STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DURAN HEAD,

Defendant-Appellant.

UNPUBLISHED
April 29, 2021

No. 352966
Wayne Circuit Court
LC No. 15-010337-01-FC

Before: TUKEL, P.J., and SERVITTO and RICK, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] the trial court's denial of his motion for relief from judgment. Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321, second-degree child abuse, MCL 750.136b(3), felon in possession of a firearm, MCL 750.224f, possession of a short-barreled shotgun, MCL 750.224b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the involuntary-manslaughter conviction, 10 to 50 years' imprisonment for the second-degree child abuse conviction, 5 to 50 years' imprisonment each for the convictions of felon in possession of a firearm and possession of a short-barreled shotgun, and two years' imprisonment for the felony-firearm conviction. Defendant argues that the trial court erred by denying his motion for relief from judgment because the prosecutor failed to timely notify him, as required by MCL 769.13(1),[2] of the 25-year mandatory minimum sentence for his involuntary-manslaughter conviction. We disagree and affirm.

[1] *People v Head*, unpublished order of the Court of Appeals, entered May 14, 2020 (Docket No. 352966).

[2] MCL 769.13(1) provides:

I. UNDERLYING FACTS

As explained by this Court when defendant appealed his convictions and sentences in *People v Head*, 323 Mich App 526, 531; 917 NW2d 752 (2018),

> This case arises out of the fatal shooting of defendant's nine-year-old son, DH, by defendant's 10-year-old daughter, TH, on November 9, 2015, in defendant's home. The involuntary-manslaughter charge against defendant was premised on his gross negligence in storing a loaded, short-barreled shotgun in a readily accessible location in his home where he allowed his children to play while unsupervised by an adult.

On November 11, 2015, a felony information was filed that charged defendant with second-degree murder, MCL 750.317; involuntary manslaughter; second-degree child abuse; felon in possession of a firearm; possession of a short-barreled shotgun; and felony-firearm. It also included a fourth-offense habitual offender notice. A November 12, 2015 felony warrant included the same information. At a pretrial hearing on June 30, 2016, the prosecution submitted a final plea offer along with an amended felony information that contained a section titled, in bold letters, "HABITUAL OFFENDER – FOURTH OFFENSE NOTICE – MANDATORY 25 YEAR SENTENCE." During the hearing, defense counsel repeatedly confirmed with defendant that he was eligible to be sentenced as a violent habitual offender and that the 25-year minimum sentence applied to him. Defendant declined the plea offer.

As explained earlier, the jury convicted defendant of all charges except second-degree murder. Defendant appealed his conviction to this Court, arguing in relevant part that he was entitled to resentencing because the prosecutor failed to file a proof of service with the trial court for the fourth-offense habitual offender notice. *Id*. at 542. We affirmed defendant's convictions and sentences. *Id*. at 532, 547. Defendant then applied for leave to appeal to our Supreme Court. His application was denied, but the Court stated that

> The denial is without prejudice to the defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include his claim that the prosecution failed to give timely notice that the defendant would be subject to a 25-year mandatory minimum under MCL 769.12(1)(a). [*People v Head*, 503 Mich 918 (2018).]

> In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

Defendant then moved in the trial court for relief from judgment, but the trial court denied his motion. Defendant subsequently moved for reconsideration, which the trial court also denied. This appeal followed.

II. MOTION FOR RELIEF FROM JUDGMENT

A. STANDARD OF REVIEW

We review a trial court's decision on a motion for relief from judgment for abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). This Court reviews the interpretation of court rules de novo. *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). Finally, "[w]hether the law-of-the-case doctrine applies is a question of law that we also review de novo." *People v Zitka*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349491); slip op at 4, lv pending.

B. ANALYSIS

As a preliminary matter, defendant appears to have conflated two closely-related issues: notice of his fourth-offense habitual offender status and notice of his violent habitual offender status. While similar, the two issues are different. The primary difference relevant to this case is their respective effects on sentencing. Fourth-offense habitual offender status raises the top end of the sentencing guidelines, but does not carry a mandatory minimum sentence. MCL 769.12(1)(b) and (c). Violent habitual offender status, on the other hand, carries a mandatory minimum sentence of 25 years. MCL 769.12(1)(a).

Defendant appears to have confused these two issues throughout the proceedings and filings up to this point. In this case, however, due to the law-of-the-case doctrine, only defendant's violent habitual offender status will be considered.

The law-of-the-case doctrine "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). "Normally, the law of the case doctrine applies without regard to the correctness of the prior determination." *Id.* (citation and quotation marks omitted). The doctrine only applies if the facts in the case "remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). The doctrine does not apply when there has been an intervening change in the pertinent law upon which the appellate court relied. See *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Additionally, the doctrine only applies to "issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

This Court dealt with both the fourth-offense habitual offender status issue and the violent habitual offender status issue on direct appeal. *Head*, 323 Mich App at 544-546. Because this

Court decided on direct appeal that defendant had received adequate notice of both his habitual offender status and the 25-year mandatory minimum sentence, the law-of-the-case doctrine normally would prevent us from again considering either issue. See *id*. at 544-547; *Herrera*, 204 Mich App at 340. Indeed, this Court reasoned that defendant received adequate notice of his fourth-offense habitual offender status. *Head*, 323 Mich App at 544. Similarly, this Court also reasoned that defendant received adequate notice of his violent habitual offender status. *Id*. at 546. As stated earlier, however, our Supreme Court explicitly stated that defendant could still file a motion for relief from judgment including his claim that "the prosecution failed to give timely notice that [he] would be subject to a 25-year mandatory minimum." *Head*, 503 Mich 918. Thus, the Supreme Court's ruling requires this Court to review the violent habitual offender status issue in the present appeal.

Despite our Supreme Court's order, a review of the merits of defendant's argument is unnecessary in this case because defendant waived the issue of whether he was timely notified of his violent offender status that resulted in his 25-year mandatory minimum sentence. Waiver occurs if a defendant "affirmatively approve[s]" of an issue before the trial court, only to later argue on appeal that there was error. *People v Jackson*, 313 Mich App 409, 420; 884 NW2d 297 (2015). "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence," a defendant's approval of a trial court decision waives the right to appeal. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved in part on other grounds 469 Mich 967 (2003) (citation and quotation marks omitted). When waiver occurs, any error is extinguished "and precludes [a] defendant from raising the issue on appeal." *People v Carter*, 462 Mich 206, 209, 215; 612 NW2d 144 (2000)

In this case, defendant did not object to the enhancement at the trial court level, nor did he request additional time to consider his options. As we noted on direct appeal, the charging documents in the trial court apprised defendant of his fourth-offense habitual offender status. *Head*, 323 Mich App at 544. The original felony information made defendant aware of his fourth-offense habitual offender status, and the amended felony information also made him aware of his status as a violent fourth-offense habitual offender. *Id*. at 546. Furthermore, defendant acknowledged several times at the June 30, 2016 pretrial hearing that he was subject to a 25-year mandatory minimum sentence due to his violent offender status if he was convicted of second-degree murder or voluntary-manslaughter. Indeed, defendant stated that he discussed the issue with his attorney the day before the pretrial hearing. After confirming all of this information, defendant testified that he would not accept the prosecution's plea offer. Before the trial court accepted defendant's plea offer, however, the following colloquy occurred:

> *The Court*: I just want to make sure you understood Mr. Head. You don't have to be convicted of murder two. 'Cause he was saying and. I just want to make you understand that it's an or. If you're convicted of either murder two or manslaughter I have to give you minimum 25. Because you were noticed as a habitual fourth. And two of your prior convictions count as serious offenses under the mandatory 25. I believe it's referred to as the violent forth offender notice.
>
> * * *

[*Defense Counsel*]: You understand that there's a distinction between the violent offender fourth habitual mandatory minimum as oppose to just your standard fourth habitual? You understand that?

Defendant shakes his head no.

[*Defense Counsel*]: The fourth habitual enhancement affects the high end of the guidelines.

Defendant: Correct. I understand that.

[*Defense Counsel*]: You understand that?

Defendant: Yes.

[*Defense Counsel*]: Versus the violent fourth offender enhancement. Which gets you to the mandatory minimum of 25.

The Court: Where it takes away any discretion.

* * *

[*Defense Counsel*]: Right. But I want to make sure you understood that.

Defendant: Yes.

[*Defense Counsel*]: Okay. And I explained that to you yesterday?

Defendant: Yes.

This exchange shows repeated acknowledgments by defendant that he was required to be sentenced as a violent habitual offender and that the 25-year mandatory minimum sentence applied to him. Indeed, defendant affirmatively acknowledged his status as a violent habitual offender multiple times; he additionally stated that he understood this meant he was subject to a mandatory minimum sentence of 25 years' imprisonment if he was convicted of second-degree murder or involuntary manslaughter. Consequently, defendant waived any challenge to his status as a violent habitual offender. See *Jackson*, 313 Mich App at 420.[3]

[3] Furthermore, even if the issue was not waived, defendant's argument would still fail because MCR 6.112(H) provides that a notice of intent to seek enhanced sentence may be filed before, during, or after trial "unless the proposed amendment would unfairly surprise or prejudice the defendant." This version of MCR 6.112(H) came into effect after the prosecution amended defendant's felony information, but because it is a procedural rule it nevertheless applies retroactively in this case. See *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 337; 602 NW2d 596 (1999) ("[T]he norm is to apply the newly adopted court rules to pending

III. CONCLUSION

For the reasons stated in this opinion, the trial court's order denying defendant's motion for relief from judgment is affirmed.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Michelle M. Rick

actions unless there is reason to continue applying the old rules."). Defendant has not provided a reason why the old version of MCR 6.112(H) should apply in this case; he similarly has not established how he was prejudiced by the timing of when the prosecution filed its notice of intent to seek enhanced sentence. Thus, even if defendant's argument was not waived, it would still fail on the merits for these reasons.