STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v EVAN THOMAS DESJARDINS, Defendant-Appellant.	UNPUBLISHED December 3, 2009 No. 286617 Isabella Circuit Court LC No. 07-001863-FH

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

A jury convicted defendant of burning real property, MCL 750.73 (arson), preparation to burn property over $20,000, MCL 750.77(1)(d)(*i*), and larceny in a building, MCL 750.360. He was sentenced as a fourth habitual offender, MCL 769.12, to 13 to 25 years' imprisonment each for the arson and preparation to burn convictions and 5 to 15 years' imprisonment for the larceny conviction, to be served concurrently but consecutive to an earlier sentence from which defendant was on parole. Defendant appeals as of right. We affirm.

I. Basic Facts and Proceedings

At 4:30 a.m. on September 16, 2007, members of the Mount Pleasant Fire Department responded to a fire at the Pizza King restaurant in Mount Pleasant. The fire was later determined to be arson, and resulted in the total loss of the Pizza King and substantial damage to two adjacent businesses. Defendant was a manager at the Pizza King and had worked at the restaurant for approximately one year. He had a key to the Pizza King. At trial, witnesses testified to seeing a car similar to the car owned by defendant near the Pizza King at the time of the fire. Also, a security recording of inside the Pizza King around the time of the fire was recovered. The owner of the Pizza King and several of his employees viewed the recording and identified defendant as the person inside the Pizza King starting the fire. Defendant denied that he was the person in the recording.

II. Effective Assistance of Counsel

Defendant first argues that he was denied effective assistance of counsel. We disagree.

A. Standard of Review

Our review of this unpreserved claim is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) counsel's errors rendered the resultant proceedings fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that trial counsel erred in failing to have him evaluated by a medical professional to determine whether he could present an insanity or temporary insanity defense based on possible mental illness or involuntary intoxication. "A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he or she made a good faith effort to avail himself of the right to present that defense and that the defense was substantial. *Id*. A substantial defense is one that might affect a trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

A person is legally insane if, "as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). Further, "mental illness . . . does not otherwise constitute a defense of legal insanity." *Id*.

Defendant argues there was evidence that he had a history of alcohol and substance abuse that could lead to a finding that he was involuntarily intoxicated. We note that the PSIR indicates a history of drug use through 2003, and that defendant abused through the date of the fire. However, defendant testified that on the night of the fire he consumed "I don't know, three mixed drinks, maybe," at a friend's house and that "I don't think I was impaired in any way." The record does not support defendant's claim that he was intoxicated, involuntarily or otherwise.

Moreover, defendant has not alleged that his mental illness or substance abuse issues resulted in the lack of capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, as required by MCL 768.21a. Because there is no basis for concluding that an insanity defense was a substantial defense, defendant cannot establish his claim for ineffective

assistance of counsel on the basis of any failure to pursue it. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (defense counsel is not required to advocate a meritless position).

III. Sentencing Errors

Defendant next contends that the trial court committed several errors in sentencing defendant.

A. Standards of Review

A defendant can preserve an issue challenging the scoring of the guidelines or challenging the accuracy of the information relied upon in determining a sentence by raising an objection at sentencing. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Although there is no general preservation requirement concerning appellate objections to a trial court's decision to depart from the guidelines range at sentencing, see *id.* at 311-312, defendant did not bring any mitigating factors to the trial court's attention during sentencing, nor did he argue that the trial court failed to consider his rehabilitative potential, that the sentence imposed constituted cruel and unusual punishment as a result, or that the principle announced in *Blakely* was violated. Therefore, these aspects of his argument are unpreserved. We review unpreserved allegations of sentencing errors for plain error affecting the defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

B. Impermissible Fact-Finding

Defendant argues that his sentence is constitutionally invalid according to the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Specifically, defendant claims the trial court engaged in impermissible fact-finding and based defendant's sentence on facts that had not been proved beyond a reasonable doubt to a jury. However, our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Although defendant argues that these cases were wrongly decided, this Court is bound to follow the decisions of our Supreme Court. See *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

C. Mitigating Factors

We also reject defendant's argument that the trial court impermissibly failed to consider mitigating factors. Defendant fails to identify any mitigating factor that the trial court should have considered. An appellant may not merely announce a position and then leave it to this Court to discover and rationalize the basis for his claim. *Matuszak*, *supra* at 59.

D. OV 4

Defendant argues that the trial court incorrectly scored OV 4 at 10 points. We need not address this claim because it was specifically waived at sentencing when defense counsel expressly agreed with the scoring. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

See also MCL 769.34(10); MCR 6.429(C). In any event, a court must assess 10 points under OV 4 if serious psychological injury occurred to the victim that may require professional treatment, although treatment need not actually be sought in order for these points to be assessed. MCL 777.34(2). Defendant's claim on appeal disregards the above language providing that treatment is not necessary. Levi Henning testified that he had considered defendant his friend. He testified that upon seeing the security recording he was shocked and felt utterly betrayed. At trial, Henning began crying as he testified that he had "lost everything," and that defendant had "ruined his life." Henning's victim impact statement indicates that he experienced emotional injury and that his ensuing financial difficulties caused additional stress. There was sufficient evidence to support the assessment of 10 points for OV 4.

E. Failure to Downwardly Depart from Sentencing Guidelines

In this case, the guidelines recommendation for defendant's minimum sentence for the arson conviction was 34 to 134 months' imprisonment. The minimum actually imposed, 13 years, or 156 months, thus exceeded the guidelines range by 22 months. However, defendant does not argue on appeal that the factors the trial court relied on in deciding to depart from the guidelines were not substantial and compelling, or that the factors were not objective and verifiable. Instead, defendant argues the trial court should also have considered substantial and compelling reasons to depart downward from the sentencing guidelines, i.e. defendant's addictions to alcohol and other drugs, his expressions of remorse, and his strong family support. This argument is not persuasive.

A substantial and compelling reason to depart from the guidelines "exists only in exceptional cases," and is one that "keenly or irresistibly grabs" the attention and is "of considerable worth in deciding the length of a sentence." *Babcock*, *supra* at 258. Assuming without deciding that defendant suffered from a substance abuse problem, felt remorse for his actions, and benefited from strong family support, we nonetheless cannot regard those factors as occurring in only exceptional cases. Nor do we deem them particularly compelling. Accordingly, they would not qualify as a substantial and compelling reason to depart downward.

F. Individualized Sentence and Proportionality

Defendant also contends that the sentence imposed violates the principle of proportionality, and is invalid because the trial court did not explain how it determined the minimum and maximum terms of imprisonment imposed. This argument is not persuasive.

A sentence must be individualized such that the specific details of the crime, and the characteristics of the offender, are taken into account. *Babcock*, *supra* at 264. In this case, the sentencing transcript reveals that the instant sentence was individualized. The trial court noted that defendant had an extensive criminal history, and that his actions resulted in the end of three area businesses. The trial court also made clear that defendant's actions constituted a serious violation of trust. We conclude the trial court adequately explained how the sentence imposed was proper under the facts and circumstances. We further conclude that the sentence imposed did not violate the rule of proportionality. The trial court properly took both the offense and offender into account in imposing the sentence.

G. Incomplete PSIR

Defendant's alternatively argues that he is entitled to resentencing because the trial court relied on incomplete information. We disagree. Defendant specifically argues that the trial court should have conducted an assessment of his rehabilitative potential. MCR 6.425(A)(5) requires that, before sentencing, a written report be submitted to the court which includes "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." Although no current psychological or psychiatric report was included in defendant's PSIR, the court rule requires such a report only "if indicated." There is nothing in the PSIR indicating that a psychological or psychiatric report was necessary in the instant case. A PSIR is presumed to be accurate, and a trial court may rely upon the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge the accuracy of the PSIR at sentencing and the accuracy of the PSIR has not been challenged on appeal. The trial court did not err in proceeding without any special assessment of his rehabilitative potential. Accordingly, resentencing is not required.

H. Cruel and Unusual Punishment

Defendant next argues that the sentence imposed amounts to cruel and unusual punishment. See US Const, Am VIII; Const 1963, art 1, § 16. A defendant's claim that his sentence violates constitutional principles is not subject to the limitation on review set forth in MCL 769.34(10). However, as noted above, the sentence was proportionate to the crime committed. A proportionate sentence does not constitute a cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 65-66; 644 NW2d 790 (2002).

I. Jail Credit

Defendant next argues that his constitutional rights were violated by the trial court's refusal to award jail credit. We disagree.

We review this unpreserved claim for clear error affecting defendant's substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). MCL 769.11b governs jail credit, and provides that a defendant is entitled to jail credit when any time in jail has been served prior to sentencing "because of being denied or unable to furnish bond for the offense for which he is convicted." However, "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). The jail credit is applied only to the sentence from which parole was granted. *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006).

Moreover, our Supreme Court has squarely rejected the position that defendant advocates:

> [U]nder MCL 791.238(2), the parolee is "liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment" and actually resumes

> serving that term of imprisonment on the date of his availability for return to the DOC, which in this case is synonymous with the date of his arrest. The parolee is not incarcerated "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." MCL 769.11b. Because the parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his eligibility for or ability to furnish bond for the new offense, the jail credit statute does not apply. [*People v Idziak*, 484 Mich 549, 566-567; ___ NW2d ___ (2009).]

For these reasons, we must reject this claim of error.

K. Sufficiency of Evidence

Defendant's also alleges in his statement of questions presented that there was insufficient evidence to support his conviction for preparation to burn. However, the corresponding argument section of his brief maintains that his convictions for arson and preparation to burn violate double jeopardy. In regard to double jeopardy we merely note that preparation to burn contains elements that arson does not; specifically, the placement or arrangement of explosive or combustible materials to set a fire. See *Blockburger v US*, 284 US 299, 304; 52 S Ct 180, 182; 76 L Ed 306, 309 (1932). Defendant has not otherwise provided argument or citation of authority to support his insufficient evidence claim, and thus has abandoned this issue on appeal. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra