

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT WESTON,

Defendant-Appellant.

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UNPUBLISHED  
February 18, 2003

No. 238168  
Wayne Circuit Court  
LC No. 01-000933-01

Before: Neff, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; assault with intent to murder, MCL 750.83; assault with intent to commit great bodily harm less than murder, MCL 750.84; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f.<sup>1</sup> The trial court sentenced defendant to forty to eighty years' imprisonment for the second-degree murder conviction, twenty to forty years' imprisonment for the assault with intent to murder conviction, five to ten years' imprisonment for the assault with intent to commit great bodily harm conviction, two years' imprisonment for the felony-firearm conviction, and two to five years for the felon in possession of a firearm conviction.<sup>2</sup> Defendant appeals his sentences as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts

Defendant's convictions arose from a shooting that occurred at a Detroit home. On the date of the occurrence, defendant and Mandell Moore visited a bank to cash Moore's \$3,800 check. Defendant waited in the car, while Moore entered the bank. After cashing the check, Moore purchased a \$1,600 ring for his girlfriend, a \$600 pair of glasses, and a \$40 tire.

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<sup>1</sup> Defendant was originally charged with first-degree murder (premeditated), MCL 750.316; two counts of assault with intent to murder, MCL 750.83; felony-firearm, MCL 750.227b; and possession of a firearm by a felon, MCL 750.224f.

<sup>2</sup> The sentences run concurrently with the exception of the felony-firearm sentence which runs consecutively.

At approximately 10:00 p.m. that evening, Calvin Berry and Melvin Berry visited defendant and Moore. Melvin Berry and defendant were close friends. Defendant and Moore were also close friends. On this evening, defendant was drinking cognac as the four men lounged in the living room. Later, while Moore was playing video games and Melvin Berry was talking on his cellular phone, defendant inexplicably began firing a gun. There was no argument preceding the shooting. Defendant did not speak while he fired the gun, but he did make “noises.” Defendant shot Melvin Berry in the hand and the bullet when through his arm into his chest. Calvin Berry asked, “Man, what are you doing?” Defendant shot Calvin Berry in the face. Moore ran to the back of the house, but defendant chased him while continuing to fire the gun. Moore was shot in the neck and the hand and he fell to the floor. Defendant walked past him and fired again, grazing Moore’s head. Defendant then returned to the living room. Moore escaped through a window.

In the living room, Melvin Berry tried to exit the front door, but could not open the door because of his injury. Defendant approached Melvin Berry, pointed the gun at him, and pulled the trigger. When the gun did not fire, defendant ran to the back of the house and exited through the back door. Ultimately, Calvin Barry died of the multiple gunshot wounds to the chest and head.

At sentencing, the trial court assigned fifty points for offense variable six (OV 6) and twenty-five points for offense variable thirteen (OV 13), placing defendant’s potential sentence in OV level III. Defendant did not object to the scoring.

## II. Sentencing

Defendant argues that he is entitled to resentencing because the trial court incorrectly scored OV 6 and OV 13.<sup>3</sup> We disagree.

This Court reviews for an abuse of discretion a sentencing court’s offense variable scoring, provided that some evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If a sentencing issue requires the application of the instructions in the legislative sentencing guidelines, it is a question of law reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). Because defendant failed to preserve his claim that the sentencing guidelines were incorrectly scored by not raising the issue at sentencing, MCR 6.429(C); MCL 769.34(10); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002), he must show plain error affecting his substantial rights in order to avoid forfeiture of this issue. *People v Kimble*, 252 Mich App 269, 277-278; 651 NW2d 798 (2002).

Defendant first argues that the trial court improperly scored fifty points for OV 6 because he was not found guilty of first-degree premeditated murder. Pursuant to MCL 777.36(a), fifty points should be scored if:

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<sup>3</sup> The offense occurred on October 21, 1999. MCL 769.34(2) provides that the sentencing guidelines promulgated by the Legislature apply to felonies “committed on or after January 1, 1999.” *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

The offender had a premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer.

Pursuant to MCL 777.36(b), twenty-five points should be scored if:

The offender had an unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.

Defendant was originally charged with first-degree premeditated murder. The trial court found him guilty of second-degree murder, finding no evidence of premeditation. There was also no evidence that defendant committed or attempted to commit any of the other enumerated crimes. Therefore, the trial court erred in scoring fifty points for OV 6. However this error does not require resentencing because defendant's second-degree murder conviction supports a scoring of twenty-five points for OV 6, which does not affect the minimum sentence range.<sup>4</sup>

Defendant also argues that the trial court improperly scored twenty-five points for OV 13. MCL 777.43 provides in relevant part:

Offense Variable 13 is a continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. . . . 25 points.

The evidence demonstrates that defendant fired a gun at three individuals. Contrary to defendant's argument, the fact that the incidents occurred within a short span of time does not render the actions less of a pattern than if they had occurred over a longer span of time. We find the evidence sufficient to establish a pattern of criminal behavior. The trial court did not err in scoring OV 13 at twenty-five points.

<sup>4</sup> Second-degree murder is a general intent crime, which requires proof that the killing was "done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001) (citation omitted). In this case, defendant shot a firearm at several people witnessing the effect of each in turn. However, this did not stop him from shooting a victim more than once or shooting at the next victim. The evidence supports the score of twenty-five points for OV 6.

Based on our finding that OV 6 should have been scored at twenty-five points and OV 13 was properly scored, defendant's total OV score would be 115. A score of 100 points or more places a sentence in OV level III. Because the change would not affect the minimum sentence range, there was no plain error affecting defendant's substantial rights. However, defendant's records should reflect a correct score of twenty-five for OV 6, and we remand this case to the trial court for the ministerial task of issuing an amended sentencing information report reflecting that adjustment.

### III. Ineffective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for failing to raise the scoring errors in the trial court. We disagree.

This Court reviews de novo claims of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). Our review is limited to the existing record because defendant failed to move for a new trial or a *Ginther*<sup>5</sup> hearing on the basis of ineffective assistance of counsel. *Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Pursuant to *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446 Mich 298, 309-327; 521 NW2d 797 (1994), a defendant must satisfy a two-pronged test to establish ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Strickland, supra* at 687.]

Effective assistance is presumed, and the defendant bears a heavy burden of proving that his counsel was ineffective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, although there was a scoring error to which defense counsel failed to object, this error did not prejudice defendant because it did not affect the sentencing guidelines range. Therefore, we find that defendant was not denied effective assistance of counsel on this basis.

Affirmed and remanded for the ministerial task of correcting the sentencing information report. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>5</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).