

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
December 17, 2013

v

LANGSTON BURCH,

No. 312303
Wayne Circuit Court
LC No. 12-005278-FH

Defendant-Appellee.

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, and breaking and entering without the owner's permission, MCL 750.115(1). The trial court sentenced defendant to 1 to 20 years' imprisonment for first-degree home invasion and time served on the two remaining counts. The prosecution appeals by leave granted. We vacate defendant's first-degree home invasion sentence and remand to the trial court for resentencing and ministerial correction of defendant's judgment of sentence.

I. DEPARTURE FROM THE SENTENCING GUIDELINES

The prosecution argues that the trial court erred by departing from the sentencing guidelines without adequate justification. We agree.

A substantial and compelling reason must exist to depart from the applicable sentencing guidelines range. MCL 769.34(3); *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). “[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). “Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made.” *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Reasons given to support a departure must be objective and verifiable. *Smith*, 482 Mich at 299. Whether those reasons are objective and verifiable is reviewed de novo as a matter of law. *Id.* at 300. “Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure.” *Id.*

“The statutory sentencing guidelines, MCL 769.34(3), require the trial court to ‘state[] on the record the reasons for departure.’” *Babcock*, 469 Mich at 258, quoting MCL 769.34(3). Although no “magic words” are required, the trial court must articulate its reasoning in a way that allows for effective appellate review of the issue. *Id.* at 259 n 13. In addition, it is not enough for the trial court to provide a substantial and compelling reason for some departure; instead, the trial court must provide a substantial and compelling reason to justify the particular departure imposed. *Id.* at 259-260.

At the beginning of defendant’s preliminary examination, the prosecutor requested that the district court consider an additional count, first-degree home invasion. Defendant objected to the court’s consideration of the home invasion charge, believing that the prosecution made the request in retaliation for defendant’s refusal of a prior plea offer. After hearing the evidence, the district court bound defendant over on charges of larceny in a building, breaking and entering, and first-degree home invasion; two other misdemeanor charges were dismissed.

At defendant’s arraignment, defendant requested a sentencing evaluation pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).¹ The circuit court provided an evaluation of probation with the first nine months to be served in the county jail, along with other conditions of probation.² The prosecution objected to the *Cobbs* evaluation because it was a substantial departure from the sentencing guidelines, which the prosecutor stated called for a minimum sentence range of 78 to 260 months’ imprisonment. The only justification for the circuit court’s downward departure was that the court found it unfair to punish defendant for rejecting the plea offer by increasing the charges against defendant at the preliminary examination.

These circumstances do not warrant the circuit court’s departure from the sentencing guidelines. Punishing an individual for asserting a constitutional or statutory right is a violation of due process. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). “Such punishment is referred to as prosecutorial vindictiveness.” *Id.* at 36. “There are two types of prosecutorial vindictiveness, presumed vindictiveness and actual vindictiveness.” *Id.* To establish actual vindictiveness, a defendant must show objective evidence of an expressed hostility or threat suggesting that the defendant was deliberately penalized because of his or her exercise of a right. *Id.* However, “[t]he mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor’s charging discretion.” *Id.* Likewise, there is no presumption of prosecutorial vindictiveness when additional charges are brought, even if a prosecutor states that a count may be added if a

¹ Under *Cobbs*, the trial court may, at the request of a party, state on the record the length of sentence that appears to be appropriate for the charged offense. *Cobbs*, 443 Mich at 283. The trial court is not bound to follow the evaluation; however, if the defendant has pleaded guilty in reliance upon the evaluation, the trial court must provide the defendant with an opportunity to withdraw the plea prior to departing from the court’s sentencing evaluation. *Id.*

² Defendant was eventually sentenced to 1 to 20 years’ imprisonment, apparently in response to defendant’s failure to abide by the court’s no-contact order with the victim.

defendant refuses a plea offer. *People v Watts*, 149 Mich App 502, 508-511; 386 NW2d 565 (1986); see also *United States v Goodwin*, 457 US 368; 102 S Ct 2485; 73 L Ed 2d 74 (1982) (no presumption of vindictiveness where prosecutor raised charges from misdemeanor to felony after the defendant demanded a jury trial); *Bordenkircher v Hayes*, 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978) (no presumption of vindictiveness where prosecutor threatened to bring additional charges if the defendant did not plead guilty and save the state from the necessity of a trial).

Here, defendant provides no evidence that the prosecutor acted with actual vindictiveness when the prosecutor added the home invasion charge, and as discussed in the cases cited above, there is no presumption of vindictiveness in these circumstances. Thus, there is no support for the assertion that the prosecutor punished defendant by adding the home invasion charge. The circuit court's factual finding that defendant had been punished is not supported by the evidence or case law. Thus, the circuit court's factual finding in this regard is clearly erroneous. See *Kurylczyk*, 443 Mich at 303.

