefore, we conclude that these factors are objective and verifiable.

Further, we conclude the three factors relied on by the trial court provide a substantial and compelling for departing from the guidelines, especially given that defendant himself so conceded at the sentencing hearing, when he stated:

I respect your obligation to separate me from a society in which I have no true -- I have never truly belonged, because I can only foresee a continuous pattern of criminal activity to which I believe I will always become accustomed. Besides, I live a nomadic and isolated existence in which I have no strong connections to anyone . . . Although I cannot agree that the severity of the sentence you will award should be applied to every single defendant . . . I completely feel that it is appropriate to the matter that concerns myself.

We also conclude that the departure is proportionate to defendant's conduct and his criminal history. While defendant's conduct in this case is relatively benign, his overall record indicates what he admits is an unwillingness to conform his behavior to the law.

D. Effective Assistance of Counsel

Finally, defendant argues that defense counsel was ineffective. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because

a *Ginther*³ hearing was not held, our review is limited to the errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

We find no errors apparent on the record. Although defendant complains of defense counsel's limited trial participation, he fails to show that there was a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different. We note that defense counsel did cross-examine the victim about the extent to which the building inhabited. Defendant also complains that defense counsel was ineffective for failing to challenge his prior convictions, but, as discussed above, defendant has not met his burden of proof with regard to his prior convictions. Further, while defendant himself raised several issues with the PSIR, he never raised any complaints about his prior convictions. Defendant also contends that defense counsel was ineffective in failing call the court's attention to mitigating factors before sentencing. But defense counsel mentioned defendant's difficulties and requested sentencing within the guidelines. Therefore, we conclude that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)