STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN BROWN,

Defendant-Appellant.

UNPUBLISHED
October 17, 2019

No. 345399
Wayne Circuit Court
LC No. 13-004789-01-FC

Before: METER, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's resentencing for defendant's jury-trial convictions of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder (AWIGBH) (MCL 750.84). We affirm.

This is defendant's third time appealing this case to this Court. In defendant's first appeal, this Court held that the trial court did not adequately justify its assessment of 25 points for offense variable (OV) 13, and therefore remanded for the trial court to either resentence defendant or explain on the record the factual basis for the 25-point score. *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2015 (Docket No. 318675), pp 5-6 (*Brown I*). Defendant appealed to our Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded to the trial court with directions to follow this Court's judgment to either "resentence the defendant or find facts to support the scoring of OV 13[.]" *People v Brown*, 499 Mich 867, 867 (2016). The Supreme Court further ordered that, if the trial court declined to resentence defendant, it was to "determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015)." *Brown*, 499 Mich at 867. The Supreme Court otherwise denied defendant's application for leave to appeal. *Id*.

The trial court decided to resentence defendant. Defendant appealed, arguing that he was denied his constitutional right to be present at resentencing. *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2017 (Docket No. 334498), pp 3-4 (*Brown II*). This Court concluded that, although "defense counsel stated that she would 'confer

with [defendant] to make sure he doesn't object to not being personally present' " for resentencing, the record was silent on whether defendant ultimately waived his right to be present, and this Court therefore remanded for a second resentencing. *Id*. at 5 (alteration in original).

On remand, the trial court again resentenced defendant, this time with defendant present. Defendant was afforded the opportunity to speak, which he used to profess his innocence. The trial court sentenced defendant to 20 to 40 years' imprisonment for the armed robbery conviction, and 5 to 10 years' imprisonment for the AWIGBH conviction.

In his first argument on appeal, defendant contends that the trial court erred by not administering an oath before allowing defendant an opportunity for allocution. We disagree.

This unpreserved[1] issue is reviewed for plain error affecting substantial rights. *People v Perry*, 317 Mich App 589, 600; 895 NW2d 216 (2016). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

At issue is MCL 769.8(2)—the statute governing a defendant's right to allocution at sentencing. That statute provides:

> Before or at the time of imposing sentence, the judge shall ascertain by examining the defendant under oath, or otherwise, and by other evidence as can be obtained tending to indicate briefly the causes of the defendant's criminal character or conduct, which facts and other facts that appear to be pertinent in the case the judge shall cause to be entered upon the minutes of the court. [MCL 769.8(2).]

Defendant contends that the plain language of MCL 769.8(2) requires that the trial court administer an oath to a defendant before the defendant is allowed allocution. To address defendant's argument, we must interpret the statute.

"Our goal in construing a statute is to ascertain and give effect to the intent of the Legislature." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (quotation marks and citation omitted). "The touchstone of legislative intent is the statute's language." *Id*. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain

[1] "To preserve a sentencing issue for appeal, a defendant must raise the issue 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.' " *People v Clark (On Remand)*, 315 Mich App 219, 223; 888 NW2d 309 (2016), quoting MCR 6.429(C). At resentencing, defendant did not raise the issue that the trial court failed to administer an oath to him.

meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

The plain language of MCL 769.8(2) states that "the judge shall ascertain [certain information] by examining the defendant under oath, or otherwise . . . ." Generally, the word "or" is a disjunctive term indicating alternative choices. *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). Thus, the phrase "under oath, or otherwise" conveys that the trial court could have examined defendant while he was under oath, or not under oath. This interpretation of MCL 769.8(2) is consistent with the sentencing procedure required by MCR 6.425(E)(1)(c), which allows defendants "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence," but does not require a trial court to administer an oath.[2] There is no error requiring reversal for the trial court's failure to administer an oath to defendant before allowing defendant the opportunity for allocution.[3]

In his Standard 4[4] brief, defendant argues that the trial court erred by relying on hearsay evidence when it sentenced defendant. The portion of defendant's brief addressing this issue is a photocopy from his Standard 4 brief in *Brown II*. The *Brown II* panel fully addressed defendant's argument and found it to be without merit. See *Brown II*, unpub op at pp 5-6. We agree with the *Brown II* panel's treatment of the issue, and even if we did not, we are bound to follow the *Brown II* panel's ruling under the law of the case doctrine. See *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995).

Defendant also argues that he received ineffective assistance of counsel when defense counsel failed to object to the introduction of hearsay evidence. The *Brown II* panel held that no hearsay evidence was introduced during defendant's sentencing because the contested statement

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[2] The full text of MCR 6.425(E)(1)(c) provides, "At sentencing, the court must, on the record . . . 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[.]"

[3] Defendant appears to argue that "or" in MCL 769.8(2) refers not to the requirement that the trial court examine defendant under oath, but is intended to separate the "under oath" requirement from the requirement that the trial court examine "other evidence." This reading of MCL 769.8(2) does not comport with the statute's plain language; "or otherwise" is separate from the "other evidence" phrase by "and," conveying a conjunction joining two separate items. *People v Bylsma*, 315 Mich App 363, 382-383; 889 NW2d 729 (2016). Thus, the statute plainly reads that, in sentencing a defendant, the trial court must examine the defendant under oath or otherwise *and* examine other evidence.

But even if defendant's reading was correct, defendant's argument would still fail. Under defendant's reading, MCL 769.8(2) would require the trial court to examine defendant under oath *or* otherwise examine other evidence. Thus, a failure to administer an oath would still not violate MCL 769.8(2), so long as the trial court examined other evidence.

[4] Administrative Order 2004–6, Standard 4.

was "a factual stipulation between counsel," not hearsay. *Brown II*, unpub op at 6. Because the contested statement was not hearsay, it would have been futile for defense counsel to object on that ground. Defense counsel cannot be ineffective for failing to advance a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant lastly argues in his Standard 4 brief that there was insufficient evidence to support his convictions. The scope of this appeal is limited to the resentencing proceeding. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). Thus, this portion of defendant's brief goes beyond the scope of this appeal, and we therefore decline to address it.

Affirmed.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle