

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 9, 2012

v

JOHN ROY BARTLEY,

No. 305813
Van Buren Circuit Court
LC No. 10-017394-FC

Defendant-Appellant.

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant John Roy Bartley appeals as of right from his convictions and sentence for manslaughter¹ and failure to stop at the scene of an accident resulting in a death (failure to stop)² following a jury trial. We affirm Bartley's convictions. But because the trial court departed upward from the sentencing guidelines for an impermissible reason, we vacate Barley's sentence and remand for resentencing.

I. FACTS

A. BACKGROUND FACTS

On the evening of October 30, 2012, Bartley struck the victim, Joseph Shoyrer, with his vehicle. Shoyrer died as a result of his injuries. Cheryl McDaniel, Shoyrer's girlfriend, testified that she, Shoyrer, Bartley, Paula Nappier went to a Halloween party together in a yellow Mustang. Nappier, who was Bartley's girlfriend, testified that the Mustang had a problem with its power steering, but that Bartley had driven the Mustang before that evening and knew about its power steering problem.

Jason Rupe testified that Bartley was driving recklessly when he arrived at the party, and that Bartley almost hit him when he turned a corner too fast. Michael Rupe testified that Bartley and Shoyrer were friendly with each other when they arrived, and that Bartley introduced

¹ MCL 750.321.

² MCL 257.617(2).

Shoyrer as his brother. Nappier testified that during the party, she was trying to secure a way to return Bartley home safely because he “was beyond that level of being able to legally drive a motor vehicle.”

Several witnesses testified that Bartley and Shoyrer engaged in two fistfights at the party. After the second fight, Shoyrer began walking away. Mike Moran, the owner of the home at which the party was held, testified that he did not allow Bartley to return to the party after the second fight, and that Bartley then walked to a yellow Mustang and “[took] off down the road squealing his tires.” Stephen Rager testified that he spoke with Bartley shortly before Bartley and Shoyrer fought, and that he was “extremely intoxicated.”

The witnesses all testified that they heard squealing tires, either one or two loud thumps, and some witnesses testified that they saw brake lights. Wendy Thyse testified that she heard a crash, and then people began yelling “he hit him, he ran him over.” Michael Rupe testified that he saw Bartley leave the subdivision in the Mustang. Jason Rupe testified that he entered his car and drove down the road to see what Bartley had hit. Jason Rupe discovered a mailbox in the middle of the road, and Shoyrer in a ditch.

Kelly Hart and Brandon Singleton, who lived across the street from Bartley, both testified that they saw Bartley and two men attempt to get the yellow Mustang out of a ditch in front of Bartley’s residence that evening. Singleton testified that Bartley appeared “highly intoxicated.”

Michigan State Police crime lab personnel discovered blood spatter on the Mustang, concentrated on the windshield. Detective Sergeant Thomas Macyauski testified that there was no evidence that anyone had attempted to clean off the spatter. Macyauski testified that he also recovered a shoe from the Mustang. The shoe matched a single shoe that he found near Shoyrer’s body.

Nappier testified that she spoke with Bartley by telephone later that evening or early the next morning, and that Bartley was not aware that he had hit the mailbox or Shoyrer. She testified that she told Bartley that “people were saying” that he struck Shoyrer, but that Bartley did not acknowledge that he had. In a recorded telephone call with his mother from jail, Bartley told his mother that he remembered hitting the mailbox, but was certain that he did not strike anybody.

B. PROCEDURAL HISTORY

The prosecution charged Bartley with first-degree murder, manslaughter, and failure to stop. The trial court allowed Bartley’s first court-appointed attorney to withdraw from representation after Bartley expressed dissatisfaction with her performance. The trial court appointed substitute counsel, but Bartley expressed dissatisfaction with his second attorney, Mr. Hunt, as well. At a competency hearing, at which the trial court found Bartley competent to stand trial, Bartley stated that he wanted to represent himself:

MR. HUNT: Your Honor, [Bartley] wants to move the Court to—

BARTLEY: No, I want him to get off my case. I’ve been asking since—let’s see, it would be—

THE COURT: Okay, sir this is your second attorney.

BARTLEY: I want to represent myself. That's the problem.

After further conversation with Bartley at the competency hearing, the trial court instructed Hunt to file a petition for Bartley to proceed in propria persona.

At the hearing on the motion, the trial court informed Bartley of the charges against him and possible consequences if the jury found him guilty. The trial court asked Bartley several times if he was sure that he wished to represent himself, and Bartley responded either "[y]es" or "[y]es, I do." The trial court granted Bartley's motion, and indicated that Hunt would act as Bartley's counsel if Bartley did not wish to continue to represent himself at any point.

Bartley later filed motions for substitute counsel and for a private investigator. He indicated at the motion hearing that he did not wish to represent himself, did not want Hunt to represent him, and wanted his first attorney to represent him. Bartley also stated that he believed that Hunt was involved in a conspiracy to wrongly convict him. The trial court explained that Bartley's first attorney was unavailable, denied Bartley's motion for substitute counsel, and informed Bartley that Hunt would represent him if he did not want to represent himself. Bartley indicated that he would rather represent himself. After it granted Bartley's motion for a private investigator, the trial court again asked Bartley if he still wished to represent himself. Bartley indicated that if the trial court would not give him a different attorney, he would represent himself.

At the commencement of trial, the trial court asked Bartley whether he still wished to represent himself. Bartley responded "[o]f course. I am not letting no bum represent me that has been framing me." Bartley represented himself during jury selection. On the second day of trial, Bartley appeared with retained counsel, who represented him for the remainder of the trial and at sentencing.

The jury acquitted Bartley of first-degree murder, but found him guilty of manslaughter and of failure to stop. The trial court indicated that Bartley's lack of remorse was a substantial and compelling reason to depart upward from the recommended sentence, and sentenced Bartley as a third-offense habitual offender³ to concurrent sentences of 17 to 30 years' imprisonment for his manslaughter conviction, and 57 to 120 months imprisonment' for his failure to stop conviction. Bartley now appeals his convictions and sentences.

II. WAIVER OF COUNSEL

A. STANDARD OF REVIEW

This Court reviews the trial court's factual findings surrounding a defendant's waiver of counsel for clear error, and reviews de novo issues involving the interpretation of the law or

³ MCL 769.11.

application of constitutional standards.⁴ We must indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel.⁵ We review for an abuse of discretion the trial court's decision concerning substitution of counsel.⁶ The trial court abuses its discretion when it chooses an outcome that falls outside of the range of principled outcomes.⁷

B. LEGAL STANDARDS

The United States and Michigan Constitutions provide that an accused is entitled to counsel to assist in his or her defense.⁸ However, an indigent defendant is not entitled to the attorney of his or her choice, or to have the trial court replace the originally appointed attorney on request.⁹ The trial court may appoint substitute counsel on a showing of good cause, and when substitution will not unreasonably disrupt the judicial process.¹⁰

The defendant's right to counsel encompasses the right to self-representation.¹¹ The Michigan Constitution provides that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."¹² In order for a defendant to exercise the right to self-representation, the defendant must unequivocally waive his or her right to the assistance of counsel.¹³ The defendant's waiver of his or her right to the assistance of counsel must be knowing, intelligent, and voluntary.¹⁴

The trial court must also advise the defendant of the charges, the maximum possible prison sentences, any mandatory minimum sentences, and the risks of self-representation, and must offer the defendant the opportunity to consult with counsel.¹⁵ Finally, the trial court must advise the defendant of his continuing right to counsel, and the defendant must waive that right

⁴ *People v Russell*, 471 Mich 182, 187, 190; 684 NW2d 745 (2004).

⁵ *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

⁶ *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

⁷ *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

⁸ US Const, Am 6; Const 1963, Art 1, § 20.

⁹ *Traylor*, 245 Mich App at 462, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

¹⁰ *Id.*

¹¹ *Faretta v California*, 422 US 806, 818; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

¹² Const 1963, Art I, § 13.

¹³ *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996), overruled in part on other grounds in *Williams*, 470 Mich 634 at 641 n 7; *Russell*, 471 Mich at 190.

¹⁴ *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970); *Williams*, 470 Mich at 642.

¹⁵ MCR 6.005(D); *Williams*, 470 Mich at 642-643.

at each subsequent proceeding.¹⁶ The trial court's failure to substantially comply with these requirements renders the defendant's waiver of counsel ineffective.¹⁷

C. APPLYING THE STANDARDS

Bartley argues that the trial court denied him his right to counsel when the trial court required him to either proceed to trial with court-appointed counsel not to his liking, or to represent himself, and that Bartley's waiver of counsel was not knowing, intelligent, and voluntary.

Our review of the record indicates that the trial court painstakingly complied with the Michigan Court Rule's requirements concerning the procedure by which an indigent defendant may waive his counsel. Bartley indicated that he understood each aspect when the trial court explained to him the charges, the maximum possible prison sentences, the mandatory minimum sentences, the risks of self-representation, and that he could consult with Hunt concerning his choice. Bartley repeatedly indicated throughout the proceedings that he wished to represent himself. Thus, the trial court did not clearly err in finding that Bartley's waiver of counsel was knowing, intelligent, and voluntary, and did not abuse its discretion when it granted Bartley's motion to proceed in propria persona.

Nor has Bartley shown that the trial court abused its discretion when it denied Bartley's later request for substitute counsel. A defendant must show that good cause warrants substituting his or her counsel.¹⁸ Good cause exists when a defendant and appointed counsel have a legitimate difference of opinion regarding a fundamental trial tactic, or when the defendant's appointed counsel lacks diligence, is inadequate, or is disinterested.¹⁹ Neither the defendant's general unhappiness with appointed counsel nor the defendant's disagreement with counsel's professional judgment are good causes to appoint substitute counsel.²⁰ Similarly, a defendant's lack of confidence in appointed counsel is not good cause, unless the defendant supports his or her lack of confidence with a substantial reason.²¹

Bartley requested substitute counsel because he generally did not trust Hunt and disagreed with Hunt's professional judgment when Hunt asked the trial court to determine his competence to stand trial and when Hunt was present at a polygraph examination. Bartley also indicated that he did not trust Hunt because he believed that Hunt colluded with the prosecution to frame Bartley when Hunt informed Bartley of a plea deal offered by the prosecution, which Hunt was responsible to do, in order to help Bartley make an informed decision whether to plead

¹⁶ MCR 6.005(E); *People v Lane*, 453 Mich 132, 137-138; 551 NW2d 382 (1996).

¹⁷ *Adkins*, 452 Mich at 726.

¹⁸ *Traylor*, 245 Mich App at 462.

¹⁹ *Id.*; *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).

²⁰ *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011).

²¹ *Id.*

guilty.²² Bartley further indicated that he believed that the prosecution was threatening Hunt's family, which Hunt denied when questioned by the trial court. We conclude that the trial court did not abuse its discretion when it denied Bartley's motion for substitute counsel after Bartley alleged only general distrust of his appointed counsel.

Bartley also argues that the trial court's decision did not comply with the Michigan Supreme Court's decision in *People v Russell*²³ because the trial court limited Bartley's options to representing himself or proceeding with counsel that he did not trust. We disagree. In *Russell*, the defendant never indicated that he desired to represent himself, but continuously maintained that he wanted to be represented by counsel.²⁴ The Michigan Supreme Court noted that the defendant did not have "the *right* to a third appointed counselor, because no defendant is entitled to the appointed counselor of his choice,"²⁵ but determined that the defendant's waiver had been equivocal because he had refused to choose between representing himself and being represented by counsel.²⁶ The Michigan Supreme Court held that the trial court erred when it required the defendant to proceed in *propria persona*, when it instead should have required the defendant continue to be represented by his appointed counsel.²⁷ Bartley's situation is distinguishable because Bartley repeatedly indicated that he wished to represent himself.

Bartley finally argues that his waiver was equivocal because he indicated that he only wanted to represent himself because he did not want to be represented by Hunt. We disagree with this characterization of Bartley's waiver of his right to counsel. Bartley interrupted a hearing on a different motion to state that he wished to represent himself. At the hearing on his motion to represent himself, Bartley unequivocally stated several times that he wanted to represent himself. Although Bartley later filed a motion for substitute counsel and stated that he no longer wanted to represent himself, after the trial court denied the motion, Bartley again indicated that he wanted to represent himself. After hearing Bartley's separate motion concerning a private investigator, the trial court *again* asked Bartley if he wanted to represent himself, and Bartley *again* answered affirmatively. Further, it is only if the trial court gives the defendant clear choices and the defendant refuses to choose self-representation that the defendant's waiver is equivocal.²⁸ Here, the trial court gave Bartley clear choices and he *did* choose self-representation.

Notwithstanding Bartley's single indication that he no longer wished to represent himself, we conclude that the trial court did not clearly err when it found that Bartley unequivocally

²² *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995).

²³ *Russell*, 471 Mich 182.

²⁴ *Id.* at 186-187.

²⁵ *Id.* at 193 n 25.

²⁶ *Id.* at 193.

²⁷ *Id.* at 194.

²⁸ *Russell*, 471 Mich at 192.

waived his right to counsel. The trial court properly presented Bartley's options as (1) proceeding with his second appointed counsel or (2) representing himself, and Bartley subsequently indicated several times that he wished to represent himself rather than be represented by appointed counsel.

III. JURY SELECTION

A. ISSUE PRESERVATION AND WAIVER

Generally, this Court reviews for an abuse of discretion whether the trial court erred by failing to excuse a juror for cause. However, to preserve an issue of jury selection for appeal, the party must either exhaust all peremptory challenges or refuse to express satisfaction with the jury.²⁹ If the defendant did not exhaust his or her peremptory challenges and expressed satisfaction with the jury, the defendant has waived any error in whether the trial court should have excused a juror for cause.³⁰

B. APPLICATION OF WAIVER AND ANALYSIS

Bartley unsuccessfully attempted to have jurors removed for cause. The trial court later asked Bartley several times if he wished to remove a juror from the panel "for any reason." Bartley answered negatively each time. After the final time that the trial court asked Bartley whether he wished to remove a juror for any reason, at the prosecution's request, the trial court asked Bartley whether he understood that, if he did not have any further challenges and if he agreed to the selected jury, "this is the jury you're going to have." Bartley responded "[y]es, sir." Bartley had peremptory challenges remaining and clearly expressed that he was satisfied with the jury. Thus, he has waived this issue on appeal.

Further, a defendant alleging that the trial court abused its discretion in failing to remove a juror for cause must also show that the decision prejudiced him.³¹ A juror is sufficiently unbiased if "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."³² Here, Bartley has not alleged prejudice, and each juror expressed his or her ability to impartially judge the evidence. Thus, even were we to review this issue, Bartley has not shown any error that warrants reversal.

²⁹ *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992).

³⁰ *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

³¹ *People v Miller*, 482 Mich 540, 546, 553-554; 759 NW2d 850 (2008).

³² *People v Cline*, 276 Mich App 634, 641; 741 NW2d 563 (2007).

IV. DENIAL OF ADJOURNMENT

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to deny a motion to adjourn the trial proceedings.³³ The trial court abuses its discretion when it chooses an outcome that falls outside of the range of principled outcomes.³⁴

B. LEGAL STANDARDS

When reviewing a trial court's decision not to grant a defendant an adjournment, we consider whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.³⁵ We may also consider the trial court's interest in the efficient administration of justice.³⁶ We may not reverse the trial court's decision concerning adjournment unless the defendant demonstrates that he or she was actually prejudiced because of the trial court's denial.³⁷

C. APPLYING THE STANDARDS

Bartley argues that the trial court abused its discretion by denying his retained counsel's motion for an adjournment on the second day of trial. Counsel asked the trial court for additional time to review reports, witness statements, and photographs that Bartley had not previously seen, and to obtain an accident reconstructionist to testify on Bartley's behalf.

We conclude that the trial court did not abuse its discretion when it denied Bartley's motion for an adjournment on the second day of trial. Bartley asserted his constitutional right to present a complete defense and had not requested previous adjournments. However, the trial court determined not to grant Bartley's request because, although Bartley's request had merit, Bartley had "creat[ed] the problem himself[.]" and the interests of justice and efficiency of the court weighed against his request since the trial court had already impaneled the jury. The trial court granted Bartley's counsel 12 hours to review the evidence and photographs. The trial court made proper considerations and its factual findings were not clearly erroneous. Thus, we conclude that the trial court's decision fell within the permissible range of principled outcomes.

Further, Bartley has not demonstrated actual prejudice. Bartley primarily sought the adjournment to obtain an accident reconstructionist to examine the evidence and testify on Bartley's behalf. Even though the trial court denied Bartley's motion, counsel was able to obtain

³³ *People v Echavarría*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

³⁴ *Yost*, 278 Mich App at 379.

³⁵ *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976); *Echavarría*, 233 Mich App at 368.

³⁶ *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003).

³⁷ *Wilson*, 397 Mich at 81; *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

an expert accident reconstructionist, Mark Gallo. Gallo testified that from the photographs, he was able to identify areas of wheel lock—where the driver would be unable to turn the car—from the skid marks, including the area of impact with Shoyrer. Gallo also testified that the photographs showed evidence of evasive driving. Because Bartley has not demonstrated actual prejudice, we will not reverse his convictions on this ground.³⁸

V. SENTENCING

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, we review for an abuse of discretion the trial court's determination that the factors in a particular case are substantial and compelling reasons to depart from the guidelines,³⁹ and a defendant's challenge to the trial court's score of a particular offense variable.⁴⁰ However, when a defendant's challenge to the trial court's decision is unpreserved, we review the issue for plain error affecting the defendant's substantial rights.⁴¹ An error is plain if it is clear or obvious.⁴² An error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.⁴³

Here, Bartley failed to argue below that the trial court improperly considered his innocence when it departed from the sentencing guidelines, or that the trial court improperly scored Offense Variable (OV) 3. To preserve an issue, the defendant must raise it before the trial court.⁴⁴ Thus, we review these issues for plain error affecting Bartley's substantial rights.

B. LEGAL STANDARDS

Our Legislature has enacted sentencing guidelines.⁴⁵ A trial court may depart from the appropriate guidelines range only if it states on the record substantial and compelling reasons for its departure.⁴⁶ We closely scrutinize the trial court's departure from the guidelines on appeal.⁴⁷

³⁸ *Wilson*, 397 Mich at 81; *Coy*, 258 Mich App at 18-19.

³⁹ *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

⁴⁰ *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002); *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006).

⁴¹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Conley*, 270 Mich App at 312.

⁴² *Carines*, 460 Mich at 763.

⁴³ *Id.*

⁴⁴ *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2009).

⁴⁵ MCL 769.34.

⁴⁶ MCL 769.34(3); *Babcock*, 469 Mich at 256-257, 272.

⁴⁷ *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

A defendant has a Fifth Amendment right to maintain his innocence even at a sentencing hearing.⁴⁸ The trial court may consider evidence of a defendant's lack of remorse as it relates to the defendant's potential for rehabilitation, but the trial court may not base its sentence even in part on the defendant's refusal to admit guilt for the offense.⁴⁹ We determine whether the defendant's refusal to admit guilt influenced the trial court's sentence by considering the defendant's maintenance of innocence after conviction, the judge's attempts to get the defendant to admit guilt, and indications that, had the defendant admitted guilt, he would have received a less severe sentence.⁵⁰ If the trial court did no more than address the defendant's remorsefulness as it pertained to his chances for rehabilitation, then a brief reference to a defendant's persistent claims of innocence will not require reversal.⁵¹

C. BARTLEY'S MAINTENANCE OF INNOCENCE

Bartley argues that the trial court improperly allowed his claims of innocence to influence its decision to depart upward from the sentencing guidelines.

Bartley has continued to maintain his innocence after conviction, and the record is replete with indications that, if Bartley had not maintained his version of events, he would have received a less severe sentence. Bartley stated three times that he was very sorry about Shoyrer's death, and that Shoyrer had been his friend. However, Bartley also maintained that he was innocent, and that he had been the victim of a conspiracy between Jason Rupe and the police to frame him. The trial court extensively and harshly criticized Bartley's belief in his own innocence, including stating that Bartley's version of events was beyond the realms of science fiction, and that only a person who was "very, very demented" could believe that Bartley was innocent. It then stated that it was departing upward from the sentencing guidelines because "you have no remorse. You have complained that you were the victim." Though the trial court did not ask Bartley to admit his guilt, the trial court at no point tied a lack of remorse to Bartley's potential for rehabilitation. After a careful review of the record, we conclude that the trial court impermissibly based its departure on Bartley's maintenance that he was an innocent victim of a conspiracy. Thus, we conclude that the trial court clearly erred when sentencing Bartley.⁵²

Bartley's continued claims of innocence improperly influenced the only reason that the trial court used to depart upward from the sentencing guidelines. Thus, had the trial court not erred, Bartley would have received a lesser sentence. We conclude that Bartley has shown that the trial court's clear error prejudiced him.

⁴⁸ *Estelle v Smith*, 451 Mich 454, 467-468; 101 S Ct 1866; 68 L Ed 2d 359 (1981); *Conley*, 270 Mich App at 314.

⁴⁹ *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977); *Spanke*, 254 Mich App at 649.

⁵⁰ *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987); *Spanke*, 254 Mich App at 650.

⁵¹ *Id.*

⁵² See *Conley*, 270 Mich App at 315.

D. BARTLEY'S OTHER SENTENCING CHALLENGES

Bartley also argues that the trial court improperly scored Offense Variable (OV) 3 at 50 points, because the prosecution did not charge Bartley with a drunk-driving offense. The trial court may score 50 points for OV 3 if (1) “[a] victim was killed,” (2) the “death results from the commission of a crime and the offense committed or attempted involves the operation of a vehicle[,]” and (3) “[t]he offender was under the influence or visibly impaired by the use of alcoholic liquor[.]” Nothing in the language of the statute provides that the prosecution must have charged the offender with a drunk-driving offense, and we will not read language into an unambiguous statute.⁵³

In this case, the evidence supported the trial court’s determination to score OV 3 at 50 points. Rager testified that Bartley was “extremely intoxicated” shortly before he entered the yellow Mustang. Singleton testified that he observed Bartley trying to get the car out of the ditch later that evening, and that Bartley appeared highly intoxicated. Thus, the evidence supported the inference that Bartley was under the influence of alcohol when he struck and killed Shoyrer with his vehicle. We conclude that the trial court properly scored Bartley 50 points for OV 3, and thus Bartley has not shown plain error affecting his substantial rights.

Bartley finally argues that the trial court erred when it refused to strike a statement from the presentence investigation report (PSIR) that the trial court ruled was inadmissible hearsay at trial. If the defendant challenges the factual accuracy of information contained in the PSIR, then the trial court must resolve the challenge.⁵⁴ However, the Michigan Rules of Evidence do not apply at a sentencing proceeding, and information that is inadmissible at trial may be included in the PSIR.⁵⁵ Here, Bartley did not challenge below, and does not challenge on appeal, the factual accuracy of the hearsay statement. Rather, Bartley argues that it is inadmissible under the Michigan Rules of Evidence. Because the Michigan Rules of Evidence do not apply at a sentencing proceeding, we reject this argument.

The trial court’s perception of Bartley’s lack of remorse was the trial court’s sole reason for departing from the sentencing guidelines. Because we conclude that Bartley’s refusal to admit guilt improperly influenced the trial court’s determination that Bartley did not express remorse, we reverse and remand for resentencing. When resentencing, the trial court may continue to score OV 3 at 50 points.

VI. PERJURED TESTIMONY

Bartley raises this additional issue in his pro per supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

⁵³ MCL 777.33(2)(c); *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

⁵⁴ *People v Waclawski*, 286 Mich App 634, 689-690; 780 NW2d 321 (2009); *Spanke*, 254 Mich App at 648-649.

⁵⁵ *Waclawski*, 286 Mich App at 689.

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Bartley did not challenge any testimony at trial on the grounds of perjury, and did not file any motions in which he alleged that testimony was perjured. Thus, this issue is unpreserved because Bartley did not raise it before the trial court.⁵⁶ We review unpreserved issues for plain error affecting the defendant's substantial rights.⁵⁷

B. LEGAL STANDARDS

A defendant's due process rights are violated when the defendant is convicted on the basis of perjured testimony.⁵⁸ A perjury occurs when a person under oath willfully testifies falsely.⁵⁹ A prosecutor "may not knowingly use false testimony to obtain a conviction, and . . . has a duty to correct false evidence."⁶⁰ The prosecutor's duty includes the duty to correct perjured testimony.⁶¹

C. APPLYING THE STANDARDS

Bartley argues that the prosecution denied him due process when it knowingly presented perjured testimony. The defendant must assert the factual basis for his claim on appeal.⁶² If a defendant does not assert the factual basis for his claim, he has abandoned it.⁶³ Here, Bartley argues that the "officer in charge" and other unnamed prosecution witnesses submitted perjured testimony at trial. Bartley does not identify the witnesses or the testimony that he asserts were perjured. Further, after a review of the record we are unable to identify any clear or obvious errors in the officers' testimonies. Thus, we deem this issue abandoned because Bartley has not asserted any factual basis for his claim.

We affirm Bartley's convictions, but vacate Bartley's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly

⁵⁶ *Dupree*, 486 Mich at 703.

⁵⁷ *Carines*, 460 Mich at 763.

⁵⁸ *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

⁵⁹ *Id.*; MCL 750.423.

⁶⁰ *People v Wiese*, 425 Mich 448, 455; 389 NW2d 866 (1982); *Herndon*, 246 Mich App at 417 (internal quotations omitted).

⁶¹ *Wiese*, 425 Mich at 455; *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998).

⁶² MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

⁶³ *Id.*