STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
v	No. 295602 Oakland Circuit Court
KEVIN DEAN MILLER, Defendant-Appellant.	LC No. 2009-225762-FH

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for larceny of property valued at more than $20,000, MCL 750.356(2)(a). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 2 to 15 years' imprisonment for the larceny conviction. We affirm defendant's conviction, but remand for resentencing.

I. BASIC FACTS

This case concerns the larceny of jewelry and gold from the home of Helen Ross, and her husband, Alan Ross. Helen Ross and Alan Ross kept jewelry, gold and important documents in a safe in the basement of their house. The safe was inside a closet under the stairwell. The safe required a combination code and a key to open. Helen Ross kept the key to the safe in a drawer in the kitchen, and she kept the combination code in a notebook in the back portion of the same drawer.

On January 29, 2009, Helen Ross went downstairs into the basement to put a package into the safe for Alan Ross because she and Alan Ross were leaving for their vacation home in Florida. Helen Ross had last opened the safe in either October or November 2008. After Helen Ross opened the safe, she decided to open one of her small jewelry boxes located inside to look at her jewelry. When she looked at her engagement ring setting, she realized the diamond was missing from it. The missing diamond was a 6.25-carat to 6.50-carat round solitaire. Helen Ross then checked her other jewelry boxes inside the safe and realized that a good portion of her jewelry was missing. Helen Ross called Alan Ross downstairs. Alan Ross came down and then proceeded to call 911.

Around the time Helen Ross realized her jewelry was gone, only she, Alan Ross, their son, David Ross, Olga, their cleaning lady, and defendant had access to Helen Ross and Alan

Ross's house and the safe. Alan Ross originally hired defendant to work as a handyman at the couple's house, and later, in 2006, Alan Ross hired defendant to work for his freight airline, IFL Group (IFL). From August 2008 through January 2009, defendant rebuilt Helen Ross and Alan Ross's basement stairs to make the stairs less steep. He also fixed the furnace and the plumbing in the house and added lighting throughout the house. Defendant worked either at IFL or at Helen Ross and Alan Ross's house when Helen Ross and Alan Ross were at their vacation home in Florida.

About ten times in 2008, defendant sold jewelry to Christopher Paul, a pawnbroker, who owns Gold Brokers Jewelry & Coins and buys and sells gold, jewelry, and coins. For each jewelry transaction Paul completed with defendant, Paul obtained defendant's valid driver's license and a thumb print. The parties stipulated that defendant's thumb prints were on Paul's receipts. Defendant told Paul that the jewelry was his inheritance from his grandmother and he owned part of an airline. However, the jewelry sold to Paul matched the list of jewelry missing from Helen Ross and Alan Ross's safe including a 6.36-carat diamond. Additionally, in December 2008, Bernard Fling, a former Harley Davidson motorcycle salesman, sold defendant a screaming eagle Harley Davison motorcycle. Defendant gave Fling a $14,000 cash deposit and financed the remaining balance.

The day after discovering the missing jewelry, Helen Ross and Alan Ross went to Florida. Defendant had previously driven Helen Ross's vehicle to Florida with his father-in-law. When Helen Ross and Alan Ross arrived in Florida, defendant and his father-in-law were already at their house. Helen Ross and Alan Ross did not speak to defendant regarding the missing jewelry because the Orchard Lake Police Department advised against it. Defendant was very friendly while in Florida and he came back to Michigan a few days later.

On February 4, 2009, Orchard Lake Police Sergeant David Sims called defendant and asked him to come into the police station. Sims told defendant he was investigating a theft from Alan Ross and Helen Ross's house. Defendant stated he suspected the housekeeper. Sims told defendant that he spoke with Paul regarding the jewelry defendant sold to him, and that he knew defendant had recently taken an expensive Disney vacation and used $14,000 cash to purchase a motorcycle. Defendant then put his head down and stated that he had messed up. Shortly after, while still at the police station, defendant received a phone call from Alan Ross. Before Sims left the room because defendant requested privacy, Sims heard defendant tell Alan Ross he was wrong and apologize. Defendant also left multiple voicemail messages for Helen Ross. On one occasion, defendant spoke on the phone with Helen Ross. She asked defendant what happened to her jewelry and defendant told her he broke into the safe and sold her jewelry to a pawnbroker.

On the other hand, defendant claimed that he did not steal the jewelry, but was given the jewelry and gold by Alan Ross when he asked for a loan. Defendant testified that he worked for Alan Ross for about three and one-half years. During that time, defendant was afraid of Alan Ross and would do whatever Alan Ross told him to do. Around July 2008, defendant asked Alan Ross for a $30,000 loan to put an addition on his house. Alan originally told defendant no, but a few months later, Alan Ross presented defendant with a plastic bag of full of gold jewelry. Alan Ross told defendant it was a gift and he did not want to be repaid. Alan Ross told defendant that defendant could not tell anyone where defendant got the jewelry from, especially not Helen

Ross. Alan Ross also told defendant never to ask for money again. Defendant went home and told his wife, Tamara Miller, what Alan Ross had said and showed her the plastic bag full of gold jewelry.

Defendant stated he sold the gold jewelry to Paul and spent a little instead of building an addition on his house. Defendant told Paul he inherited the gold because Alan Ross told him not to tell anyone about the gift. At some point, Alan Ross approached defendant and told defendant that he had accidentally given defendant one of Helen Ross's favorite necklaces and defendant needed to give it back. Defendant went to the pawnbroker and the pawnbroker gave defendant the necklace back as a gift. Defendant returned the necklace to Alan Ross at the IFL office.

According to defendant, in January 2009, while in Florida, Alan Ross spoke to defendant regarding the gifted gold and jewelry. Alan Ross told defendant that Helen Ross was upset and believed that her jewelry had been stolen. Alan Ross told defendant not to say anything about how he got the jewelry. Alan Ross told defendant to tell everyone that he took the jewelry and Alan Ross would take care of him. In Michigan, after defendant returned from Florida, defendant called Helen Ross's phone and left three messages expressing remorse and guilt because Alan Ross told him to. Thereafter, defendant received a call from Sims regarding the gold jewelry. When Sims told defendant he was investigating missing gold jewelry from Alan Ross and Helen Ross's home, defendant felt scared and believed that he was being wrongly set up. At first, defendant denied taking the jewelry, but after Sims showed defendant the receipts from the pawnbroker, defendant told Sims he messed up. While talking with Sims, defendant received a phone call from Alan Ross and he answered the phone call. Alan Ross told defendant to apologize to him on the phone, which defendant did. Alan Ross then told defendant to ask Sims to leave the room. Once Sims left the room, Alan Ross asked defendant how he was doing. Alan Ross told defendant while it was going to be hard to take the fall regarding the jewelry, defendant should be a man and do what Alan Ross told him to do. Defendant told Alan Ross he would be alright. Alan Ross then told defendant that Helen Ross wished to speak to him. Helen Ross asked defendant where her jewelry was and defendant told her he sold it to a pawnbroker. Defendant never told Sims that Alan Ross was telling defendant what to say because he was in fear for his life.

Despite defendant's testimony that he was given the jewelry and was afraid of Alan Ross, he was convicted and sentenced. Defendant now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues he was denied the effective assistance of counsel. A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, our review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial court level. Therefore, review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d

246 (2002). The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 343; 521 NW2d 797 (1994).

Defendant contends that the defense counsel "displayed a spectacular range of awkward and incompetent behavior" and "an inability to conform to rules of evidence and an inability to obey the dictates of the trial judge" that ultimately resulted in a total failure of defense counsel to present a substantial defense. In particular, defendant argues that defense counsel failed to adequately cross-examine witnesses, failed to investigate the case, failed to elicit the required testimony to support the defense theory from defendant's witnesses, including Tamara Miller and defendant, failed to obtain character evidence, and failed to deliver acceptable opening and closing statements. Although at times the defense theory was unartfully presented by defense counsel, the defense theory was presented and did not make an overall difference in the outcome of the case given the substantial evidence against defendant. As a result, defendant was not denied the effective assistance of counsel.

The failure to present evidence only rises to ineffective assistance if defendant is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.*

The defense theory that defendant alleges was not presented was that Alan Ross gifted the jewelry to defendant as part of an insurance fraud scheme and directed defendant to state that he stole the jewelry. Alan Ross would claim insurance on the jewelry, alleging that it had been stolen when in fact it had not, and obtain cash. According to defendant, Alan Ross had a history of committing similar insurance fraud. Moreover, as a condition of the gift, Alan Ross prohibited defendant from telling anyone about it. Defendant claimed that he was afraid of Alan Ross and was intimidated into participating in the scheme.

Despite defendant's argument to the contrary, defense counsel's cross-examination of Helen Ross and Alan Ross addressed the defense theory of the case. During Helen Ross's cross-examination, defense counsel sought to elicit testimony from Helen Ross regarding her knowledge whether Alan Ross had made fraudulent insurance claims. Defense counsel's cross-examination of Helen Ross revealed that she did not have any knowledge of Alan Ross making false insurance claims. Likewise, during Alan Ross's cross-examination, defense counsel sought to elicit testimony from Alan Ross regarding his filing of fraudulent insurance claims. Defense counsel's cross-examination revealed that Alan Ross denied making fraudulent claims. Defense counsel's cross-examination of Helen Ross and Alan Ross sought to expose that Alan Ross had a

history of making fraudulent insurance claims; thus, counsel had a strategic purpose in cross-examining these witnesses. That counsel's strategy failed does not render counsel's assistance ineffective. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defendant's argument that defense counsel failed to investigate the substantial defense is also not supported by the record. There is no basis in the record, other than defendant's testimony, that Alan Ross engaged in insurance fraud. As a result, there is no evidence that defense counsel would have found evidence of insurance fraud if he had engaged in more investigation. Because our review is limited to mistakes apparent on the record, *Noble*, 238 Mich App at 661, we cannot conclude that defense counsel was deficient for failing to investigate the defense theory and obtain proof of insurance fraud.

Defense counsel's direct examination of Tamara Miller and defendant was not ineffective for failing to elicit testimony in support of the defense theory. In fact, defense counsel's questioning of Tamara Miller revealed that Tamara Miller believed defendant received the gold jewelry as a gift from Alan Ross, and defense counsel's questioning of defendant revealed that defendant asserted that Alan Ross gave defendant the jewelry as a gift and then Alan Ross directed defendant to say he stole the jewelry even though he did not. While defense counsel's questions to Tamara Miller and defendant were not always clear, the evidence regarding the defense theory was admitted into the record. Moreover, decisions regarding the questioning of witnesses should not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant has failed to overcome the presumption that defense counsel's action constituted sound trial strategy. *Pickens*, 446 Mich at 343.

Defendant's argument that defense counsel failed to elicit character evidence is also without merit. Defense counsel properly sought reputation testimony pursuant to MRE 405(a) during his direct examination of Tandy Shepard and Rebecca Chapliss, the character witnesses, to support the defense theory that defendant was trustworthy and would not steal. MRE 405(a) provides that where evidence of a character trait is admissible, "proof may be made by testimony as to reputation or by testimony in the form of an opinion." Here, defense counsel questioned Shepard and Chapliss regarding their knowledge of defendant's reputation within the community. Shepard testified that her daughter and defendant's daughter had grown up together and she believed defendant to be "honest and trustworthy." Chapliss testified that she had known defendant for thirteen years and believed him to be trustworthy. Because defense counsel was permitted to choose whether to ask the character witnesses questions pertaining to reputation or opinion testimony, defense counsel properly used MRE 405(a) to obtain reputation evidence about his trustworthiness and to support the defense theory and was not ineffective on this basis.

Defense counsel's opening statement did not amount to deficient performance and adequately set forth the defense theory. Defense counsel began his opening statement by stating, "[o]kay. Alan Ross, one of the few super wealthy people who abuse their power. Now super wealthy people (indiscernible)." Immediately following this sentence, the trial court interrupted defense counsel and told counsel to remember that the trial was about defendant. While the first sentence of defense counsel's opening statement focused on Alan Ross, instead of defendant, defense counsel's strategy in giving this statement was to present the defense theory that Alan Ross controlled defendant and gave defendant the jewelry as part of the insurance fraud scheme.

Defense counsel subsequently reinforced this theory through his direct examination and cross-examination of various witnesses. That defense counsel's strategy failed does not amount to ineffective assistance of counsel. *Petri*, 279 Mich App at 412.

Finally, defense counsel's closing argument did not amount to deficient performance. Defense counsel twice attempted to bring evidence not presented during trial into his closing argument and the trial court properly refused to allow defense counsel to argue from such evidence. Defense counsel sought to use this evidence to advance defendant's theory that Alan Ross controlled defendant and orchestrated the entire prosecution of defendant in order to claim the insurance money from the missing gold jewelry and diamonds. Likewise, defense counsel's definition of "beyond a reasonable doubt" was part of his strategy to persuade the jury that there was not sufficient evidence to prove defendant was guilty. Because defense counsel had a strategy in mind that failed, *Id.*, and was presenting a substantial defense, *Kelly*, 186 Mich App at 526, defendant has failed to overcome the presumption that defense counsel's actions constituted sound trial strategy, *Pickens*, 446 Mich at 343.

Defendant argues that had defense counsel been effective, the defense would have created reasonable doubt and the outcome would have been different. We disagree and conclude that any deficient performance by defense counsel was not outcome determinative because of the strong evidence against defendant and the fact that he was convicted despite presentation of the defense. Defendant admitted to Helen Ross, Alan Ross, and Sims that he took the gold jewelry. Paul testified that defendant sold him a variety of gold pieces between August and December 2008, and Fling testified that in December 2008, defendant purchased a Harley Davidson motorcycle with a $14,000 cash down payment. As discussed above, defense counsel presented the defense theory through his arguments, the cross-examination of witnesses and through his presentation of witnesses, but defendant was still convicted. Thus, any deficiency in counsel's performance did not prejudice defendant.

III. JUDICIAL IMPARTIALITY

Defendant argues that various comments made by the trial court to defense counsel within the presence of the jury denied him a fair trial. We disagree. Unpreserved errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id*.

Criminal defendants have a constitutional right to a fair and impartial trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Trial courts have "wide discretion and power in matters of trial conduct[;]" however, that power is not without limits. *Id.* at 307-308. The overriding principle is that a court's action cannot pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "[A] trial court must exercise caution and restraint to ensure that its questions [and comments] are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). In determining whether the challenged judicial remarks or conduct were improper, we consider whether the remarks or

conduct "were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial." *Conley*, 270 Mich App at 308 (internal quotation marks omitted). In reviewing the challenged remarks or conduct, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Defendant cites to a multiple comments made by the trial court to demonstrate that he was denied a fair trial. The first comment occurred during defense counsel's cross-examination of Alan Ross when defense counsel inquired into whether Alan Ross realized he had made between six and eight automobile insurance claims within the last six years. The prosecution objected on the basis of relevancy and the trial court sustained the objection, explaining to defense counsel that defense counsel's insurance scheme theory was "only a theory. I told you in my chambers that it's only in your imagination at this point. We've not gotten any further than somebody making claims." The trial court's comment was not partial but amounted to an explanation of his ruling that there was no evidentiary basis for defense counsel's question.

Additionally, the next allegedly improper comment by the trial court occurred in the course of defense counsel's direct examination of defendant. In response to the prosecution's objection to defense counsel's question regarding what made defendant afraid of Alan Ross, the trial court stated, "[p]ut a frame of reference in it. Get into this game called the practice of law. June 2008, January 2009. Put it in a frame of reference. If it's just what has he said to you who knows where they're coming from, Mr. Corr." Again, the trial court was not acting partially, but was explaining to defense counsel that his question was problematic because it contained no time limitation.

Further, defense counsel asked defendant if defendant knew that Alan Ross's lawyer was in the court room. The trial court stated, "[t]his isn't the trial, Mr. Corr. The trial is June – if I tell you one more time we'll have matter to take care of out of the jury's presence. June 2008, January 2009." Defense counsel then stated that the trial court was precluding counsel from explaining defendant's frame of mind in dealing with Alan Ross. In response, the trial court stated, "I haven't done that. Haven't done that at all. I said practice law like a lawyer, that's what I've said. You ask the question if it's proper and [the prosecutor] doesn't object to it[,] it will go forward to it." Defense counsel responded that he would continue to ask defendant questions and the trial court replied, "[t]hat's fine. You keep trying. Next question?" The trial court's comments were intended to ensure that defense counsel's questions were proper, not to express any partiality.

Moreover, following the prosecutor's objection to defense counsel's question to defendant regarding Alan Ross's wealth, defense counsel argued that he needed to show Alan Ross's wealth to prove that it was easy for a wealthy man to give away significant amounts of gold and jewelry. The trial court replied, "[y]ou've been watching too many T.V. programs, Mr. Corr. Objection sustained. Next question." Again, viewed in context, the trial court is attempting to explain the reason for his ruling and get defense counsel to ask proper questions.

During defense counsel's cross-examination of Alan Ross as a rebuttal witness, defense counsel told Alan Ross that defendant had just written defense counsel a note indicating that

Alan Ross was going to have defendant killed. Defense counsel asked Alan Ross if he knew why defendant would write such a note. The prosecution objected and the trial court stated, "[t]hat's not on trial here. . . . You know this is not Jerry Springer. Please, Mr. Corr." Defense counsel was attempting to ask a prejudicial question and the trial court's comment was in relation to that question, to caution defense counsel for a clearly improper question.

Finally, the prosecution objected to defense counsel mentioning a fact not in evidence during closing argument. The trial court stated, "[n]ot in evidence. Not allowed to be argued. Don't say it again." The trial court was properly excluding defense counsel's argument of a fact not in evidence, which is the role of the trial court.

Ultimately, in looking at the trial court's comments in context, it is clear that the trial court was trying to keep the attorneys' points of inquiry relevant, to clarify and focus the questions asked by the attorneys to the witnesses to ensure that the witnesses' testimony remained relevant, to prohibit the attorneys from mischaracterizing testimony, to respond to defense counsel's persistent attempts to avoid evidentiary rulings made by the trial court and to explain those rulings, and to properly admonish defense counsel for arguing with the witnesses and the trial court. Thus, in reviewing the record in context, there is no evidence of that the trial court pierced the veil of judicial impartiality, and reversal is not warranted.

IV. RESENTENCING

A. IMPARTIAL JUDGE

Defendant argues he has a right to be resentenced by the judge who presided over his trial and the judge who sentenced him was biased. We disagree. This Court reviews a trial court's denial of a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). Unpreserved errors in a criminal case are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764. For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *Jones*, 468 Mich at 356. The defendant bears the burden of showing prejudice. *Id*.

A defendant is entitled to be sentenced by the judge who presided at his jury trial unless the judge is reasonably unavailable. MCR 2.630; *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993). Here, the record reveals that Judge Rudy Nichols, the judge who presided over defendant's jury trial, was on a medical leave of absence for heart surgery on the date of defendant's sentencing. Thus, pursuant to MCR 2.630, Judge Steven Andrews acted properly when he denied defendant's request to be sentenced by Judge Nichols and proceeded to sentence defendant.

A judge is disqualified if she cannot impartially hear a case, including:

> (1) when she is personally biased or prejudiced for or against a party or attorney; (2) when she has personal knowledge of disputed facts; (3) when she has been involved in the case as a lawyer; (4) when she was a partner of a party or lawyer within the preceding two years; (5) when she knows that she or a relative has an economic interest in the proceeding or a party to the proceeding; (6) when she or

> a relative is a party or an officer, director, or trustee of a party; (7) when she or a relative is acting as counsel in the proceeding; or (8) when she or a relative is likely to be a material witness in the proceeding. [*People v Wade*, 283 Mich App 462, 469-470; 771 NW2d 447 (2009); see MCR 2.003(C).]

"[A] trial judge is presumed to be impartial, and the party asserting partiality has a heavy burden of overcoming that presumption." *Wade*, 283 Mich App at 470. Generally, a showing of actual prejudice is required to disqualify a judge under MCR 2.003. *Wade*, 283 Mich App at 470. However, the Michigan Supreme Court has recognized that "'there might be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation.'" *Id.*, quoting *Cain v Dep't of Corrections*, 451 Mich 470, 512 n 48; 548 NW2d 210 (1996). Consequently, a showing of actual bias is not needed when the trial court judge: "(1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker." *Wade*, 283 Mich App at 470. But, the fact that a trial court's ruling is reversed, or that the judge stated that the effect of the reversal would be difficult to accept, does not require disqualification on remand. *People v Page*, 83 Mich App 412, 419-420; 268 NW2d 666 (1978). Further, a judge is not automatically disqualified because she made prior rulings adverse to the defendant. *People v Elmore*, 92 Mich App 678, 681; 285 NW2d 417 (1979).

Defendant has not overcome the presumption that Judge Andrews was impartial. Defendant asserts that Judge Andrews was biased because he expressed contempt, hostility, and disdain towards defendant throughout the sentencing hearing. However, a review of the Judge Andrews' comments reveals that the comments centered on the circumstances of the crime and the victims' loss. Judge Andrews then sentenced defendant based on the scoring from the sentencing information report and departed from the guidelines based on the facts of the case, discussed *infra*. Judge Andrews' comments do not show that the trial court held an actual prejudice against defendant nor did Judge Andrews' comments create the appearance of impropriety. Defendant has not established that plain error occurred when Judge Andrews presided over his sentencing hearing.

B. DEPARTING FROM THE GUIDELINES

Defendant argues he is entitled to resentencing because the trial court abused its discretion in departing from the sentencing guidelines and the trial court sentenced defendant based on inaccurate information. We agree. A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *Id.* The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error, and the conclusion of whether a reason is objective and verifiable is reviewed de novo. *Id.*

Under MCL 769.34(2), a trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. The trial court may only depart from the sentencing guidelines if it has a substantial and compelling reason to

do so, and it states the reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *Smith*, 482 Mich at 300. Substantial and compelling reasons for departure exist only in exceptional cases. *Id*. at 299. In determining whether there is a sufficient basis to justify departure, the principle of proportionality applies. *Id*. at 300. Proportionality defines the "standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." *Smith*, 482 Mich at 300.

Additionally, the trial court's reasons for departing from the guidelines range must be objective and verifiable. *Abramski*, 257 Mich App at 74. Objective and verifiable has been defined to mean, "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, [the] defendant, and others involved in making the decision, and must be capable of being confirmed." *Id*. The objective and verifiable facts "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. The trial court may draw inferences about the defendant's behavior from the objective evidence. *Petri*, 279 Mich App at 422.

Defendant's correct minimum sentence guidelines range for larceny as a second habitual offender is 0 to 11 months. Judge Andrews, who thought defendant's minimum sentencing range was 0 to 13 months, departed from the minimum sentencing guidelines by giving defendant a minimum sentence of 24 months. In originally departing from the guidelines, Judge Andrews stated, "[i]t is the sentence of this Court on a charge of larceny over $20,000, habitual third, that I depart from the guidelines, because the amount of property stolen and not returned is $93,415.00." Thereafter, on the motion for resentencing Judge Nichols stated:

> Judge Andrews's sentence, the People say was valid, defendant's motion should be denied; [the People's brief] goes through the departure from the guidelines, the [sic] he properly sentenced as scored on the guidelines and sentenced him as an habitual third. Now the amount, the restitution amount was verified in the report. Under the circumstances and in view of the Peos – the People's brief, the Court denies defendant's request. Have a good day.

Judge Nichols was then correctly informed by the prosecution that defendant was only a second habitual offender, but he was also incorrectly informed by the prosecution that defendant's minimum sentencing range was 0 to 13 months. Therefore, the parties held a bench conference with the trial court. The record is silent regarding what happened during this bench conference, but the trial court subsequently issued an amended judgment of sentence, sentencing defendant to 2 to 15 years' imprisonment.

We conclude that the reason given on the record for departing from the sentencing guidelines was not substantial or compelling. Defendant was convicted of larceny over $20,000 and was assessed ten points in OV-16 for stealing property valued over $20,000. Thus, the amount defendant stole could only be used as a factor by the trial court if it found that OV-16

gave the factor inadequate or disproportionate weight. Neither Judge Andrews nor Judge Nichols placed on the record how the amount stolen was a substantial and compelling factor not adequately accounted for within the sentencing guidelines.

Furthermore, "[a] sentence is invalid when a sentencing court relies on an inappropriate guidelines range." *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). As previously noted, defendant is a second habitual offender and his correct minimum guidelines range is 0 to 11 months. Neither trial judge was aware of defendant's correct sentencing guidelines range. Judge Andrews sentenced defendant to 2 to 20 years believing defendant was a habitual third offender and his minimum sentencing range was 0 to 13 months, and Judge Nichols resentenced defendant to 2 to 15 years believing defendant's minimum sentencing range as a second habitual offender was 0 to 13 months. Because the record reflects that the trial court relied upon inaccurate information in determining defendant's sentence, he is entitled to resentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause