

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

COREY JOSEPH JACKSON,

Defendant-Appellant.

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UNPUBLISHED

November 17, 2005

No. 256297

Wayne Circuit Court

LC No. 02-000394-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for voluntary manslaughter, MCL 750.321, and possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life in prison. We affirm defendant's convictions. However, we vacate his sentence and remand for resentencing.

This case arose out of the shooting death of Michael Saunders. Apparently, Saunders and Damien Walker had been selling drugs on the same street corner for several years, but upon returning from a week's absence they found defendant selling drugs there. Saunders and Walker argued with defendant. Defendant walked away, and Saunders and Walker went into a store. Saunders exited the store, then Walker heard gunshots and, when he looked outside, he saw Saunders on the ground and defendant running away. Walker did not observe the actual shooting. Defendant was found guilty after a jury trial of second-degree murder, felony-firearm, and felon in possession of a firearm. We granted defendant's motion to remand for an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to inquire into the effectiveness of his trial counsel. On remand, the trial court found that trial counsel had been ineffective for failing to call a witness to corroborate his version of events, that he shot in self-defense after wrestling the gun away from Saunders. The trial court granted defendant a new trial.

Defendant argues that his trial counsel in this trial was also ineffective for failing to call Patricia Graham as a different witness. We disagree. Defendant must show that counsel's performance was objectively so deficient that he was not acting as the counsel guaranteed by the Sixth Amendment, that the challenged action could not be considered sound trial strategy, and that defendant was prejudiced by the deficiency. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994). In the absence of an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413

(2000). The record shows that Graham was dead. She provided no previous testimony, so there was no transcript, only brief statements to the police. Defendant was not prejudiced by counsel's failure to achieve the impossible. In any event, police reports indicate that Graham did not clearly see what happened, so even if she was alive there is no reasonable likelihood that her testimony would have affected the outcome of the trial. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues that he is entitled to a new trial on the basis of newly discovered evidence in the form of a witness who could not be located for trial but has now come forward offering testimony. We disagree. Defendant did not move for a new trial in the trial court on this basis, so it is unpreserved. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Therefore, we review for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although newly discovered evidence may warrant remand, defendant knew of the witness before trial, so the evidence is not newly discovered. *People v Dixon*, 217 Mich App 400, 409-410; 552 NW2d 663 (1996).

Defendant argues that the prosecution impermissibly filed an untimely notice of intent to enhance his sentence as a fourth-offense habitual offender. Defendant did not preserve this issue by raising it below, so we review for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. MCL 769.13(1) imposes a "bright line test," under which the prosecutor must file an habitual offender information "by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense." *People v Ellis*, 224 Mich App 752, 754-755; 569 NW2d 917 (1997). The statute does not afford any exceptions, even for undiscovered out of state convictions under an alias. *People v Morales*, 240 Mich App 571, 574-575; 618 NW2d 10 (2000).

The prosecution moved to amend the original information more than 21 days after defendant was first arraigned, seeking to add a charge of firearm possession by a felon and a fourth-offense habitual offender notice on the basis of a recently discovered alias. The case was then remanded, and defendant was arraigned on the amended information, which included the habitual offender notice. Therefore, defendant was notified within 21 days of his "arraignment on the information charging the underlying offense." It was the second, amended information that was used in defendant's second trial. We do not see plain error affecting defendant's substantial rights.

Defendant argues that his life sentence for voluntary manslaughter<sup>1</sup> was a disproportionate departure from the sentencing guidelines. We agree.

Manslaughter, MCL 750.321, is a class C offense. MCL 777.16p. Defendant's offense and prior record levels under MCL 777.64 mandate a minimum sentence range of 58 to 114 months. However, as a fourth habitual offender under MCL 769.12(1)(a), the upper limit of the sentence range is increased by 100 percent. MCL 777.21(3)(c). Defendant's minimum sentence

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<sup>1</sup> Defendant's felon in possession conviction was superseded by this sentence and is therefore not at issue in this appeal.

range under the sentencing guidelines is therefore 58 to 228 months, which defendant's sentencing information report correctly reflects. However, the trial court chose to depart from this range to impose a life sentence. Therefore, we are required to "determine whether the trial court articulated a substantial and compelling reason to justify its departure from that range." *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003).

We review the trial court's factual findings for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). We determine whether a particular factor is objective and verifiable as a matter of law. *Babcock, supra* at 265. However, "whether a reason is substantial and compelling is reviewed for abuse of discretion." *Id.* Any departure must be assessed against "the principle of proportionality – that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *Id.*, 262.

The trial court first based its departure on the objective and verifiable finding that defendant had a history of criminal activity and was a problem prisoner with a "dismal" record. However, with one exception defendant's prior convictions were already taken into account by the guidelines scoring. A single not-accounted-for conviction for malicious destruction of property does not so "keenly or irresistibly grab our attention" that we recognize it "as being of considerable worth in deciding the length of a sentence." *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995) (internal quotations omitted). Some of defendant's offenses while incarcerated, like failing to clean and use of vulgar language, are insignificant. Others, like inciting to riot, fighting, and assault, were not accounted for in defendant's guidelines scoring, and their seriousness and multiplicity do keenly grab our attention as being of considerable worth. However, the trial court did not "articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Babcock, supra* at 272 (emphasis in original). The trial court also did not indicate that the guidelines scoring gave inadequate weight to the other convictions. *People v Hendrick*, 472 Mich 555, 564 n 10; 697 NW2d 511 (2005).

The trial court also based its departure on the fact that a prior drug and weapons case against defendant had been dismissed. Although objective and verifiable, because there was no conviction in that case defendant remains entitled to the presumption of innocence. *People v Goss*, 446 Mich 587, 617-618; 521 NW2d 312 (1994). It is therefore an abuse of discretion to find a dismissed criminal charge against defendant to be substantial and compelling.

The trial court also based its departure on the objective and verifiable fact that defendant was on bond on six cases at the time of this offense. The fact that defendant was on bond at the time of the offense was already taken into account by the sentencing guidelines. We cannot say the trial court abused its discretion in finding the sheer number of cases substantial and compelling. However, the trial court did not state that the guidelines gave inadequate weight to this factor, and it did not articulate how this factor justifies the particular departure made here. *Babcock, supra* at 272. Likewise, the trial court's stated ground of defendant's drug use is objective and verifiable, given defendant's own admission thereof. However, the trial court did not articulate how it is substantial and compelling or how it justifies this particular departure. Because the "sentence is not based on a substantial and compelling reason to justify the *particular* departure . . . [we] must remand to the trial court for resentencing." *Id.*, 273.

Defendant finally argues that the trial court engaged in vindictive sentencing. We disagree. A presumption of vindictiveness arises when the same judge re-sentences a defendant to a longer sentence than originally imposed. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Because defendant was resentenced by a different judge, the presumption does not apply here. *Colon, supra* at 66-67.

We affirm defendant's convictions. However, we vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Alton T. Davis  
/s/ E. Thomas Fitzgerald  
/s/ Jessica R. Cooper