

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD HENRY ENGLE,

Defendant-Appellant.

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UNPUBLISHED

December 15, 1998

No. 204150

Monroe Circuit Court

LC No. 96-027982 FH

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). The trial court sentenced defendant to thirty-five to sixty years in prison as a fourth habitual offender, MCL 769.12; MSA 28.1084. We affirm.

Defendant argues that he was denied the right to a fair trial as a result of the trial court limiting defendant to calling Deputy Jeffrey Weeman only as a rebuttal witness and also by allowing the prosecutor to cross-examine Deputy Weeman on issues which were beyond the scope of his direct testimony. We disagree.

In order to determine whether defendant received a fair trial, we must review the record and determine whether the process in limiting defendant to calling Deputy Weeman as a rebuttal witness denied him the right to a fair trial. *People v Robinson*, 386 Mich 551, 556; 194 NW2d 709 (1972). A trial court's decision in determining the scope of cross-examination is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

After the prosecution rested, defendant objected to the prosecution's failure to call Deputy Weeman as a witness. Defendant argued that it had planned on cross-examining Deputy Weeman regarding the report he prepared in order to develop some "inconsistencies in the Prosecutor's case." After some discussion, the trial court stated that it would allow defendant to call Deputy Weeman as a defense witness. Defense counsel later stated that he would only call Deputy Weeman as a rebuttal witness. The trial court then informed defendant that it would allow him to call Deputy Weeman as a

rebuttal witness but cautioned him that he would be limited to questioning Deputy Weeman to rebut another witness' testimony. We find no merit to defendant's claim that the trial court limited defendant to calling Deputy Weeman as a rebuttal witness. Furthermore, it appears from the record that defendant chose the course of action which he now claims was error. A defendant cannot harbor error to be used as an appellate parachute in the event of jury failure. *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996), citing *People v Hardin*, 421 Mich 296, 332; 365 NW2d 101 (1994).

We also find that the trial court did not abuse its discretion in allowing the prosecution to cross-examine Deputy Weeman. Deputy Weeman's testimony on direct examination focused on his arrival at the crime scene and subsequent interview of the homeowner, who ran into defendant after he had exited her home. On cross-examination, the prosecution questioned Deputy Weeman regarding his whereabouts when he received the radio dispatch concerning the offense, as well as the information that was conveyed to him in the radio dispatch. After reviewing the trial court record, we conclude that the prosecutor's questions were not outside the scope of Deputy Weeman's direct testimony. *Canter, supra*.

Defendant also argues that he is entitled to be resentenced because the trial court increased his maximum prison sentence after it was made aware that the original sentence was more than two-thirds of the statutory maximum and, therefore, a possible *Tanner* violation. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). We disagree.

At sentencing, the trial court gave defendant a thirty-five to fifty year sentence as a fourth habitual offender. The prosecution immediately informed the trial court of the possible *Tanner* violation. The trial court noted its error and immediately changed defendant's maximum sentence before the sentencing hearing ended. Defendant argues that the trial court's modification of his sentence violated the rule set forth in *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994). In *Thomas, supra*, the Michigan Supreme Court held that the trial court erred in changing the defendant's sentence after the defendant moved to set aside his sentence several months later on the ground that it violated *Tanner*. This case is different from *Thomas, supra*, in that here, the trial court was informed of its error and changed defendant's sentence before the sentencing hearing ended.

The prohibition against changing a valid sentence does not apply until after the court has finally imposed its sentence and the court has lost its ability to modify the sentence. This occurs when the court enters the judgment of sentence or the defendant is remanded to the jail to await execution of the sentence. *People v Barfield*, 411 Mich 700, 702-703; 311 NW2d 724 (1981). A trial court's mere oral pronouncement of its sentencing decision does not terminate the court's ability to modify the sentence. *People v Bingaman*, 144 Mich App 152, 157-159; 375 NW2d 370 (1984). In this case, the trial court modified the sentences on the record before the sentences were actually imposed by court order and while defendant was still present. Under these circumstances, the trial court had the authority to modify the sentences.

Finally, defendant argues that his sentence is disproportionate. We disagree. Appellate review of sentences is limited to whether the sentencing court abused its discretion. *People v Albert*, 207

Mich App 73, 74; 523 NW2d 825 (1994). Appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. *People v Maleski*, 220 Mich App 518, 526; 560 NW2d 71 (1996). Thus, appellate review of habitual offender sentences is limited to considering whether the sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality requires sentences be proportionate to the seriousness of the matter for which punishment is being imposed. *Milbourn, supra*, 435 Mich 635.

Here, defendant was convicted of second-degree home invasion. Defendant has seven felony convictions in Florida, two felony convictions in Ohio, and at least four felony convictions in Michigan. At sentencing, the trial court indicated that defendant had an extensive criminal record and that he continued to engage in unlawful acts and failed to show any intent to reform himself. We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael J. Talbot