

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 17, 2012

v

DENNIS HUGUELY,

No. 303436
Wayne Circuit Court
LC No. 10-011269-FH

Defendant-Appellant.

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3), for which he was sentenced to life imprisonment as an habitual offender, fourth offense, MCL 769.12. He appeals as of right. We affirm defendant's conviction, but remand for further proceedings with regard to sentencing.

I. BASIC FACTS

Defendant was convicted of breaking into a family home on July 9, 2010, sometime between 8:00 a.m. and 3:00 p.m. The house was ransacked and several items were stolen. Defendant was linked to the crime because his fingerprints were lifted from the scene and because he brought one of the stolen items, an older Tag Heuer watch, to a pawn shop on the same day it was taken from the home.

On appeal, defendant challenges as ineffective the actions of his trial counsel. Defendant also challenges his sentence of life imprisonment, both as a "punishment" imposed for exercising his right to go to trial, and as improperly departing from the sentencing guidelines.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first challenges his trial counsel's handling of his direct examination testimony, which he claims was deficient because counsel did not afford him the opportunity to present his theory of defense. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent from the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000) ("Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the

appellate record contains sufficient detail to support the defendant's claim."); *People v Brown*, 159 Mich App 21, 23; 406 NW2d 228 (1987) ("To the extent defendant's claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.")

We find that the record is sufficiently developed for this court to conclude that defense counsel's actions were a matter of reasonable trial strategy, and that the record therefore does not support defendant's claims. To establish ineffective assistance of counsel, defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant also must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Id.* at 302-303 (citation and internal quotation marks omitted).

At trial, on direct examination, defense counsel asked defendant his age and whether he was at the victim's home on July 9, 2010. Defendant denied ever being there. Defense counsel did not ask any additional questions. The record reflects that the trial court discussed this apparent trial strategy with defense counsel:

Trial Court: . . . You weren't going to ask those other questions because out of trial strategy, is that correct, Counsel?

Defense Counsel: Yeah, it's a trial strategy and the questions he has are not even relevant.

Trial Court: And you didn't --

Defense Counsel: Potentially harmful.

Trial Court: And you did not want to ask those because they potentially opened up the jail tape.

Defense Counsel: Yes.

Trial Court: And --

Defense Counsel: That was my biggest concern.

Trial Court: And the possible prior conviction, right?

Defense Counsel: Right, exactly. That's my biggest concern and that's all I really cared about.

Trial Court: So all you wanted -- you put him on the stand and all you really asked for is a categorical denial, correct?

Defense Counsel: That's correct.

Trial Court: Okay. And then you just left it there and that was due to trial strategy, right?

Defense Counsel: Absolutely.

We find that the record establishes that defense counsel's decision not to question defendant further was a deliberate and strategic one. Defense counsel attempted to limit the scope of cross-examination through limited direct examination of defendant. We decline defendant's request to reevaluate counsel's trial strategy after the fact. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Counsel's strategy did not constitute ineffective assistance of counsel simply because it did not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Further, defendant has not demonstrated that he was prejudiced by his counsel's alleged ineffectiveness. Although defendant now contends that trial counsel should have asked additional questions to allow him to present his theory, he does not indicate what additional questions should have been asked or what additional testimony he would have provided. Absent that showing, defendant has failed to establish prejudice, i.e., a reasonable probability that but for counsel's omission, the result of the proceeding would have been different. In short, defendant has failed to establish the factual predicate necessary for his claim. *People v Hoag*, 460 Mich 1, 9; 594 NW2d 57 (1999).

Defendant also requests that this Court remand this case for an evidentiary hearing regarding the alleged ineffectiveness of his defense counsel. We decline to do so. In addition to failing to move for a new a trial or an evidentiary hearing in the court below, defendant has not filed a motion to remand in this court. Defendant's request for remand is not accompanied by an affidavit or offer of proof demonstrating factual support for his claim that he was prejudiced by defense counsel's failure to conduct a more comprehensive direct examination. MCR 7.211(C)(1). The record also does not support defendant's claim of ineffective assistance of counsel. Accordingly, we decline to remand defendant's case for an evidentiary hearing.

III. RESENTENCING

Defendant next challenges his life sentence on several grounds and argues that he is entitled to resentencing.

A. The Record Does Not Reflect Sentencing Imposed as Punishment.

First, defendant argues that the trial court sentenced him to a life term as punishment for his decision to exercise his right to a trial, noting that the court had expressed a willingness before trial to sentence him to a three-year minimum. A court may not sentence a defendant more harshly because of his decision to exercise his right to a jury trial. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731, 733 (1985). However, "[u]nless there is something in the

record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, the sentence imposed will be sustained." *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987).

In this case, the trial court indicated as early as the arraignment that because of defendant's criminal history, a conviction could result in a life sentence. The court's comments before trial suggest at most a willingness to impose a more lenient sentence if defendant pleaded guilty pursuant to the prosecutor's plea offer, which would allow defendant to be sentenced at the low end of the guidelines. In *People v Godbold*, 230 Mich App 508, 513; 585 NW2d 13 (1998), this Court rejected the argument "that an implied promise of leniency if a jury trial is waived is the equivalent of an implied threat of punishment if the right to a jury trial is exercised." The same is true here. The trial court's willingness to consider a more lenient sentence if defendant pleaded guilty pursuant to a prosecutorial plea offer does not mean that the court's later imposition of the life sentence was imposed as a penalty for defendant exercising his right to a trial. Therefore, we reject this claim of error.

B. Departure from Sentencing Guidelines

Next, defendant argues that the trial court's life sentence is a departure from the appropriate guidelines range, and that the trial court did not provide substantial and compelling reasons to justify the departure. The record reflects that the trial court acknowledged, in sentencing defendant to life imprisonment, that it was departing from the sentencing guidelines. The trial court justified that departure by referencing defendant's 31-year history of criminal activity.

Defendant received 82 total prior record variable points, placing him in PRV level F, and 30 total offense variable points, placing him at OV level III. The sentencing grid for a Class C offense, MCL 777.64, provides a minimum sentence range of 43 to 86 months for an offender in the F-III cell. Because defendant was a fourth habitual offender, the upper end of the guidelines range is increased by 100 percent, MCL 777.21(3)(c), resulting in an enhanced guidelines range for defendant of 43 to 172 months.

MCL 769.12(1)(a) authorizes a sentence of life imprisonment for a fourth habitual offender for conviction of an offense with a statutory maximum of five or more years or life, which includes second-degree home invasion. MCL 750.110a(6). Therefore, defendant was eligible for a life sentence for the offense. However, because the sentencing grid for a Class C offense does not provide a life sentence for an offender who falls in the F-III cell, the life sentence constitutes a departure from the appropriate guidelines range. See *People v Houston*, 473 Mich 399, 410 n 22, 416-417; 702 NW2d 530 (2005). Accordingly, the trial court was required to "follow the departure rules because the sentencing guidelines did not recommend a sentence of life in prison." *People v Johnigan*, 265 Mich App 463, 473-474; 696 NW2d 724 (2005).

A sentencing court may depart from the applicable sentencing guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). Only objective factors that are verifiable provide substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Smith*, 482 Mich 292, 299, 303; *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003).

This Court reviews the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Id.* at 264-265.

The trial court explained that its departure was based upon “[t]he defendant’s lengthy 31-year history and the fact that the defendant has a 31-year history of committing the same and/or similar crimes.” Criminal history and recidivism are objective and verifiable factors that may be the basis for a departure from the guidelines. However, a sentencing court “may not premise a departure on an offense characteristic or offender characteristic already considered in determining the appropriate guidelines range unless the court *explicitly* finds from the facts of record that the characteristic was given inadequate or disproportionate weight.” *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002), citing MCL 769.34(3)(b) (emphasis added). To determine whether a factor has been given inadequate or disproportionate weight in the guidelines calculations, a court “must determine how that characteristic affected the defendant’s minimum sentence range.” *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). “Because the sentencing guidelines make elaborate provision for a defendant’s criminal record and base the recommended minimum sentence in part on those provisions, a trial court may not depart from the recommended minimum on the basis of a defendant’s prior record unless the court first finds that the sentencing guidelines gave inadequate or disproportionate weight to that criminal history.” *Id.* at 454-455.

In this case, the record reflects that the trial court did not refer to the variables that address defendant’s prior criminal acts and did not determine the effect of his criminal record on the scoring of the guidelines in order to evaluate whether the guidelines gave inadequate weight to that criminal history. Absent that analysis, this court is unable to determine why the trial court determined the departure to have been justified. Therefore, we find that the trial court’s failure to adequately articulate the reasons for its departure constitutes a clear error of law. See MCL 769.34(3)(b); see also *Smith*, 482 Mich at 304. Therefore, articulation or resentencing is required. See *Smith*, 482 Mich at 302-303 n 21; *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006).

Additionally, the trial court did not articulate its reasons why the *amount* of the departure was justified. “[I]n departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason.” *Babcock*, 469 Mich at 264. This Court declines to substitute its own judgment regarding the extent of a departure for that of the trial court. However, while (as noted) we have found nothing in the record to indicate that defendant’s sentence was imposed as a penalty for asserting his right to a jury trial, we do note that there is a significant disparity between the 36-month (at the *low end* of the guidelines applicable to the proposed plea) minimum sentence that the trial court was willing to impose based upon a plea, and the subsequent actual post-trial sentencing of defendant to life imprisonment, a sentence that, while permissible, is *substantially in excess* of the guidelines. Particularly given that level of disparity, we believe that it is incumbent upon the trial court to adequately articulate the reasons both for its departure, and for the extent of its departure, from the guidelines. Accordingly, we vacate defendant’s sentence and remand this case to the trial court. On remand, the trial court shall either sentence defendant within the appropriate guidelines range or articulate on the record a

substantial and compelling reason for departing from the guidelines range and justify the extent of any departure in accordance with MCL 769.34(3)(b).

C. Request for Different Judge

In the last line of his brief on appeal, defendant requests that he be resentenced by a different judge. An actual showing of prejudice is required before a trial judge will be disqualified. MCR 2.003(B)(2); *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). As defendant has failed to set forth this issue in his questions presented, failed to cite the appropriate standard of review, failed to argue the issue's merits, and has provided no record citations or legal authority in support of his position, we consider this issue abandoned. See MCR 7.212(C)(5), (7); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Because we are remanding for further proceedings relating to sentencing, we need not address defendant's remaining challenges to his sentence.

IV. CONCLUSION

We affirm defendant's conviction, but vacate his sentence and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

/s/ Mark T. Boonstra