The addition of a charge, supported by the evidence at the preliminary examination, does not warrant a departure from the sentencing guidelines. Only "substantial and compelling" reasons justify a departure from the sentencing guidelines. *Smith*, 482 Mich at 300. Substantial and compelling reasons are those that "keenly or irresistibly grab[] our attention; [are] of considerable worth in deciding the length of a sentence; and exist[] only in exceptional cases." *Babcock*, 469 Mich at 247 (internal quotations and citations omitted). As discussed above, there is no evidence that the prosecutor increased the charges as a punishment for defendant's decision to refuse the plea offer and proceed with the preliminary examination. The prosecutor had the right to request an additional charge where the facts supported it. See *People v Joseph*, 114 Mich App 70, 78; 318 NW2d 609 (1982). Because the prosecutor requested the additional count at the commencement of the preliminary examination, defendant had an opportunity to cross-examine with this charge in mind. Defendant does not allege that he was unfairly surprised or burdened by the addition of the charge at the preliminary examination. These circumstances do not "keenly or irresistibly" grab one's attention. In fact,

[a]s early as 1876, the Michigan Supreme Court explained the duties of the magistrate. *Yaner v People*, 34 Mich 286, 288 (1876). The Court held that the magistrate has an obligation to determine, based upon the whole examination, whether an offense was committed by the accused. The magistrate must conduct an examination in regard not only to the offense charged, but to any other matter connected with that charge. *Id.* [*People v Gonzalez*, 214 Mich App 513, 516-517; 543 NW2d 354 (1995).]

The addition of a charge, supported by the evidence at the preliminary examination, is not an exceptional circumstance. See *id.*; *Joseph*, 144 Mich App at 78. The circuit court abused its discretion when it found that the circumstances amounted to a substantial and compelling reason warranting a departure from the sentencing guidelines.

Further, the circuit court did not provide any reason why the prosecution's addition of the home invasion charge justified the particular departure it chose. "[T]he trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed." *Babcock*, 469 Mich at 260. "When departing, the trial court must explain why the sentence

imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith*, 482 Mich at 304. Here, in providing its *Cobbs* evaluation, the circuit court merely stated that, in light of the circumstances, “nine months in the Wayne County Jail will be more than adequate.” The circuit court eventually sentenced defendant to 1 to 20 years’ imprisonment in response to his violation of a no-contact order with the victim. The circuit court did not reference the applicable sentencing guidelines range or explain why a departure of nearly six years below the minimum sentencing guidelines range was warranted. Resentencing is required because, where the trial court gives a reason for a departure but fails to explain why that reason justifies the extent of the departure, the sentence cannot be upheld. See *Smith*, 482 Mich at 311.

Defendant argues that the circuit court’s departure is justified on the basis of a number of factors, such as defendant’s criminal record and the particular facts of the case. However, none of the factors cited by defendant were articulated by the circuit court in announcing defendant’s sentence. As stated in *Babcock*:

[I]t is not enough that there exists some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court’s sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. [*Babcock*, 469 Mich at 258-259.]

Accordingly, this Court cannot affirm defendant’s sentence on the basis of factors that were not articulated by the circuit court. However, upon resentencing, if the circuit court wishes to sentence defendant to a term exceeding that stated in the *Cobbs* agreement, defendant must be given an opportunity to affirm or withdraw his plea. MCR 6.310(B)(2)(b); *Cobbs*, 443 Mich at 283.

II. MINISTERIAL CORRECTIONS

Upon review of defendant’s judgment of sentence, this Court has noted clerical errors requiring correction upon remand. Currently, the judgment of sentence reflects a sentence of 1 to 20 years’ imprisonment for defendant’s larceny in a building conviction, and sentences of time served for defendant’s breaking and entering without permission and first-degree home invasion sentences. The sentences, as announced by the circuit court at defendant’s sentencing hearing, were time served for breaking and entering without permission and larceny in a building, and 1 to 20 years’ imprisonment for home invasion. In addition, the judgment of sentence incorrectly states that “defendant [is] sentenced to time served on counts 2 & 5; dismiss counts 2 & 3.” In actuality, counts three and four were dismissed, and defendant was sentenced to time served on counts one and two. On remand, we direct the circuit court to correct defendant’s judgment of sentence to rectify these clerical errors. See MCR 6.435(D); MCR 7.208(A)(1).

III. ISSUES RAISED IN DEFENDANT'S BRIEF ON APPEAL

In his brief on appeal, defendant discusses three issues that are not properly before this Court. First, defendant argues that his breaking and entering without permission conviction violates the Double Jeopardy Clause of the Fifth Amendment of the Michigan and United States constitutions. Second, defendant discusses the circuit court's failure to provide him with an opportunity to withdraw his guilty plea before sentencing him to a term differing from what had been stated in defendant's *Cobbs* evaluation. Finally, defendant argues that the circuit court erroneously denied him credit for time served. In the order granting the prosecution leave to appeal, this Court stated that the appeal was limited "to the issues raised in the application and supporting brief." *People v Burch*, unpublished order of the Court of Appeals, entered January 25, 2013 (Docket No. 312303). These three issues were not raised in the prosecution's application and supporting brief. Thus, these issues are not properly before this Court and need not be decided.

Vacated with respect to defendant's first-degree home invasion sentence and remanded to the circuit court for resentencing and ministerial correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad