

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ARTHUR JAMES CAPLE,

Defendant-Appellee.

UNPUBLISHED

June 23, 2009

No. 284143

Wayne Circuit Court

LC No. 07-015182-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR JAMES CAPLE,

Defendant-Appellant.

No. 286490

Wayne Circuit Court

LC No. 07-015182-FH

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), and unarmed robbery, MCL 750.530. He was originally sentenced on February 15, 2008, to three years' probation, with the first year to be served in the county jail and placement in a county mental health diversion program.¹ Plaintiff appeals as of right in Docket No. 284143, challenging the trial court's decision to sentence defendant below the sentencing guidelines range of 36 to 60 months, and defendant appeals as of right in Docket No. 286490, challenging his convictions and sentence. We affirm defendant's convictions, but remand for resentencing.

¹ The trial court later resentenced defendant on April 21, 2008, to five years' probation, with the first year to be served in the county jail and placement in a mental health program after his release from jail.

Defendant was convicted of unlawfully entering the house of his mother and robbing her of her property.

I. Defendant's Issues in Docket No. 286490

We first address defendant's challenge to the validity of his convictions.

A. Jury Voir Dire

Defendant first argues that the trial court erred by conducting jury voir dire because the court was not sufficiently probing to allow him to adequately evaluate the jurors for potential bias and to intelligently exercise challenges for cause. However, a defendant does not have a right to have counsel conduct voir dire. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). But, where a court conducts voir dire, it abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause can be intelligently exercised. *Id.*

In this case, the trial court conducted voir dire and then asked the attorneys if they had any additional questions for the jurors. Defense counsel indicated that she had no additional questions, so we conclude that defendant's assertions of error were waived. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215, 612 NW2d 144 (2000). A waiver extinguishes any error and precludes appellate review. *Id.*

We also reject defendant's related argument that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and denied him the Sixth Amendment right to counsel, and that, but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Defendant asserts that counsel was ineffective because the voir dire conducted by the trial court was inadequate, but he does not identify any questions or subject matters that he believes should have been explored and were not. Thus, he has failed to establish that he received the ineffective assistance of counsel. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

B. Admissibility of Prior Conviction

Defendant next argues that on cross-examination he was improperly questioned about a nonexistent breaking and entering conviction, and that the prosecutor improperly impeached him with evidence of a prior conviction for entering without breaking, which was not admissible under MRE 609(a)(2). Because defendant did not object to the prosecutor's cross-examination at trial, these issues are not preserved. We therefore review these issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During the prosecutor's cross-examination of defendant, the prosecutor asked defendant if he had previously been convicted of breaking and entering. Defendant responded that he had not been convicted of that offense, but had been convicted of "entering without permission."

The prosecutor then clarified that defendant was convicted of entering without permission by plea, which defendant agreed was accurate.

A witness may not be examined about charges that do not result in conviction, including higher original charges that do not result in conviction, whether by plea or trial. *People v Clemons*, 177 Mich App 523, 527-528; 442 NW2d 717 (1989). In this case, it is not apparent from the record that the prosecutor sought to examine defendant about a charge that did not result in a conviction. Rather, the prosecutor was questioning defendant about an actual prior conviction. Thus, there was no plain error. Also, defendant's substantial rights were not affected because defendant was permitted to clarify that he was convicted not of breaking and entering, but only of entering without permission, which the prosecutor then acknowledged was accurate, and the prosecutor did not make any further reference to "breaking and entering," either during cross-examination of defendant or closing argument. Further, because there was no plain error or indication that defendant was prejudiced by the prosecutor's question, defendant's related argument that defense counsel was ineffective for failing to object to the prosecutor's question also fails. *Mack, supra*.

Defendant also argues that it was improper to impeach him with his prior conviction of entering without breaking, because the conviction was not admissible for impeachment under MRE 609. As defendant acknowledges, however, entering without breaking includes as an element the "intent to commit a felony or any larceny therein." MCL 750.111. Thus, the crime contains an element of theft, thereby subjecting it to the balancing test of MRE 609(b) to determine its admissibility.

The prior conviction was for a theft crime, which is probative of veracity, and it was relatively recent, thereby increasing its probative value. *People v Allen*, 429 Mich 558, 595, 610-611; 420 NW2d 499 (1988). Regarding the prejudicial effect of the conviction, the conviction involved an offense that was similar, but not identical to the charged home invasion offense. Moreover, there is no indication that the conviction had an effect on defendant's decision to testify. On balance, defendant has not demonstrated that it was plain error to introduce the conviction for purposes of impeachment. Further, the record does not indicate that the conviction affected defendant's substantial rights. Although the prosecutor argued during closing argument that defendant was not credible, she did not refer to his prior conviction, but instead argued that he was not credible because his story was "completely incoherent." Thus reversal is not required. In addition, in the absence of plain error or prejudice, defendant cannot prove that defense counsel was ineffective for failing to challenge the admissibility of his prior conviction. *Mack, supra*.

C. Sufficiency of the Evidence

Defendant next argues that because there was insufficient evidence that he entered his mother's house without permission, his conviction for first-degree home invasion must be vacated. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459 (Kelly, J.); 697 NW2d 494 (2005). All conflicts in the evidence must

be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Questions involving the credibility of witnesses and the weight accorded the evidence are for the jury to resolve. *Id.*

Although defendant's mother testified that defendant sometimes stayed at her house and had some of his belongings there, she stated that he was not permitted to freely enter her home and that he was supposed to call before coming over. She further testified that he did not have permission to enter her house on the day of the offense. Viewed in a light most favorable to the prosecution, the testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant entered his mother's home without permission.

II. Sentencing

In Docket No. 284143, plaintiff appeals the trial court's decision to depart below the sentencing guidelines range of 36 to 60 months and sentence defendant to probation. In Docket No. 286490, defendant argues that the trial court lacked the authority to vacate his original sentence of three years' probation and resentence him to a longer term of five years' probation.

A. Jurisdiction

Initially, we address defendant's claim that this Court lacks jurisdiction to consider plaintiff's appeal in Docket No. 284143 because the appeal was filed from the original sentence imposed in February 2008, not the sentence imposed on resentencing in April 2008. We also consider defendant's argument that the trial court lacked the authority to resentence him. We review de novo both the question of whether this Court has jurisdiction to hear an appeal, *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002), and whether the trial court had jurisdiction to resentence defendant. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

Defendant was originally sentenced to three years' probation on February 15, 2008. Plaintiff thereafter filed a claim of appeal on March 6, 2008, and defendant filed a claim of appeal on March 28, 2008. On April 21, 2008, while this appeal was pending, the trial court, acting on its own, resentenced defendant on its own motion to five years' probation.²

It is undisputed that plaintiff timely filed a claim of appeal from the February 15, 2008, judgment of sentence, thereby invoking this Court's jurisdiction. MCL 770.12(1); MCR 7.203(E). However, if the trial court properly resentenced defendant in April 2008, it would have effectively vacated the prior judgment, rendering an appeal of the February 2008 sentence moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994) ("[w]here a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot"). We conclude, however, that the trial court lacked jurisdiction to resentence defendant.

² It appears that the trial court resentenced defendant because he did not qualify for a mental health diversion program, which was a condition imposed as part of his probation.

MCR 7.208(A) provides that “[a]fter a claim of appeal is filed . . . the trial court . . . may not set aside or amend the judgment or order appealed,” subject to certain exceptions, including, in a criminal case, a timely motion as permitted by MCR 7.208(B). Similarly, MCR 6.429(B)(2) provides that after a claim of appeal is filed, “a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).” MCR 7.208(B) provides a procedure for a *defendant* to file a motion for resentencing in the trial court after a claim of appeal is filed.³ Similarly, MCR 7.211(C)(1) provides a procedure whereby an appellant may file a motion to remand with this Court. Here, neither party filed a motion to remand under MCR 7.211(C)(1). Further, the plain language of MCR 7.208(B)(1) provides that only a *defendant* may file a prescribed postjudgment motion, such as a motion for resentencing. In this case, defendant did not file a motion for resentencing, so the trial court did not have the authority to act under MCR 7.208(B) after the claim of appeal was filed. Because under the circumstances MCR 7.208(A) precluded the trial court from setting aside or amending its February 15, 2008, judgment of sentence after a claim of appeal had been filed, and no exception to this rule is applicable, the trial court did not have jurisdiction to resentence defendant.

Since plaintiff timely filed a claim of appeal from the February 15, 2008, judgment of sentence, and because the trial court did not have jurisdiction to modify that sentence, we conclude that this Court has jurisdiction to consider plaintiff’s appeal. Although plaintiff’s substantive arguments on appeal are directed at the trial court’s April 21, 2008, sentencing decision, the trial court’s reasoning for departing below the guidelines was the same at both proceedings and plaintiff’s arguments are equally applicable to the original February 15, 2008, sentencing decision. Therefore, it is appropriate to address plaintiff’s appeal in the context of defendant’s February 15, 2008, sentence. See MCR 7.216(A)(7).

B. Sentencing Departure

Plaintiff argues that, in sentencing defendant to probation, the trial court improperly departed below the appropriate sentencing guidelines range without substantial and compelling reasons for a departure.

A court is required to sentence a defendant in accordance with the appropriate minimum sentence range under the sentencing guidelines unless there is a substantial and compelling reason for departure and the court states its reasons for departure on the record. MCL 769.34(2) and (3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). In order for a reason to be substantial and compelling, it must be objective and verifiable, and it should keenly or irresistibly grab the court’s attention and be of considerable worth in determining the length of the sentence. *People v Horn*, 279 Mich App 31, 43, 43 n 6; 755 NW2d 212 (2008). To be objective and verifiable, a factor must be an action or occurrence external to the mind and capable of being confirmed. *Id.* In reviewing a departure from the guidelines, the existence of a

³ MCR 7.208(B)(1) provides that “[n]o later than 56 days after the commencement of the time for filing the *defendant-appellant’s* brief as provided by MCR 7.212(A)(1)(a)(iii), the *defendant* may file in the trial court a motion . . . for resentencing.” [Emphasis added.]

particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, and the determination that the factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 43.

The sentencing guidelines range for defendant's first-degree home invasion conviction was 36 to 60 months. The trial court explained that a departure was appropriate because a county mental health diversion program was willing to accept defendant and because the prosecution had made a prior plea offer that included a sentence agreement of three years' probation, with the first year to be served in the county jail.

Initially, we note that defendant's mental health problems are not a matter of record. Regardless, the mere fact that a treatment program was willing to accept defendant does not strike us as a substantial and compelling reason to depart from the guidelines. More significantly, the trial court's principal justification for departing from the guidelines was its belief that a sentence within the guidelines would improperly punish defendant for exercising his right to a trial, because the prosecution had previously made a plea offer that included a sentence agreement of three years' probation, with the first year to be served in jail. We conclude that the trial court erred in finding that the rejected plea offer provided a substantial and compelling reason to depart below the guidelines.

Although a court may not punish a defendant for exercising his right to a trial, this does not preclude a court from imposing, following a trial, a higher sentence than that contained in a prior plea offer. As this Court explained in *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985):

It is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. While confronting a defendant with the risk of more serious punishment may discourage defendant's assertion of his constitutional right to trial by jury, the imposition of these difficult choices is an inevitable and permissible attribute of a system that tolerates plea negotiation.

See also *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987) (a court is permitted to impose a higher penalty than that contained in a prior plea offer unless there is something in the record indicating that the sentence was imposed as a penalty for the defendant's assertion of his right to trial; but in the absence of something in the record, retaliation will not be presumed).

The purpose of the sentencing guidelines is to arrive at a proportionate sentence based on consideration of important offense and offender characteristics. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). Accordingly, a sentence within the guidelines is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Likewise, "[t]he 'principle of proportionality . . . defines the standard against which . . . allegedly substantial and compelling reasons in support of [a] departure are to be assessed.'" *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008), quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). Thus,

[a] sentencing departure is appropriate when “there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history” The departure from the guidelines recommendation must “contribute to a more proportionate criminal sentence than is available within the guidelines range.” [*Smith, supra* at 305, quoting *Babcock, supra* at 264 (footnotes omitted).]

Here, the trial court stated that its departure sentence was consistent with the prosecution’s prior plea offer. But apart from the existence of the plea offer, it did not refer to any particular circumstances of the offense or the offender to explain why it believed that a sentence within the guidelines range was not proportionate, or why the sentence it imposed would contribute to a more proportionate sentence than one available within the guidelines range. Therefore, the court abused its discretion in departing from the guidelines without articulating substantial and compelling reasons for a departure. Accordingly, we vacate defendant’s sentence and remand for resentencing. On remand, the trial court shall sentence defendant within the appropriate guidelines range, or articulate on the record a substantial and compelling reason for departing from that range in accordance with *Babcock* and *Smith, supra*.

We reject plaintiff’s suggestion that defendant should be resentenced before a different judge. There is a heavy presumption of judicial impartiality, *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), and the sentencing judge’s primary reason for departure, conformance with the prior plea offer, was based on a misunderstanding or misapplication of the law. That is not a sufficient reason to disqualify a judge from rehearing a case. *Id.* We are confident that on remand the trial court will apply the correct law in resentencing defendant.

We affirm defendant’s convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray