STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2017
v	No. 334089 Livingston Circuit Court
MICHAEL RAY BROWN, Defendant-Appellant.	LC No. 13-021638-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny over $1,000 but less than than $20,000, MCL 750.356(3)(a), and unlawfully driving away a motor vehicle (UDAA), MCL 750.413. Following an appeal to this Court and a remand for resentencing,[1] the trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 4 to 20 years' imprisonment for each offense. Defendant appeals as of right. We affirm.

I. BACKGROUND FACTS

This Court previously summarized the pertinent background facts of the case as follows:

> This case involves the theft of copper wire and a service truck from a Detroit Edison (DTE) service center in Howell on December 8, 2012. Brown allegedly worked with codefendants Terry Garten and Patrick Cronan to break into the service center and push large spools of copper wire onto a service truck. According to Cronan, Brown drove the service truck to Cronan's residence, while Cronan followed in his wife's car and Garten followed in his blazer. The men unloaded the wire into Cronan's barn, before Brown and Garten abandoned the service truck on US-23. Cronan testified that the next day, Brown and Garten helped him strip the wire, then Cronan took it to a recycling yard for money,

[1] *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2016 (Docket No. 325115).

> which the three of them split. [*People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2016 (Docket No. 325115), p 1.]

The trial court originally sentenced defendant to 4 to 20 years' imprisonment for each of his convictions. On appeal, this Court determined that the trial court erred by assessing 10 points for offense variable (OV) 16, MCL 777.46, and concluded that the trial court should have assessed only five points. *Brown*, unpub op at 6. This change reduced defendant's minimum sentencing guidelines range, so this Court vacated his sentences and remanded for resentencing. *Id.* at 6, 15.

At resentencing, the trial court assessed only five points under OV 16. The prosecutor brought to the court's attention, however, that OV 13, which pertains to a continuing pattern of criminal behavior, MCL 777.43, was overlooked at the first sentencing. The prosecutor argued that the court should assess five points under OV 13 because the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against property. MCL 777.43(1)(f). Defense counsel did not object, and the trial court again sentenced defendant to 4 to 20 years' imprisonment for each conviction, explaining that the minimum sentencing guidelines range did not change after it deducted five points from OV 16 because it assessed five points under OV 13.

Defendant moved in the trial court to correct the sentence or for resentencing. At a hearing on the motion, defendant's counsel argued that the doctrines of res judicata and collateral estoppel precluded the court from assessing points under OV 13 at resentencing when the court did not assess points under this OV at the original sentencing. Defendant further argued that the court improperly relied on uncharged offenses to assess points under OV 13. The trial court denied defendant's motion, and this appeal followed.

II. RES JUDICATA AND COLLATERAL ESTOPPEL

On appeal, the sole argument raised by defendant's appellate counsel is that the doctrines of res judicata and collateral estoppel barred the trial court from assessing points under OV 13 at resentencing. We need not address this issue, however, because defense counsel waived the issue at resentencing. Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant who waives his rights cannot seek appellate review of a claimed deprivation of those rights because the waiver extinguishes any error. *Id.* Defense counsel waived any objection concerning OV 13 by twice stating that she did not have any objection to the assessment of five points under OV 13 at resentencing. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d (2011). Defense counsel's waiver extinguished any alleged error.

Regardless, the issue lacks merit. Once an original sentence is vacated, the case is returned to a presentence posture allowing the trial court to examine every aspect of the sentence de novo. *People v Davis*, 300 Mich App 502, 509; 834 NW2d 897 (2013), abrogated on other grounds by *People v Rhodes (On Remand)*, 305 Mich App 85, 87-88; 849 NW2d 417 (2014). In *Davis*, this Court explained that proceedings on remand are limited to the scope of the remand order. *Davis*, 300 Mich App at 508. In the previous appeal, this Court vacated defendant's sentences and remanded for resentencing without specifying that the trial court could only correct the scoring of OV 16. *Brown*, unpub op at 15. Because the remand was for resentencing

generally, the trial court had full authority to resentence defendant and to consider other issues aside from OV 16. See *Davis*, 300 Mich App at 509-510. Therefore, the trial court was entitled to assess points under OV 13 for the first time at resentencing.

The doctrines of res judicata and collateral estoppel do not change this outcome. "The doctrine of res judicata bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008) (quotation marks and citation omitted). "Collateral estoppel bars relitigation of an issue in a subsequent, different litigation between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was both actually litigated and necessarily determined." *People v Brown*, 279 Mich App 116, 126; 755 NW2d 664 (2008). Resentencing was done in furtherance of defendant's original criminal case; it was not a separate, subsequent criminal case. Res judicata applies to subsequent actions; it does not apply within a single action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). Likewise, collateral estoppel only applies to bar relitigation of an issue "in a subsequent, different litigation between the same parties . . . ." *Brown*, 279 Mich App at 126. Therefore, neither res judicata nor collateral estoppel could bar the trial court from assessing points under OV 13 at resentencing because the resentencing was not part of a subsequent criminal case.

III. STANDARD 4 BRIEF ISSUES

In his Standard 4 brief, defendant raises numerous other allegations of error pertaining to trial, his first sentencing, his first appeal, and resentencing. However, "where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand." *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994); see also *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975) (holding that "the scope of the second appeal is limited by the scope of the remand," and in the case of resentencing, a "second appeal shall be concerned only with matters which arose at resentencing"). Because this Court remanded the case solely for the purpose of resentencing, the only issues that we will address and that are properly before us on second appeal are those pertaining to resentencing.[2]

A. RESENTENCING ISSUES

In his Standard 4 brief, defendant argues that the trial court incorrectly assessed points under OV 13 and prior record variables (PRVs) 1, 2, and 5 at resentencing. We first note that any error regarding this issue is waived because defense counsel expressly stated at resentencing

[2] We note that several of the issues defendant raises in his Standard 4 brief, including a claim that his trial counsel provided ineffective assistance, that the trial court violated the 180-day rule, and that insufficient evidence supported his convictions at trial, were addressed and rejected by this Court in defendant's first appeal. *Brown*, unpub op at 6-7, 12-15. Even if these issues were properly before us, the law of the case doctrine would preclude us from addressing the issues anew. See *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

that she had no objection to the trial court's scoring of the sentencing guidelines.[3] See *Kowalski*, 489 Mich at 504-505. In any event, the issue lacks merit.

The sentencing guidelines apply to any enumerated felony committed on or after January 1, 1999. MCL 769.34(2); *People v Wilcox*, 486 Mich 60, 65; 781 NW2d 784 (2010). The court must score and consider the sentencing guidelines for offenses occurring after that date, although the court is no longer compelled to impose a minimum sentence within the guidelines range. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). Defendant contends that the trial court improperly scored PRVs 1, 2, and 5 by taking into account offenses defendant committed before January 1, 1999; however, defendant's argument misconstrues the meaning and application of MCL 769.34(2). The fact that the court must score the guidelines for offenses committed on or after January 1, 1999, does not preclude the court from taking into account offenses committed before that date for the purpose of scoring the PRVs. Defendant's challenge to the assessment of points under the PRVs on this basis therefore lacks merit.

Defendant also contends that the trial court incorrectly assessed 10 points under OV 13. However, the trial court only assessed five points under OV 13. An assessment of five points is prescribed if the offense was part of a pattern of felonious criminal activity involving three or more crimes against property. MCL 777.43(1)(f). The trial court assessed five points because the prosecutor reminded the court about evidence demonstrating that, in addition to the instant offenses, defendant participated in two similar larcenies from utility sites. Defendant contends that the trial court improperly considered these other alleged offenses because they did not result in convictions. But when scoring OV 13 "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction*." MCL 777.43(2)(a) (emphasis added). The fact that the two other offenses did not result in convictions did not bar the trial court from relying on the offenses to assess points under OV 13.[4]

Defendant also contends that the trial erred by concluding that our Supreme Court's holding in *Lockridge* applied to his sentence because, he argues, the decision should not apply

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[3] The trial court asked defense counsel whether she had "[a]ny . . . challenges to the guidelines as scored in this update," to which she responded, "I have none." The court then gave defendant a chance to review the updated presentence case report, which contained the sentencing information report with the scoring guidelines, and defendant agreed that the information was correct. Finally, the trial court again asked defense counsel whether she had "[a]ny other objections to the guidelines," to which she responded, "None."

[4] Testimony concerning these other offenses was presented at trial and defendant concedes that this evidence was admissible at trial. Indeed, in defendant's first appeal, this Court held that evidence regarding these other criminal acts was admissible under MRE 404(b). See *Brown*, unpub op at 2-5. Defendant contends that the trial court should not have considered this evidence at resentencing because a sentencing hearing occurs post-trial. However, a trial court may consider testimony adduced at trial to score the guidelines. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). Defendant's argument to the contrary therefore lacks merit.

retroactively. But defendant's argument about retroactivity is inapt because his resentencing occurred on June 9, 2016, which postdates the 2015 *Lockridge* decision. Defendant further asserts that his sentence was not proportional. Defendant argues that the court sentenced him to a minimum sentence at the top of the guidelines range because of his extensive criminal history, which the guidelines already take into account. However, we must affirm a minimum sentence within the guidelines range unless there was an error in scoring the guidelines or the court relied upon inaccurate information. MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). Defendant has not demonstrated that there was an error in scoring the guidelines or that the court relied upon inaccurate information. Therefore, we must affirm the sentence because it was within the properly scored guidelines. MCL 769.34(10).[5]

B. CREDIT FOR TIME SERVED

Defendant also contends that he is entitled to an additional 315 days' credit for time served between September 10, 2013, the day he alleges that charges were filed in the instant case, and July 24, 2014, the day he was first sentenced. This issue is also waived, however, because defense counsel expressly stated that she had no objection to the trial court's allowance of only 688 days' credit for time served, beginning after July 24, 2014. See *Kowalski*, 489 Mich at 504-505. Regardless, the issue lacks merit.

MCL 768.7a(2) states the following:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

MCL 768.7a(2) simply requires that "[a] parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

Defendant is not entitled to credit for time served between September 10, 2013, and July 24, 2014, because he was on parole when he committed the instant offenses. MCL 768.7a(2) thus requires that defendant "must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense." *Seiders*, 262 Mich App at 705. Therefore, he is not entitled to credit for time served on the sentence imposed for the previous offense for which he was on parole.

Defendant's arguments to the contrary are all unavailing. First, he contends that he was not on parole on September 10, 2013, when the instant charges were filed. But MCL 768.7a(2)

[5] Defendant asserts that he should be resentenced before a different judge. We will not address this contention, however, because defendant did not demonstrate entitlement to resentencing.

does not inquire whether a defendant was on parole when charges were filed; the operative question is whether defendant was on parole when he committed the instant offenses. Defendant contends that there was no evidence presented that he was on parole at the time he committed the instant offenses, but the presentence investigation report (PSIR) clearly indicates that defendant was on parole at the time he committed the instant offenses. "A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

Defendant also argues that the judgment of sentence states that his sentences are actually concurrent and that he is subject to a "parole sentence," which he contends is not a valid type of sentence in Michigan. The judgment of sentence provides that defendant's sentences for the instant offenses run "concurrent w/Oakland County & consecutive to parole sentence." It is clear that by "parole sentence" the trial court was referring to the sentence that defendant will serve in connection with the offense for which he was on parole when he committed the instant offenses. Defendant does not explain why the fact that his instant sentences are to be served concurrently with sentences imposed in another case arising from Oakland County should result in sentencing credit on the instant offenses. Defendant's claim of error therefore lacks merit.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that his appellate counsel provided ineffective assistance with regard to the previous appeal and at resentencing. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The same legal standard that applies to issues of ineffective assistance of trial counsel applies when scrutinizing the performance of appellate counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81.

Defendant asserts that his appellate counsel was ineffective for failing to challenge the scoring of OV 13 at resentencing. For the reasons discussed earlier in this opinion, the trial court was entitled to assess points under OV 13 for the first time on resentencing, and OV 13 was properly scored. Any objection by counsel would have been meritless, and failing to raise a meritless objection does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant also contends that counsel misrepresented his criminal record to the trial court during resentencing. Counsel conceded that defendant had an "extensive prior record" but minimized it, explaining that "with the exception of two offenses his entire record consists of

theft, minor theft, and drunk driving related offenses." Defendant contends that this information is false because he has no convictions for "theft" or "minor theft." Defendant is substantially correct because aside from the instant larceny conviction, no other larceny charges[6] appeared in defendant's criminal record, which primarily consisted of drunk-driving or vehicle-related offenses. However, even if counsel's performance was deficient because of this misstatement, defendant does not explain how the misstatement prejudiced him in the context of resentencing. Notably, the trial court was in possession of the PSIR containing defendant's criminal record, so the court had an accurate account of his criminal history, which negates any claim of prejudice.

Finally, defendant argues that counsel was ineffective for failing to visit him in prison and for failing or refusing to timely provide him with transcripts. But defendant does not explain how these alleged failings prejudiced him. Defendant has not demonstrated ineffective assistance of counsel because he does not explain how the outcome of his first appeal or resentencing would have been different if counsel had visited him in prison or provided him with transcripts at an earlier time.

D. PROSECUTORIAL ERROR

Defendant contends that the prosecutor committed various acts that rose to the level of misconduct. To preserve a claim of prosecutorial error, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant failed to object to any of the alleged instances of error referenced in his Standard 4 brief. "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, "[w]here a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The test of prosecutorial error is whether the defendant was denied a fair and impartial trial. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Initially, we note that the scope of defendant's second appeal is limited to errors arising as the result of resentencing. See *Jones*, 394 Mich at 435-436. Therefore, defendant's attempt to raise a claim of prosecutorial error, which concerns only whether a defendant was denied a fair and impartial *trial*, is misplaced. Nonetheless, we note that defendant's claims of alleged impropriety by the prosecutor at resentencing lack merit.[7] Defendant alleges that the prosecutor erred by asking the

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[6] The only charge potentially related to larceny or theft appeared to be a 1990 charge for receiving or concealing stolen property, MCL 750.535.

[7] Defendant also argues that the prosecutor treated codefendant Patrick Cronan with unfair leniency and offered him a plea deal in exchange for his testimony, and that Cronan admitted he was untruthful. Defendant also argues that the prosecutor improperly stated that defendant was a career criminal who engaged in a continuing pattern of criminal behavior and would continue to steal if he was ever released. However, the statements referenced by defendant in his brief occurred at his first sentencing hearing; this Court vacated defendant's first sentence on appeal. *Brown*, unpub op at 15. These alleged instances of prosecutorial error did not arise as a result of resentencing, so they are outside the purview of this appeal. *Jones*, 394 Mich at 435-436.

court to assess points under OV 13 for the first time at resentencing, but as discussed earlier in this opinion, the trial court was entitled to do so. Defendant further alleges that the prosecutor justified the assessment of points under OV 13 by introducing her own testimony, but the record reveals that the prosecutor justified the proposed assessment of points by referencing the testimony of witnesses and evidence adduced at trial. In a similar vein, defendant asserts that the prosecutor intentionally misquoted MCL 777.43(1)(j)[8] and (2)(a) in order to secure an inappropriate sentence, but he provides no citation to the record where this allegedly occurred.

Defendant also asserts that the prosecutor committed a *Brady*[9] violation by waiting until remand to assert that the court should assess points under OV 13. To establish a *Brady* violation, a defendant must show that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155; 845 NW2d 731 (2014). Defendant failed to prove a *Brady* violation because his claim of error has no relation to the prosecution withholding or concealing favorable and material evidence.

IV. CONCLUSION

In summary, neither appellate counsel nor defendant through his Standard 4 brief has brought to light any errors warranting correction.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola

[8] Defendant's Standard 4 brief states that the prosecutor misquoted MCR 777.43(1)(j), but no such court rule exists. Defendant presumably meant MCL 777.43, which addresses OV 13, but this statue has no subsection (1)(j).

[9] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).