STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRELL DWAYNE FRIDAY,

Defendant-Appellant.

UNPUBLISHED
May 27, 2021

No. 353576
Wayne Circuit Court
LC No. 14-007691-01-FC

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of carjacking, MCL 70.529a, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court originally sentenced defendant to imprisonment for 18 to 30 years (216 to 360 months) for his carjacking and armed robbery convictions, 12 to 20 years (144 to 240 months) for home invasion, those three sentences to be served concurrently with each other and consecutive to two years for felony-firearm. This Court previously affirmed defendant's convictions but remanded because some of his sentencing offense variables (OVs) had been improperly scored on the basis of judicial fact-finding. On remand before a successor judge, the trial court resentenced defendant to terms of 17 to 30 years (204 to 360 months) for carjacking and armed robbery, but otherwise re-imposed the same sentences. Defendant again appeals by right. We affirm.

I. BACKGROUND

Defendant was tried jointly with another participant in the crimes, Olajuwon Onik Carter. In the prior consolidated appeal by defendant and Carter, this Court described the factual background as follows:

> Defendants' convictions arise from an August 14, 2014 attempted carjacking, armed robbery, and home invasion at the home of Danny and Olie Kauthar in Detroit, Michigan. That afternoon, Danny entered his 2013 Ford Flex in order to go to the store. Before Danny could back out of the driveway, a white or cream-colored car pulled in behind the Flex, blocking Danny from leaving. A

man, whom Danny later identified as defendant Friday, approached the driver's side of the Flex carrying a gun. Another man, who was also carrying a gun, approached the passenger's side of the vehicle. He pointed the gun at the Flex and made an "up and down motion," as if he was indicating that Danny should get out. Danny exited the car, and Friday instructed Danny to hand over his keys. Danny ultimately cooperated, and Friday removed $340 from Danny's pocket after taking the keys. Friday then entered the car and attempted to start the vehicle, even though the car was already started. After fumbling with the controller, Friday exited the vehicle and moved toward the house, demanding to know which of Danny's keys opened the side door. Friday then broke a window with the handle of his gun in order to enter the house, where Olie and the couple's great-grandsons were located. Olie testified that Friday entered the house, pointed a gun at her, and instructed her to lie on the ground.

Meanwhile, Danny was still standing at the car when an unidentified perpetrator pointed a gun at his back and ordered him into the house. Ignoring this command, Danny ran toward the third perpetrator, who was standing near the driver's side door of the perpetrators' car, pointing a gun at Danny. At trial, Danny identified the third perpetrator as defendant Carter. As he ran, Danny yelled for help, intending to attract the attention of his neighbors across the street, who were talking on their porch. Friday exited the home, and the three men entered their car and drove away.

Soon after arriving at the scene, the police discovered Friday's cell phone in the Kauthars' yard. Danny watched as a police officer looked through the pictures on the phone, and he spontaneously identified Carter and Friday as the perpetrators in some of the pictures. [*People v Carter*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket Nos. 326442; 326467), vacated in part 503 Mich 891 (2018), unpub op at p 2.]

In relevant part, this Court affirmed defendant's convictions. *Id*., unpub op at pp 10-14, 16-18. However, although this Court rejected some of defendant's challenges to the scoring of his sentencing offense variables (OVs), this Court concluded that the trial court had improperly scored OVs 1, 4, 8, and 10 on the basis of judicial fact-finding. *Id*., unpub op at pp 15-16, citing *People v Lockridge*, 498 Mich 358, 364, 391-395; 870 NW2d 502 (2015). This Court remanded for possible resentencing pursuant to *Lockridge*, 498 Mich at 395-399, and *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Carter appealed to our Supreme Court, and on December 11, 2018, this Court ordered Carter's and defendant's cases deconsolidated. Four months later, defendant, *in propria persona*, moved for resentencing pursuant to this Court's remand order. Defendant was appointed counsel, who filed a further motion stating that defendant was aware that he could "opt out" of resentencing

pursuant to the *Crosby* procedure,[1] he was aware of the risks of resentencing, and he wished to pursue resentencing. Through counsel, defendant requested to appear personally before the successor judge and provided some information about his conduct while incarcerated. For no reason readily apparent from the record, defendant's appointed counsel was replaced, and substitute counsel requested additional time to review the trial materials. The replacement of counsel and the request for additional time were both discussed on the record during hearings held on July 26 and 29, 2019, respectively. Defendant was present for both hearings.

The trial court held a resentencing hearing on August 14, 2019. Defendant was present during the hearing. Through counsel, defendant asked the trial court to resentence defendant to minimum terms of no more than 180 months, pursuant to this Court's calculation of his resulting minimum sentence range with OV 1 scored at 5 points,[2] and OVs 4, 8, and 10 scored at zero points. The prosecution noted that the trial court must make a decision on the record whether to resentence defendant, but noted that defendant had asked to be resentenced. The trial court stated that it would resentence defendant, whereupon it entertained argument regarding the proper scoring of the challenged OV scores. Ultimately, the trial court agreed with the prosecutor that OV 1 and OV 8 should each be assessed 15 points, and it agreed with defendant that OV 4 and OV 10 should each be assessed 0 points.

The parties agreed that, pursuant to defendant's new OV score, he was placed in cell IV-D under MCL 777.26, and his new minimum guidelines range was 126 to 210 months (10 ½ years to 17½ years). Defendant asked the trial court not to impose consecutive sentences, pointed out that defendant had only been 18 years old at the time of the offenses, and asked the trial court to impose a minimum sentence no higher than 180 months. The prosecution asked the trial court to re-impose defendant's original sentences, which defendant pointed out would be a departure under the recalculated guidelines. Defendant personally addressed the court, expressing regret for some of his actions, stating that he was attempting to learn from his mistakes and improve himself while incarcerated, and asking for a lower sentence "so I can make it home to my family" and "get a second chance to be the best man that I could be." The trial court resentenced defendant as described, and this appeal followed.

II. DEFENDANT'S PRESENCE AT HEARINGS

Defendant first argues that his rights were violated because the trial court failed to follow the proper *Crosby* procedure on remand by resentencing defendant in absentia. Defendant asserts that defendant was not produced in open court and not given an opportunity to be heard. However, it is plainly obvious from the lower court record that defendant *was* present for the resentencing, which included the trial court's decision on the record to resentence defendant. Indeed, defendant

[1] On a *Crosby* remand, "a trial court should first allow a defendant an opportunity to inform the court that he or she will *not* seek resentencing." *Lockridge*, 498 Mich at 398, citing *Crosby*, 397 F3d at 118 (emphasis added).

[2] Defendant previously conceded that 5 points were appropriate for OV 1. See *People v Carter*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket Nos. 326442; 326467), unpub op at p 16 n 10.

exercised his right to allocution. Defendant has not established a factual predicate for this argument, see *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), nor does it appear possible that he could. We need not discuss this issue further, because it is fundamentally premised on an assertion that irreconcilably conflicts with the record.

III. UPDATED PRESENTENCE INVESTIGATION REPORT

Defendant also argues that he is entitled to resentencing because his presentence investigation report (PSIR) was not updated or verified for the 2019 resentencing hearing. We disagree.

Because defendant did not object on this basis at his resentencing, this issue is unpreserved. See *People v McLaughlin*, 258 Mich App 635, 699-670; 672 NW2d 860 (2003). The standard of review for unpreserved sentencing issues is plain error. *People v McGuffey*, 251 Mich App 155, 161, 164-165; 649 NW2d 801 (2002). Therefore, defendant must show that "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Presentence reports are required for every felony case in Michigan. MCL 771.14(1); *People v Brown*, 393 Mich 174, 180-181; 224 NW2d 38 (1974). These reports, which must include a wide range of information about defendant's criminal record and character, must be "complete, accurate and reliable." *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). A PSIR developed for an earlier sentencing must be "reasonably updated" for use at a later sentencing. *Id.* at 512-516; see also, e.g., *People v Foy*, 124 Mich App 107, 110; 333 NW2d 596 (1983). Nevertheless, the mere age of a previously-prepared PSIR is not necessarily enough to render that PSIR "inherently defective" in the absence of changed circumstances since the report was prepared. *People v Crook*, 123 Mich App 500, 503; 333 NW2d 317 (1983). A defendant may not waive the preparation of a PSIR, but a defendant may waive the preparation of an updated PSIR at resentencing, unless the previously-prepared PSIR is "manifestly outdated" or "manifestly stale." *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992).

In this matter, a PSIR was prepared for defendant's original sentencing, which occurred on March 3, 2015. That PSIR included detailed information on the crimes at issue, defendant's criminal record, the prosecution's recommended disposition, and more. No new or updated PSIR was prepared for defendant's resentencing. Although the parties apparently recognized this omission and made no objection, a failure to object constitutes forfeiture only; defendant did not express affirmative approval that would constitute a waiver. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). We note that there is no "bright line" test for when a PSIR becomes stale or outdated. Nevertheless, we presume that a span of four years likely did call for preparation of an updated PSIR. We are therefore generally inclined to agree with defendant that the absence of an updated PSIR was erroneous. We need not decide that point, however, because we conclude that any error was harmless under the circumstances.

Presuming the lack of an updated PSIR constitutes plain error, we are unpersuaded that any such error "affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. Defendant argues only that the lack of an updated PSIR is not subject to harmless-error analysis,

but defendant appears to confuse the requirement of preparing an initial PSIR with the requirement of preparing an updated PSIR. See *Hemphill*, 439 Mich at 581-582. Defendant does not identify any changed circumstances or new information that should have been in an updated PSIR. In one of his motions, defendant advised the trial court that since his incarceration defendant had (a) obtained several misconducts, (b) attended religious services, (c) participated in a mental health group, (d) attended some classes when available at his location, and (e) begun writing to constructively occupy his time. In his allocution, defendant made a vague statement expressing regret for "things," that he was learning from his mistakes, and he was working to improve himself. The record suggests that the changed circumstances since his initial sentencing were fairly minor, in contrast to the more noteworthy changes apparent in *Crook*, 123 Mich App at 503. Although defendant's PSIR was arguably outdated purely due to the passage of time, we have been provided with no argument, evidence, offer of proof, or indication from the record that the information in the PSIR was actually stale or incomplete. It is unlikely that the lack of an updated PSIR resulted in prejudice that affected defendant's resentencing outcome. Resentencing is, therefore, not mandated.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Michael J. Riordan
/s/ Colleen A. O'Brien