

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY EUGENE ANDREWS,

Defendant-Appellant.

UNPUBLISHED

September 25, 2008

No. 277777

Van Buren Circuit Court

LC No. 06-015376-FC

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for perjury, MCL 767A.9(1)(b), and the trial court's subsequent entry of nolle prosequi on two charges of felony murder, MCL 750.316(1)(b).¹ Defendant was sentenced to 10 to 35 years' imprisonment for his perjury conviction. Because the trial court has broad discretion in determining who may speak at sentencing and defendant fails to establish any bias or prejudice on the part of the trial court in hearing the statements of the murder victims' relatives, we affirm defendant's sentence. However, because the judgment of sentence contains a typographical error regarding the numbers of days credit defendant received for time served, we remand for the ministerial task of correcting the mistake. In addition, because the trial court did not abuse its discretion in entering the nolle prosequi order on the two murder charges, we affirm the order of nolle prosequi.

Defendant first claims on appeal that the sentencing court erred in permitting oral victim impact statements from four relatives of the murder victims. Defendant asserts that those statements improperly implicated him in the murders, as well as violated due process, the Crime Victim's Rights Act, MCL 780.751 *et seq.*, and the court rules. We disagree.

A trial court has broad discretion in determining who may speak at sentencing. *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

¹ The prosecution charged defendant with all three counts in the initial felony complaint, but the trial court severed the perjury count, with the trial for the felony murder counts set to follow the perjury trial.

A sentencing court must “give the defendant, the defendant’s lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.” MCR 6.425(E)(1)(c). Generally, a victim is an individual, “who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.” MCL 780.752(1)(l)(i). However, a sentencing court may permit other individuals to speak at sentencing. *Albert, supra* at 74-75. In addition, assuming that the four individuals who spoke at defendant’s sentencing are not victims under MCL 780.752(1)(l)(i), defendant has not established any bias or prejudice on the part of the trial court resulting from hearing these additional statements. See *id.* at 75. We are confident that, in sentencing defendant, the sentencing court was able to “separate the evidence at trial from the subjective requests of victims or their family members.” *People v McAllister*, 241 Mich App 466, 476; 616 NW2d 203 (2000).

In reaching our conclusion, we reject defendant’s assertion that the sentence imposed was excessive. Defendant’s minimum sentence fell within the recommended minimum sentence range under the legislative guidelines. Therefore, it is presumed proportional. See *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant has failed to present any evidence to overcome the presumption of proportionality.

Defendant also claims the judgment of sentence must be corrected to accurately reflect the sentence imposed by the sentencing court. We agree. The trial court sentenced defendant to 10 to 35 years’ imprisonment with 188 days credit for time served. However, the judgment of sentence only provides defendant with 133 days credit. Thus, we remand to the trial court for the ministerial task of correcting the error.

Defendant next claims the trial court erroneously entered an order of nolle prosequi on the felony murder counts. The trial court’s decision to enter an order of nolle prosequi is reviewed for an abuse of discretion. See *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997); *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121; 215 NW2d 145 (1974).

MCL 767.29 provides in pertinent part:

A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes.

Nolle prosequi is a dismissal without prejudice, and it does not preclude initiation of a subsequent prosecution. *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976). Approval by a trial court has been described as the “sine qua non” of the decision to nolle prosequi. *Id.* “Where the prosecution properly seeks to nolle prosequi, the trial court’s review of that order is limited to whether the prosecutor has abused the power confided to him.” *Id.* at 587.

The record establishes that the prosecutor complied with the requirements of MCL 767.29. The prosecutor sought to enter an order of nolle prosequi because a necessary witness was unavailable. The prosecutor stated his reasons for seeking the order on the record. Defendant’s girlfriend, Michelle Gogins, who testified at his perjury trial, refused to testify at his

felony murder trial on the advice of her appellate counsel.² The prosecutor did not know how long it would take to resolve the issues with Gogins, but rather than move for an adjournment, the prosecutor sought an order of nolle prosequi. The trial court entered the order, noting that while Gogins testified at the perjury trial, she refused to testify about what occurred in the murder victims' dwelling on the night in question and counsel did not pursue that line of inquiry. Given that the trial court presided over the perjury trial, and it was aware of Gogins' testimony at that trial, the trial court did not abuse its discretion in entering the order of nolle prosequi.

We reject defendant's arguments that the order of nolle prosequi violated his due process rights and his right to a speedy trial. On appeal, defendant has provided no more than cursory treatment of those arguments. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, defendant has abandoned these issues. We also reject defendant's purported claim involving a violation of the 180-day rule, MCL 780.131. The only action that triggers the 180-day period is the delivery of a Department of Correction's notice to the prosecution. *People v Williams*, 475 Mich 245, 259; 716 NW2d 208 (2006). The lower court record does not contain a Department of Correction's notice and no mention of such a notice is made in the trial transcripts or in defendant's appellate brief. Defendant bears the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal is predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Thus, the issue is abandoned.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

² Gogins was tried and convicted of two counts of first-degree murder, and we affirmed those convictions in *People v Gogins*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 17, 2007 (Docket No. 267371). After she was sentenced, Gogins implicated defendant in those same homicides.