

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELGIN RICHARD MARION,

Defendant-Appellant.

UNPUBLISHED

September 20, 2005

No. 254011

Oakland Circuit Court

LC No. 2003-192206-FC

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, felonious assault, MCL 750.82, and third-degree fleeing or eluding a police officer, MCL 257.602a(3)(a)(failure to obey an officer's directions, resulting in a collision). The trial court sentenced him to concurrent prison terms of fifteen to thirty years for the assault with intent to rob conviction, 2-1/2 to 4 years for the felonious assault conviction, and 3-1/2 to 5 years for the fleeing or eluding a police officer conviction. We vacate defendant's felonious assault conviction and sentence, but affirm his remaining convictions and sentences.

Defendant entered a CVS Pharmacy store in Ferndale on August 24, 2003, just before closing. Defendant, who had previously worked at another CVS location, approached an employee at the back of the store. Holding a pistol in one hand, he put his other arm around the employee and pushed her toward the store's office. Near the office, the employee was able to break free, and defendant ran out of the store, still carrying the gun. Defendant fled the scene in his vehicle and was pursued by the police into Oak Park. Defendant disregarded a police officer's signal to stop, lost control of his vehicle, and crashed into a house, a car, and a tree. Defendant climbed out of his vehicle and ran. A police officer pursued him on foot, ultimately apprehending him.

Defendant was charged with assault with intent to rob while armed (count I), two counts of felonious assault (counts II and III), and third-degree fleeing or eluding a police officer (count IV). Counts I and II both pertained to the employee. Count III pertained to a customer who claimed that defendant pointed the gun at him. Defendant was acquitted of count III. The felony information did not state that count II was an alternative to count I, but the prosecutor stated at trial that it was. When defense counsel requested clarification, the prosecutor again stated that count II was charged as an alternative to count I.

Defendant argues that the dual convictions of assault with intent to rob while armed and felonious assault violate the constitutional protections against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Because defendant failed to raise this issue before the trial court, it is unpreserved and we review it for plain error affecting defendant's substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). In *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981), this Court held that the Legislature did not intend to separately punish armed robbery and felonious assault unless "it can clearly be established that the offenses occurred at separate times." See also *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002). The prosecutor does not claim that this exception applies in the instant case. On the contrary, the prosecutor concedes plain error affecting defendant's substantial rights. Accordingly, we vacate defendant's conviction and sentence for felonious assault and remand for modification of defendant's judgment of sentence consistent with this opinion. See *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998).

Defendant also argues that he was denied the effective assistance of counsel at sentencing when counsel failed to object to the scoring of the sentencing guidelines. Because defendant failed to file a motion for new trial on these grounds or request a *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578. In order to establish that counsel was ineffective, defendant must show that the guidelines were improperly scored, and that he would have received a lower minimum sentence range if trial counsel had objected to the scoring. *People v Wilson*, 252 Mich App 390, 394-397; 652 NW2d 488 (2002). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Defendant claims that counsel was deficient for failing to object to the scoring of offense variable ("OV") 1, OV 2, OV 10, and prior record variable ("PRV") 7. OV 1 takes into account the aggravated use of a weapon. MCL 777.31(1). The trial court assigned fifteen points, which is proper where "[a] firearm was pointed at or toward a victim." MCL 777.31(1)(c). Defendant argues that counsel should have requested a lower score of five points, which is proper where "[a] weapon was displayed or implied." MCL 777.31(1)(e). Defendant claims that the jury might have believed his testimony that he was carrying a cellular telephone, not a pistol, and convicted him of assault with intent to rob while armed on the ground that he was armed with an

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon.” MCL 750.89. Defendant also raises this argument in his challenge to the scoring of OV 2, which takes into account the lethal potential of the weapon possessed. MCL 777.32(1). The trial court scored five points, which is the appropriate score where an offender possessed a pistol. MCL 777.32(1)(d). Defendant asserts that counsel should have requested zero points for no weapon because a cellular telephone is not a weapon. MCL 777.32(1)(f).

Three witnesses, including the employee, testified unequivocally that defendant was carrying a gun. Accordingly, there was sufficient evidence to support the trial court’s scoring of OV 1 and OV 2. *Houston, supra* at 471. Because defense counsel is not required to make futile objections, we find that defendant’s arguments with regard to OV 1 and OV 2 are meritless. *Wilson, supra* at 393-394, 397.

The trial court assigned ten points for OV 10, which takes into account the exploitation of a vulnerable victim and is proper where the offender exploited a victim’s agedness. MCL 777.40(1)(b). The Presentence Investigation Report (“PSIR”) indicates that the employee was seventy-two years old, which supports the trial court’s determination that defendant exploited the employee’s agedness when he attempted the robbery. Because defense counsel is not required to make futile objections, we find that defendant’s argument with regard to OV 10 is meritless. *Wilson, supra* at 393-394, 397.

PRV 7 takes into account subsequent or concurrent felony convictions. MCL 777.57(1). The trial court assigned twenty points for PRV 7 because defendant was also convicted of felonious assault and fleeing or eluding a police officer. As discussed above, the felonious assault conviction should have been vacated. Accordingly, the trial court should have assigned only ten points for PRV 7 for one concurrent conviction instead of two. MCL 777.57(1)(b). Defendant’s corrected total PRV score would be seventeen points instead of twenty-seven, placing him in PRV level C instead of level D. MCL 777.62. This would result in a reduced minimum sentence range of 81 to 135 months, which is less than the 108 to 180 month range as scored by the trial court. MCL 777.62.

However, the prosecutor correctly argues that the trial court also erred in scoring OV 13, which takes into account a continuing pattern of criminal behavior. MCL 777.43(1). Defendant received zero points for OV 13, but he should have received twenty-five because “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). All crimes within a five-year period, including the sentencing offense, are counted for purposes of OV 13, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). According to defendant’s PSIR, which he did not challenge, he had been arrested for seven armed robberies and one assault with intent to rob during the eight months preceding the instant offense. All charges were pending at the time defendant was sentenced for the convictions in the instant case. Thus, defendant’s OV total should have been seventy points, placing him in OV level IV, resulting in a minimum sentence range of 108 to 180 months, which is the same range that the trial court used at sentencing. MCL 777.62.

Failure to object to a scoring error does not constitute ineffective assistance of counsel if the defendant’s minimum sentence guidelines range would not have changed with the correct score. *Wilson, supra* at 396-397. Because the trial court made scoring errors that both favored and prejudiced defendant, and correction of the errors produces the same minimum sentence

guidelines range, trial counsel's representation was not ineffective in failing to object to the scoring. See *id.*

We vacate defendant's conviction and sentence for felonious assault and affirm in all other respects.

Affirmed in part, vacated in part, and remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder