

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 31, 2012

v

PARIS ORLANDO BRIDGEFORTH,  
Defendant-Appellant.

No. 304274  
Monroe Circuit Court  
LC No. 10-038392-FH

---

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver the controlled substance dihydrocodeinone (“Lorcet”), MCL 333.7401(2)(b)(ii), possession with intent to deliver the controlled substance dihydrocodeinone (“Vicodin”), MCL 333.7401(2)(b)(ii), resisting and obstructing a police officer, MCL 750.81d(1), and obstruction of justice, MCL 750.505. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 4 to 15 years’ imprisonment for the possession with intent to deliver marijuana conviction, 9 to 40 years for the possession with intent to deliver less than 50 grams of cocaine conviction, 9 to 40 years for the possession with intent to deliver Lorcet conviction, 9 to 40 years for the possession with intent to deliver Vicodin conviction, 4 to 15 years for the resisting and obstructing a police officer conviction, and 4 to 20 years for the obstruction of justice conviction. We affirm defendant’s convictions but remand for resentencing as discussed below.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution failed to prove beyond a reasonable doubt that he committed the crimes of possession with intent to deliver marijuana, Lorcet, and Vicodin. Specifically, defendant argues that there was insufficient evidence presented at trial to establish the element of possession. Defendant also argues that even assuming the prosecution established the element of possession, there was insufficient evidence that he intended to deliver Vicodin. We disagree.

“Due process requires the prosecution in a criminal case to introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a reasonable doubt.” *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998). We review de novo a

defendant's challenge to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). There is sufficient evidence to sustain a conviction if, after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *Id.* This Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). If any conflicts arise while reviewing the record, they must be resolved in favor of the prosecution. *Martin*, 271 Mich App at 340.

*Constructive Possession of marijuana, Lorcet, and Vicodin*

To establish that defendant committed the offense of possession with intent to deliver less than five kilograms of marijuana, the prosecution had to prove beyond a reasonable doubt that: (1) defendant knowingly possessed the controlled substance; (2) defendant intended to deliver the controlled substance to another individual; (3) defendant was aware that the controlled substance was marijuana; and, (4) the substance was marijuana and it weighed less than five kilograms. MCL 333.7401(2)(d)(iii); *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005). Further, to establish that a defendant is guilty of possession with intent to deliver a controlled substance, such as, the present case, Lorcet or Vicodin, the prosecution must prove beyond a reasonable doubt that a defendant knowingly possessed those narcotics and intended to deliver them to another person. See MCL 333.7401(2)(b)(ii).

The element of possession requires a showing that a defendant has "dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977)). A defendant may be in actual or constructive possession, and possession may be exclusive or jointly shared. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Circumstantial evidence and the inferences arising therefrom are sufficient to prove possession. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *Id.* Nevertheless, a defendant's "mere presence" at a location where contraband is located, without evidence of an additional connection between the defendant and the contraband, is insufficient to establish constructive possession. *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999).

Defendant asserts that because he did not have any narcotics on his person during the search and because there were no residency ties to that location, there was insufficient evidence to show that he constructively possessed the seized narcotics. We disagree. We conclude that a "sufficient nexus" between defendant and the controlled substances existed to establish possession. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992). Monroe Police Corporal Zimmerman testified that he drove by the house twice a week and observed defendant at the house more than a dozen times in the month prior to the search. Corporal Tolstedt observed defendant on the porch of the house earlier in May of 2010. Defendant's bridge card was found at the house amongst a pile of clothing. Viewing the evidence in the light most

favorable to the prosecution, a reasonable jury could conclude that defendant had “dominion or right of control” over the narcotics in the house. *Nunez*, 242 Mich App at 615.

Defendant’s behavior in response to the search further supports this inference. As the police entered the residence, defendant ran toward the bathroom, where he attempted to flush down the toilet a bag of crack cocaine. The bag contained six individual packages of crack cocaine, which Zimmerman testified indicated that it was for sale, not personal use. In the hallway, a shoebox containing Lorcet and Vicodin were located. In the front west bedroom, a digital scale, packaging items, marijuana, crack cocaine, and Vicodin were located. Marijuana was also located in various other locations. Additionally, there were several packaging items located at the residence. Given that these items were located in the residence to which defendant was connected and that many of these items were in plain view at the residence, there is sufficient evidence for a rational trier of fact to conclude that defendant had knowledge of their presence and character. *Nunez*, 242 Mich App at 615.

Further, shortly after the raid, Sergeant Kolbas informed defendant that he could be possibly charged for “resisting and obstructing, possession with intent to deliver marijuana, and possession with intent to deliver crack cocaine.” Upon hearing the potential charges against him, defendant said something like, “shit, that’s only about an ounce. I smoke about half an ounce a day. . . . this is what we do, and when we get out we’ll be doing it again.” A rational trier of fact could conclude that by making such an admission, defendant acknowledged his control and possession over the seized narcotics. Accordingly, under the totality of circumstances, there is sufficient evidence for a reasonable jury to conclude that there was a sufficient nexus between defendant and the marijuana, Lorcet, and Vicodin, thereby supporting the reasonable conclusion that defendant was in constructive possession of the said narcotics. *Johnson*, 466 Mich at 500.

#### *Intent to deliver Vicodin*

Alternatively, defendant argues that even if there was sufficient evidence presented to establish possession, the prosecution failed to provide sufficient evidence that he intended to deliver Vicodin. We disagree. “Intent to deliver has been inferred from the quantity of narcotics in a defendant’s possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest.” *Wolfe*, 440 Mich at 524. Minimal circumstantial evidence is sufficient to prove intent to deliver. *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

Here, Vicodin was located in two locations in the residence; pills were located in a shoebox in the front hallway and in a shoebox in a bedroom where a digital scale, packaging items, crack cocaine, and marijuana were located. One of the shoeboxes also contained 13 individually packaged bags of marijuana. The room in which this box was found also contained digital scales and crack cocaine. The other shoebox contained the Lorcet pills as well as the Vicodin pills. Additionally, in at least one location where the Vicodin was retrieved, the pills were packaged in a single bag, not in a traditional prescription container as would be expected if the pills were for personal use. While defendant alleges that there is a discrepancy in the evidence regarding the number of seized Vicodin pills, the packaging of the Vicodin and the fact that such pills were located near and in close proximity to other individually-packaged narcotics and packaging materials, provides sufficient evidence for a reasonable trier of fact to conclude

that defendant intended to deliver Vicodin along with the other narcotics. *Wolfe*, 440 Mich at 524. Accordingly, in viewing the evidence in a light most favorable to the prosecution and resolving all conflicts in evidence in favor of the prosecution, there was sufficient evidence for a reasonable jury to conclude that defendant intended to deliver Vicodin.

## II. JURY INSTRUCTIONS

Defendant next argues that he was deprived of his constitutional right to a fair trial when the trial court failed to give the standard criminal jury instruction on “mere presence.” CJI2d 8.5. We disagree.<sup>1</sup>

Jury instructions are reviewed in their entirety to determine if an error requiring reversal has occurred. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). “Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *Id.* “Further, it has been held that the failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant’s ability to effectively present a given defense.” *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

“When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The jury instruction on “mere presence” provides:

Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it. [CJI2d 8.5.]

In discussing the applicability of this instruction, the trial court indicated such an instruction would not apply unless the prosecution intended to rely on an aiding and abetting theory. The trial court, however, highlighted that the issue raised by defendant of mere presence is incorporated into the instruction on possession. We agree with the trial court.

The language of CJI2d 8.5 indicates that the instruction applies to situations where the prosecution intends to proceed on an aiding and abetting theory. Here, the prosecution did not

---

<sup>1</sup> We note that by expressing satisfaction with the trial court’s instruction, defendant waived review of this issue. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). While defendant expressed a desire to include this specific instruction before trial commenced, defendant never objected to the instructions given nor asked the trial court to include such an instruction when the parties were discussing which instructions the trial court would provide. We nonetheless review this issue as it relates to defendant’s ineffective assistance of counsel claim.

rely on an aiding and abetting theory but rather, sought to show that defendant actually committed the charged offenses. Accordingly, the instruction was not proper.

More importantly, even assuming that the “mere presence” instruction applied to such situations where the prosecution was proceeding on a principal theory in a controlled substance offense, the substance of this instruction was substantially covered in the possession instruction. *Chapo*, 283 Mich App at 373; *Moldenhauer*, 210 Mich App at 159-160. Specifically, when instructing the jury on possession, the trial court stated that “[i]t is not enough if the Defendant merely knew about the substance. The Defendant possessed the substance only if he had control of it, or the right to control it, either alone or together with someone else.” Had the jury believed defendant’s theory that he was not connected to the seized contraband or the residence, it would not have found him guilty under the given instructions. *Moldenhauer*, 210 Mich App at 161. Accordingly, because defendant’s rights were protected, reversal is not required. *Chapo*, 283 Mich App at 373; *Moldenhauer*, 210 Mich App at 159-160.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was deprived of his constitutional right to the effective assistance of counsel because defense counsel failed to pursue discrepancies in admitted evidence, failed to renew his request for a “mere presence” instruction, and failed to object to various scoring errors. We disagree.

Because this Court denied defendant’s motion to remand his case for a *Ginther*<sup>2</sup> hearing, this Court’s review is confined “to errors apparent on the record.” *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). An ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.* at 579.

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const Am VI, Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel’s performance was deficient and that such deficiencies prejudiced the defendant’s case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel’s error, the outcome of the proceeding would have been different. *Carbin*, 463 Mich at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

---

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions to decline to object to procedures, evidence or an argument may also fall within sound trial strategy. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Defense counsel is afforded wide latitude on matters of trial strategy, and this Court abstains from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243

As defendant acknowledges, defense counsel “vigorously pursued” the issues surrounding possession of the narcotics and the lack of residency ties connecting defendant to the residence to support defendant’s theory that he was not connected to the narcotics or to the residence and that therefore, the prosecution failed to establish actual or constructive possession. Defendant, however, argues that defense counsel either was unaware of or failed to pursue several inconsistencies concerning the narcotics seized from the residence. While the testimony regarding the descriptions of the narcotics seized and the information surrounding where the narcotics were located may have varied or caused confusion, considering the quantity of evidence admitted, defense counsel could have reasonably believed that further inquiry into such issues would have harmed defendant as it would have shed greater light on the quantity of drugs seized, their packaging, and their location in proximity to defendant, thereby undermining defendant’s theory that there was insufficient evidence to establish constructive possession or the intent to deliver. We decline to review defense counsel’s trial strategy with the benefit of hindsight. “[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Further, counsel’s strategy does not constitute ineffective assistance of counsel simply because it did not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). We therefore defer to defense counsel’s decision regarding what to pursue as a matter of trial strategy. *Unger*, 278 Mich App at 253. Additionally, given the quantity of narcotics and packaging items admitted at trial, defendant’s damaging statement, and evidence connecting defendant to the residence, we cannot conclude that but for defense counsel’s failure to pursue the alleged inconsistencies, the outcome of defendant’s trial would have been different. *Carbin*, 463 Mich at 600.

Defendant also argues that defense counsel was ineffective for failing to renew his request for a standard jury instruction on “mere presence.” CJI2d 8.5. As concluded above, the “mere presence” instruction did not apply to the charges against defendant. Further, the possession instruction substantially covered defendant’s theory. Accordingly, defense counsel was not ineffective for failing to object where the instructions given “as a whole properly and completely instructed the jury and protected defendant’s rights.” *People v Orlewicz*, 293 Mich App 96, 110; 809 NW2d 194 (2011).

Lastly, defendant argues that defense counsel failed to object to the scoring of Prior Record Variable (“PRV”) 2 and the enhancement of defendant’s status to a fourth-habitual offender. As will be discussed below, defendant’s sentence was properly enhanced, and even if there was a scoring error regarding PRV 2, such an error would not have affected his PRV level. Accordingly, defendant has failed to establish that such errors would have affected the outcome of the proceedings. *Carbin*, 463 Mich at 600.

V. SCORING OF SENTENCING VARIABLES

Defendant’s final argument on appeal is that the trial court improperly scored PRV 2, and Offense Variables (“OV”) 13 and 14, and improperly sentenced him as a habitual offender (fourth). We disagree with respect to PRV 2 and OV 14, but agree with defendant (albeit for different reasons) that OV 13 was improperly scored.

The interpretation and application of sentencing guidelines are reviewed de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). This Court reviews a trial court’s scoring of a sentencing variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). “[I]f a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon.” *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). However an error in scoring that results in a different guidelines range requires resentencing. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

*PRV 2 and Habitual Offender*

Defendant argues the trial court misscored PRV 2 at 10 points for having two prior low severity felonies based on two convictions in 1997 for resisting and obstructing police, MCL 750.479 convictions, because these offenses were misdemeanors, not felonies, when committed and when he was convicted. Defendant also argues that the trial court improperly classified him as a fourth-habitual offender based on these two misdemeanor convictions. We disagree.

MCL 777.52, which governs the scoring of PRV 2, provides in relevant part:

(1) Prior record variable 2 is prior low severity felony convictions. Score prior record variable 2 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:

\* \* \*

(c) The offender has 2 prior low severity felony convictions..... 10 points

\* \* \*

(2) As used in this section, “prior low severity felony conviction” means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:

(a) A crime listed in offense class E, F, G, or H.

(b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.

(c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

(d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

Even though the crime of resisting and obstructing a peace officer was classified as a misdemeanor for purposes of the Penal Code in 1996 and 1997 when defendant committed the offenses,<sup>3</sup> it constituted a “felony” within the meaning of the Code of Criminal Procedure, which defines a felony as a crime punishable by more than 1 year in prison. MCL 761.1(a); see also *People v Hathcox*, 135 Mich App 82, 86; 351 NW2d 903 (1984). The Code of Criminal Procedure governs “collateral consequences of conviction [which] attach to a given offense.” *People v Smith*, 423 Mich 427, 437-448; 378 NW2d 384 (1985).<sup>4</sup> In *Smith*, the Supreme Court stated that two-year misdemeanors could be considered felonies for the purposes of the habitual-offender statutes, probation statute, and consecutive sentencing statute. *Id.* The rationale of *Smith* applies to the scoring of PRV 2. Thus, defendant could be properly scored under MCL 777.52(2)(c) for two convictions of “felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.”<sup>5</sup> Accordingly, for purposes of scoring PRV 2, the trial court properly scored defendant 10 points for his two prior convictions of resisting and obstructing a police officer.

We also disagree with defendant’s argument that the trial court improperly relied on these two convictions in sentencing him as a habitual offender. Our Supreme Court has explicitly stated that a resisting and obstructing a police officer conviction, while classified as a misdemeanor within the meaning of the Penal Code at the time, can constitute a “felony” for purposes of the habitual-offender statutes. *Smith*, 423 Mich at 446. Accordingly, defendant was properly sentenced as a fourth-habitual offender.

*OV 13*

---

<sup>3</sup> See MCL 750.479, amended 2002 PA 270, effective July 15, 2002.

<sup>4</sup> “Each code has its own definitions of ‘misdemeanor’ and ‘felony’ in order to more effectively promote the distinct purposes of each. The Penal Code’s definitions serve to describe the grade of each offense and, in some instances, to prescribe the penalty for the offense. The definitions in the Code of Criminal Procedure govern which procedural protections and which collateral consequences of conviction attach to a given offense. The Legislature clearly expressed its intent that offenses punishable by more than one year of imprisonment be treated as ‘felonies’ throughout the Code of Criminal Procedure.” *Smith*, 423 Mich at 442.

<sup>5</sup> Although violation of MCL 750.479 is currently a class G offense, this offense was not placed in that class until December 15, 1998. See 1998 PA 317. Thus defendant, in 1997, was not convicted of a crime listed in offense class “E, F, G, or H,” rendering MCL 77.52(2)(a) inapplicable.

Defendant argues the trial court incorrectly assessed 10 points for OV 13 because the record does not support a finding that defendant was involved in an “organized criminal group.” We agree that OV 13 was incorrectly scored, but for different reasons.

Under OV 13, defendant was scored 10 points because the offense was part of activity related to membership in an organized criminal group. In 2009, the Legislature amended MCL 777.43, which governs the scoring of OV 13, by removing the 10 point scoring provision for an offense that “was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group.” See MCL 777.43, amended 2008 PA 562, effective April 1, 2009. The amended and current version of MCL 777.43 provides in relevant part:

(1) Offense variable 13 is 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:

(a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.....50 points

(b) The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against for withdrawing from a gang.....25 points

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

(d) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.....10 points

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 to 333.7403.....10 points

(f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property.....5 points

(g) No pattern of felonious criminal activity existed.....0 points

Thus, the trial court clearly erred by scoring 10 points on the basis of activity relating to membership in an organized criminal group where the statutory provision allowing for scoring of that particular conduct was removed before the sentencing offense occurred in 2010. A defendant must be sentenced according to the version of the guidelines in effect on the date the crime was committed. MCL 769.34(2); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

Although the trial court also made reference to other grounds allowing for scoring under OV 13, it appears that the trial court was referring to MCL 777.43(1)(d). But from the record, there was not a violation of the underlying section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, as defendant was convicted under MCL 333.7401(2)(d)(iii), MCL 333.7401(2)(a)(iv), MCL 333.7401(2)(b)(ii), MCL 750.81d(1), and MCL 750.505. See MCL 777.43(1)(d). We therefore cannot conclude that the record supports the score for OV 13. See *Elliott*, 215 Mich App at 260. Because the subtraction of 10 points from OV 13 changes defendant's OV Level from Level IV to III, we remand for resentencing in light of the error in scoring this variable. See *Jackson*, 487 Mich at 792.

#### OV 14

Defendant also argues that the trial court incorrectly assessed 10 points for OV 14. We disagree.

Offense variable 14 focuses on the "offender's role" during the entire criminal transaction. MCL 777.44(1). If the defendant was a "leader in a multiple offender situation," 10 points is properly assessed under OV 14. MCL 777.44(1)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). "The entire criminal episode must be evaluated to determine whether a defendant was a leader." MCL 777.44(2)(a); *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012).

Here, after discussing the potential charges against him, defendant made remarks suggesting that he had control or assumed a leadership role in the illegal operation. Also, defendant attempted to flush a quantity of crack cocaine down the toilet during the execution of the search warrant, which suggests a leadership role as it could be reasonably inferred that defendant believed he had the authority to destroy such narcotics. Further, as the trial court noted, if three or more offenders were involved, more than one offender may be determined to have been a leader; thus, the fact that there were additional leaders involved in the sale of narcotics does not negate a finding that defendant acted as a leader as well. MCL 777.44(2)(b). Accordingly, the trial court did not err in scoring 10 points for OV 14.

We affirm defendant's convictions but remand for resentencing in accordance with this opinion.

/s/ Pat M. Donofrio  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra