STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DEAN JAKEWAY,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 350285
Emmet Circuit Court
LC No. 19-004871-FH

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of second-degree arson, MCL 750.73(1) (willful or malicious burning of a dwelling), preparation to commit arson, MCL 750.79, and possession of a firearm during the commission of a felony (arson) (felony-firearm), MCL 750.227b. The jury acquitted him of assault with a dangerous weapon and a felony-firearm charge related to the assault charge. The trial court sentenced defendant to concurrent prison terms of 5 to 20 years for the second-degree arson conviction, 17 months to 10 years for the preparation to commit arson conviction, and to a consecutive 2-year term for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. FACTUAL BACKGROUND

On January 13, 2019, a fire occurred at the residence defendant rented with others. That morning, defendant expected to go with his brother and friends on a drive to pick up a vehicle. Defendant awoke to learn that the group had left without him. His acquaintance, Gary Groh, testified that he and defendant were drinking and defendant's anger escalated to the point that he became aggressive, destroyed household items, upended furniture, shot a BB gun at cans on the counter, stabbed a tin statue, made threats, and started small fires in the house. Groh testified that he found a fire in a trash can in the bathroom which he extinguished. Defendant, however, continued lighting fires by crumpling up balls of paper, lighting them, and dropping them onto the living room floor. Groh testified that he extinguished those paper fires until defendant brandished his handgun, at which point Groh left the house while observing defendant continuing to light

paper on the living room floor. The house started burning and defendant asked a neighbor to call 911. He did so and a driver passing by also called 911 when he noticed the house fire.

II. INEFFECTIVE ASSISTANCE

Defendant argues that his trial counsel provided ineffective assistance by stating in closing argument that an arson had occurred and by failing to object to remarks by the trial judge. We disagree.

A claim of ineffective assistance of counsel "presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or seek an evidentiary hearing in the trial court, but if he has failed to do so, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Defendant did not raise the issue of ineffective assistance in the trial court. Therefore, he failed to preserve this issue and we review for errors apparent on the record.

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This "right to counsel encompasses the right to the effective assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007) (quotation marks and citation omitted). Defendant bears the burden of establishing that trial counsel provided ineffective assistance by showing that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citation omitted). Defendant must overcome a strong presumption that trial counsel provided effective assistance. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (citation omitted).

Defendant contends that his counsel provided ineffective assistance by admitting in closing argument that defendant was guilty of arson when defense counsel stated:

> This is an arson case. There's no doubt about it. There was an arson in this case, and I want to take you through the evidence that I think is important, and I'm going to address my client's credibility and Mr. Groh's credibility as well, but I'm going to go into a little more detail in the facts, because I think that the facts make a huge difference in this case.

Defendant argues that his trial counsel conceded his guilt by affirming that an arson occurred. A second-degree arson occurs when a person "willfully or maliciously burns, damages, or destroys by fire . . . a dwelling . . . or its contents." MCL 750.73(1). "[D]ue process requires the prosecution to prove every element beyond a reasonable doubt, *People v Oros*, 502 Mich 229, 240 n 3; 917 NW2d 559 (2018), citing*Patterson v New York*, 432 US 197, 210; 97 S Ct 2319; 53

L Ed 2d 281 (1977). As with all felony offenses, the prosecution must prove the defendant's identity as an element of the offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "[A] defendant is deprived of the effective assistance of counsel when his lawyer admits the client's guilt without first obtaining the client's consent to this strategy." *People v Krysztopaniec*, 170 Mich App 588, 595; 429 NW2d 828, 832 (1988) (citations omitted).

In this case, however, defendant's trial counsel did not admit his client's guilt but only stated that an arson occurred. Evidence at trial established this fact. Two experts testified that the fire had been set intentionally. Evidence did not establish that the fire occurred accidentally. Examination of the record establishes that defense counsel did not admit that defendant started the fire. "[I]t is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel." *Id*. at 596.

The record reflects that defense counsel argued that Groh set the fire and blamed defendant. Defendant testified that Groh had been lighting matches and throwing them at him. Defendant denied lighting any fire. Defendant testified that he left the house for a few minutes to smoke a cigarette and returned to find his couch on fire. Defendant claimed that he and Groh left the house and that he was not sure whether Groh had gone back in. He indicated that rather than being relieved when he later saw Groh at the property, he was angry with Groh because he thought that Groh started the fire.

Later in closing argument, defense counsel discussed the evidence in detail. Defense counsel asserted:

> [Defendant] was not a man who wanted to burn his house down or ever intended to burn his house down or did burn his house down, and I hope with his credibility up against Gary Groh's, whose testimony just on so many levels does not make sense when you compare it with the physical evidence and compare it with the timeline, and [I] know you'll take all those things into consideration when determining his guilt or innocence as to these charges. I would submit to you that the evidence is compelling that he did not start this fire; did not attempt to prepare to start this fire. He did not do any of things that Gary Groh accused him of.

Defense counsel concluded:

> I think that [defendant's arguments] are compelling. I think that they make a case that this fire was started by Gary Groh and not by my client, and that he's not guilty of any of the five charges against him.

The record reflects that defense counsel expressly argued that defendant did not commit arson, consistent with the defense strategy of claiming that Groh actually set the fire. Defendant's claim that defense counsel admitted his guilt to the arson is not supported by the record. Therefore, defendant's claim of ineffective assistance of counsel in this regard lacks merit. Defense counsel's performance did not fall below an objective standard of reasonableness and we find no errors apparent on the record.

Defendant also argues that defense counsel provided ineffective assistance by failing to object to a remark by the trial court. We disagree.

A defendant has a right to a neutral and detached judge and a trial court may not "pierce the veil of judicial impartiality." *People v McDonald*, 303 Mich App 424, 437; 844 NW2d 168 (2013), citing *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The trial court "must not allow its views on disputed issues of fact to become apparent to the jury." *Cole v Detroit Auto Inter-Ins Exch*, 137 Mich App 603, 610; 357 NW2d 898 (1984). Given the important role of the trial judge, "jurors look to the judge for guidance and instruction" and "are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *People v Stevens*, 498 Mich 162, 174; 869 NW2d 233 (2015) (quotation marks and citation omitted).

During defendant's testimony, defense counsel asked him about an agreement he had made to do repair work inside the residence in exchange for credit against his rent. After an objection about defendant testifying from a document that detailed his rent payments, the trial court asked defense counsel, "What's the point of this?" Defense counsel explained that he sought testimony about defendant's rent arrangement which had been testified about previously. The trial court remarked:

> Well, it's already established by that exhibit in evidence that he was paying rent. To the extent that he's going to try and explain that he torched the place because he didn't want to pay his rent, you've got that exhibit in evidence that shows that he paid his rent, and he got a hundred-dollar credit, so why are we doing this?

Defense counsel and the trial court continued discussing the relevance of the document, and the trial court concluded:

> Whatever you're offering has to have some relevance and to prove something that's at issue. You already have that in evidence. If you want to ask him, you know, were you happy with your living conditions; or were you happy with the deal you struck to get some credit off your rent, you certainly can do that.

Defendant interprets and attributes the trial court's use of the conjunction "he's" in the statement "[t]o the extent that *he's* going to try and explain that he torched the place" (emphasis added) as meaning and referring to defendant. Defendant maintains that the trial court stated an opinion on defendant's guilt which would have influenced the jury.

The trial court's remarks were made during a side-bar conference. The trial court discussed the relevance of testimony with the attorneys, and did not address its remarks to the jury. There is no indication that the jury heard the remark. Further, the trial court did not comment regarding defendant's guilt. Rather, a close reading of the statement in the context of the remarks makes clear that the trial court referenced the prosecution's theory that one of the motivating factors for the arson concerned defendant's rent, i.e., that defendant desired to burn the house because of his anger with the landlord about the house's condition and a dispute over reimbursement for the work that he had done on it. Properly understood, the trial court's remarks did not reference defendant or improperly declare defendant guilty of arson.

The conduct of a trial judge can violate a defendant's "constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's

conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Stevens*, 498 Mich at 171. Here, however, the trial court's comment did not advocate for a party or improperly influence the jury because the remark did not indicate advocacy or partiality and it was made to the attorneys at a side-bar conference outside of the hearing of the jury. The trial court did not offer an opinion about defendant's guilt. Defendant's claim that his trial counsel should have objected, therefore, lacks merit. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (citation omitted). Defense counsel's performance did not fall below an objective standard of reasonableness and we find no errors apparent on the record. Therefore, defendant has failed to establish that his counsel provided him ineffective assistance.

III. OFFENSE VARIABLE ASSESSMENT

Defendant argues that the trial court incorrectly assessed points for Offense Variable (OV) 1 and OV 4. We disagree.

To preserve a claim of a sentencing guidelines scoring error by the trial court for miscalculation of an OV, a defendant must object to the trial court's OV scoring, and the trial court must have heard and decided the objection. *People v Ackah-Essien*, 311 Mich App 13, 35-36; 874 NW2d 172 (2015). In this case, defendant objected to the scoring of OV 1 but not OV 4. Therefore, defendant preserved for appeal the issue regarding OV 1 but not OV 4.

We review the trial court's factual determinations at sentencing for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. See also *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165, 167 (2017). When calculating the sentencing guidelines scores, a trial court may consider all evidence in the record including but not limited to the PSIR, admissions, and testimony of witnesses during preliminary examination and trial. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). We review de novo a trial court's interpretation and application of the statutory sentencing guidelines. *People v Jackson*, 487 Mich 783, 789; 790 NW2d 340 (2010). A trial court's factual determinations are clearly erroneous only if we are left with a definite and firm conviction that the trial court made a mistake. *People v Armstrong*, 305 Mich App 230, 242; 851 NW2d 856 (2014).

Our Supreme Court recently clarified that sentencing courts must determine the applicable range of sentence under the sentencing guidelines and take such calculations into account when imposing a sentence, but the guidelines are advisory only and not mandatory. *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." *Jackson*, 487 Mich at 791, quoting MCL 769.34(10).

"A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). A trial court relies on

inaccurate information when it sentences a defendant by consulting an inaccurate advisory guidelines range. *Id*. at 89 n 7. The court must consult the advisory sentencing guidelines and assess the highest amount of possible points for all offense variables. *Lockridge*, 498 Mich at 392 n 28. The sentencing offense determines which offense variables are to be assessed, and the appropriate offense variables are generally assessed on the basis of the sentencing offense. *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008).

A. OV 1

OV 1 is assessed when the offense involved the aggravated use of a weapon. MCL 777.31(1). OV 1 must be scored for all felony offenses. MCL 777.22. Five points must be assessed where "[a] weapon was displayed or implied." MCL 777.31(1)(e). Defendant argues that the trial court should have assessed zero points for OV 1 because the jury acquitted him of assault with a dangerous weapon. To convict a person of felonious assault, the prosecution must prove "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." MCL 750.82(1), *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (citation omitted). A defendant is presumed innocent after a jury has specifically acquitted the defendant of a charge, and the trial court may not consider acquitted conduct as an aggravating factor at sentencing. *People v Beck*, 504 Mich 605, 626-627; 939 NW2d 213 (2019).

In this case, although the jury acquitted defendant of felonious assault, the jury did not find that defendant did not display a weapon. Evidence at trial established that he displayed a gun to Groh after lighting fires in the house. Groh testified that defendant emerged from the bedroom with a nine-millimeter handgun that he waived around in the living room while threatening to shoot his friends if they came into the house. Groh also testified that defendant "kind of" pointed the gun in his direction while asking if Groh had a problem. Defendant argues that he did not display the gun during the arson because it was not used to start the fire. Groh, however, testified that defendant began lighting things on fire in the bathroom and living room before brandishing the gun. Groh also testified that he left the house because of the gun, while defendant continued balling up more paper and lighting them on fire in a pile on the living room floor. The evidence, therefore, supported assessing defendant five points for OV 1 because he displayed a weapon during the arson. This is consistent with defendant's felony-firearm conviction, which required the possession of a firearm during the commission of a felony, in this case arson. See *People v Bass*, 317 Mich App 241, 268-269; 893 NW2d 140 (2016), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The trial court, therefore, did not err in assessing five points for OV 1.

B. OV 4

Not only did defendant fail to preserve this issue but defendant's trial counsel waived this issue for review by expressly agreeing with the trial court that the offense variables, other than OV 1 and OV 9, did not require discussion. A waiver is the "intentional relinquishment or abandonment of a known right," and it extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). "Waiver requires the express approval of the trial court's action." *People v Loper*, 299 Mich App 451, 472; 830 NW2d 836 (2013) (citation omitted). "When defense counsel

clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "A defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal." *Carter*, 462 Mich at 214 (quotation marks and citation omitted). Additionally, this court need not review the assessment of a sentencing variable that had not been preserved for review. MCL 769.34(10); *Jackson*, 487 Mich at 791. Therefore, we decline to address this issue.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford