STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW JAMES BLUMKE,

Defendant-Appellant.

UNPUBLISHED
June 17, 2021

No. 353460
Macomb Circuit Court
LC No. 2013-004546-FC

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his motion for resentencing following a second *Crosby*[1] remand. We affirm.

I. STATEMENT OF FACTS

On June 13, 2014, defendant was convicted by a jury of assault by strangulation or suffocation, MCL 750.84(1)(b); unlawful imprisonment, MCL 750.349b; malicious destruction of personal property worth $200 or more but less than $1,000, MCL 750.377a(1)(c)(*i*); and interfering with a crime report, MCL 750.483a(2)(a). Defendant was sentenced by Macomb Circuit Court Judge Mary A. Chzranowski as a fourth-offense habitual offender, MCL 769.12.

On August 19, 2014, defendant appealed as of right to this Court. We affirmed defendant's convictions but remanded for a hearing under *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), for the trial court to "determine whether, now aware of the advisory nature of the guidelines, it would have imposed a materially different sentence" in light of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *People v Blumke* (*Blumke I*), unpublished per curiam opinion of the Court of Appeals, issued February 23, 2016 (Docket No. 323199), p 1.

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

A *Crosby* remand hearing was held on February 22, 2017, before Judge Chrzanowski's successor, Judge Michael E. Servitto. Defendant was not present at this hearing, but his counsel argued that certain sentencing guideline variables had been improperly scored. In an opinion and order issued on February 28, 2017, the trial court concluded that, even in light of *Lockridge*, it would not have imposed a materially different sentence, the sentencing variables had been properly scored, and any potential error in scoring the sentencing variables did not result in any prejudice to defendant.

Defendant appealed as of right to this Court for a second time. This Court remanded for a second *Crosby* hearing "so defendant may appear in person before the newly assigned judge," as required by *People v Howard*, 323 Mich App 239, 253; 916 NW2d 654 (2018). *People v Blumke* (*Blumke II*), unpublished per curiam opinion of the Court of Appeals, issued August 21, 2018 (Docket No. 338058), pp 1, 4. This Court directed that "the trial court's only task is to determine whether it would have imposed a materially different sentence under the advisory nature of the guidelines." *Id*. at 5. This Court also addressed defendant's specific challenges to the scoring of the sentencing variables and rejected each challenge as without merit. *Id*. at 5-9. Further, this Court addressed, and rejected, defendant's several other claims, including his challenges to the reasonableness of his sentence, the accuracy of the PSIR, and the notice of sentence enhancement. *Id*. at 9-14.

A second *Crosby* hearing was held before Judge Servitto on February 27, 2020. Defendant was present for this hearing and verbally confirmed on the record that he was requesting a resentencing. Defense counsel again challenged the scoring of the sentencing variables. In an opinion and order issued on March 5, 2020, the trial court declined to consider defendant's arguments related to the scoring of the sentencing variables because he "merely rehashe[d] the same arguments that were previously found to lack merit[.]" The trial court concluded that "substantial sentences remain warranted in this matter and materially different sentences would not have been imposed under the advisory nature of the sentencing guidelines." Accordingly, the court denied defendant's renewed motion for resentencing. This appeal followed.

II. ANALYSIS

A. ALLOCUTION

Defendant argues that resentencing is necessary because the trial court erroneously failed to allow defendant to allocute at the February 27, 2020 *Crosby* hearing. We disagree. This issue is raised for the first time on appeal, and thus, is unpreserved. Accordingly, our review is for plain error that affected defendant's substantial rights. See *People v Bailey*, 330 Mich App 41, 59; 944 NW2d 370 (2019), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court did not err at the February 27, 2020 *Crosby* hearing. That hearing was not a resentencing proceeding; we did not order resentencing on remand. Rather, the purpose of the February 27, 2020 *Crosby* hearing was to determine "*whether* to resentence . . . defendant." *Lockridge*, 498 Mich at 398 (emphasis added), citing *Crosby*, 397 F3d at 117. While it is true that at resentencing a defendant and defense counsel must be given "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence," MCR 6.425(D)(1)(c), the requirements are not the same for a *Crosby* hearing before a judge other than

the original sentencing judge. At a *Crosby* hearing before such a judge, the trial court must give a defendant "an opportunity to appear before the court and be heard before the judge can decide whether he or she would resentence the defendant." *Howard*, 323 Mich App at 253. In this case, the *Crosby* and *Howard* requirements were satisfied. Defendant appeared in person and confirmed on the record that he was requesting a resentencing. See *Crosby*, 397 F3d at 118.

> *The Court*: And he is here today. That's—that's correct, [defendant], you're asking for a resentencing?
>
> *Defendant*: Yes, Your Honor.
>
> *The Court*: All right. Is there anything else that you want to add to your brief?

Defense counsel then proceeded to advance defendant's argument that—contrary to the trial court's and this Court's prior decisions—the sentencing guidelines had been incorrectly scored and that issue should be addressed before the trial court decided whether to resentence defendant. The prosecution disagreed, noting that this was merely a *Crosby* hearing and reconsideration of the guidelines scoring would be inappropriate, and moreover, the trial court and this Court already held that they were properly scored.

Consequently, defendant had an opportunity to appear before the newly assigned judge in the trial court and be heard. See *Howard*, 323 Mich App at 253. In fact, defendant presented arguments through his counsel. Defendant relies on MCR 6.425(D)(1)(c) to argue that he should have been allowed to "inform the trial court of 'any circumstances' that he believed the trial court should consider when crafting and imposing the sentence." But because the trial court was not performing a resentencing, MCR 6.425(D)(1)(c) was not applicable. Here, unlike the defendant in *Howard*, defendant was able to both appear and be heard before the trial court. See *Howard*, 323 Mich App at 253. The fact that defense counsel, rather than defendant, specifically addressed the trial court is of no import. The trial court took defendant's claims into consideration. Defendant was not entitled to "allocute" because he was not being sentenced. See *People v Petty*, 469 Mich 108, 119 n 7; 665 NW2d 443 (2003) (noting the definition of allocution as generally referring to a defendant having an opportunity to ask a sentencing judge for mercy, explain conduct, apologize, "or say anything else in an effort to lessen the impending sentence"). And defendant's reliance on *Petty* to support his claim is misplaced. That case involved a sentencing hearing, not a *Crosby* hearing as in this case. See *id*. at 111. In summary, there was no error, plain or otherwise, here and resentencing is not warranted.

B. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several arguments in his Standard 4 brief on appeal, including (1) whether this Court erred with respect to the resolution of his challenge to the notice of sentence enhancement; (2) whether defendant was prejudiced by the culmination of the alleged errors by this Court and the trial court; and (3) whether the law-of-the-case doctrine should apply in this case. However, we decline to address these improperly raised issues. This matter was on remand to the trial court solely to conduct a *Crosby* hearing. *Blumke II*, unpub op at 1. "[W]here 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). As such, "the scope of the second appeal is limited by the scope of the remand." *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). Consequently, the issues set forth in defendant's Standard 4 brief are beyond the scope of the remand and are not properly before us.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica