

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE GEORGE, JR.,

Defendant-Appellant.

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UNPUBLISHED

February 15, 2007

No. 264765

Cass Circuit Court

LC No. 04-010321-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while impaired (“OWI”), MCL 257.625(3), and of malicious destruction of property, MCL 750.377b. He was sentenced as a habitual offender, MCL 769.10, to 36 to 90 months’ imprisonment for his OWI conviction and to 2 to 6 years’ imprisonment for his malicious destruction of property conviction. Defendant appeals as of right. We affirm.

Defendant first argues that OWI is a cognate lesser offense, not a necessarily included lesser offense, of OUIL, and therefore, that the trial court erred when it instructed the jury that it could convict defendant of OWI. Defendant also argues that the trial court’s reference to OWI as a “less serious offense,” misled the jury into believing that defendant would face a lesser penalty if they convicted him of OWI rather than OUIL, when the penalties for the two offenses are the same. We disagree with both arguments. Because defendant did not object to the trial court’s instructions, this Court’s review is limited to the determination whether the instructions amounted to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Whether OWI is a necessarily included lesser offense of OUIL is a question of law that this Court reviews de novo. *People v Martin*, 271 Mich App 280, 286; 721 NW2d 815 (2006). Contrary to defendant’s assertion, OWI is a necessarily included lesser offense of OUIL. *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999). Additionally, the Legislature has specifically authorized a guilty verdict for OWI in OUIL prosecutions. See MCL 257.625(3). Therefore, the trial court did not err in instructing the jury that OWI is a necessarily included lesser offense of OUIL. *People v Cornell*, 466 Mich 335, 357, 359; 646 NW2d 127 (2002). Further, because OWI is a lesser offense of OUIL, the trial court did not err in referring to it as such. See *People v Torres (On Remand)*, 222 Mich App 411, 422-423; 564 NW2d 149 (1997). Further, to the extent that the instruction implied that OWI carried a lesser

penalty, the jury was instructed not to allow possible penalties to influence its decision. As a general rule, juries are presumed to follow their instructions. *Id.* at 423. Hence, defendant cannot establish that the trial court's comments, even if misleading, affected his substantial rights.

Defendant also contends that his trial counsel was ineffective for failing to object to the OWI instruction. However, because any confusion was cured by the trial court's instruction to the jury that it may not allow possible penalties to influence its decision, *id.*, defendant cannot demonstrate prejudice. Therefore, even if we were to conclude that defendant's trial counsel's failure to object constituted performance that fell below an objective standard of reasonableness, this error would not warrant reversal. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant next argues that the trial court incorrectly scored offense variable (OV) 9 relative to his conviction for malicious destruction and incorrectly scored OVs 3, 12, 13, 18 and 19 relative to both convictions.

A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence on the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the trial court's scoring decisions "to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The sentencing court's scoring should be upheld if there is any support in the record for it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). The sentencing court's findings of fact are reviewed for clear error. *Id.* However, because defendant did not object to the scoring of OVs 3, 9, 12, 13, 18 or 19 at sentencing, this Court reviews this issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines, supra* at 474.

OV 3 is to be scored at ten points if a victim suffered bodily injury requiring medical treatment, or at five points if a victim suffered bodily injury not requiring medical treatment. MCL 777.33. For purposes of OV 3, "'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3).

Relative to defendant's OWI conviction, two passengers in the car struck by defendant were transported to the hospital by ambulance following the accident. One passenger testified that he was injured in the accident, that he lost consciousness briefly and that he still suffered from knee pain at the time of trial. In addition, the passenger submitted numerous medical bills documenting the medical treatment he received for injuries resulting from the accident. Therefore, there was record support for the trial court's scoring of OV 3 at ten points relative to defendant's OWI conviction.<sup>1</sup>

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<sup>1</sup> Even were we to conclude otherwise, however, there is ample support for scoring OV 3 at five points, for injury to a victim not requiring medical treatment. Given our conclusions regarding the remaining OVs defendant challenges on appeal, a reduction of five points on OV 3 would not  
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Conversely, there is no indication in the record that anyone was injured relative to defendant's malicious destruction of property conviction. Offense variables are to be scored "only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994).<sup>2</sup> Therefore, the trial court was required to score OV 3 at zero points for defendant's malicious destruction of property conviction. MCL 777.33(1). However, because a correct scoring of this variable would not change defendant's final offense level<sup>3</sup> or recommended minimum sentence range, this error does not require a remand for resentencing. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

OV 9 is to be scored at zero points if there were fewer than two victims or at ten points if there were 2 to 9 victims. MCL 777.39(1)(c)-(d). For purposes of scoring OV 9, a court is to "count each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). Defendant does not dispute that a score of 10 points was proper for his OWI conviction, but he asserts that there were no victims, or at least no more than one victim of his malicious destruction offense. However, the officer responding to the scene testified that he was assisted by an off-duty officer present at the scene in arresting defendant and placing him in the patrol car. That officer stayed with the patrol car and assisted the responding officer in subduing defendant after defendant began to kick the interior of the patrol car. Defendant's violent conduct following his arrest placed both the responding officer and the off-duty officer in danger of injury. Therefore, there was record support for the trial court's score of ten points on OV 9.

OV 12 is for contemporaneous felonious acts. It is to be scored at five points for one contemporaneous felonious act involving a crime against a person within 24 hours of the sentencing offense, which has not and will not result in a separate conviction. MCL 777.42. Defendant was charged with, but not tried for, resisting and obstructing a police officer, in violation of MCL 750.479, based on his violent and disruptive conduct at the scene, which included an attempt to escape the patrol vehicle and threats to assault the arresting officers. Resisting and obstructing a police officer constitutes a felonious act involving a crime against a person. Therefore, there was support in the record for the trial court's scoring of OV 12 at five points.

OV 13 is for a continuing pattern of criminal behavior. It is to be scored at ten points if the sentencing offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property within a five-year period. MCL 777.43. For purposes of scoring OV 13, "all crimes within a 5-year period, including the

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affect defendant's sentence. Therefore, any error in scoring OV 3 at ten points would be harmless.

<sup>2</sup> *Chesebro* addressed OV 6 of the former judicial sentencing guidelines, which was identical to OV 9 of the legislative sentencing guidelines at issue here.

<sup>3</sup> Defendant's total OV score for his malicious destruction conviction was 50, placing him in OV Level III. Even absent any points on OV 3, defendant's total OV score of 40 remains within the parameters of OV Level III.

sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Malicious destruction of property is classified as a crime against property. MCL 777.16s. Defendant was also charged with resisting and obstructing a police officer in connection with the present offenses. He was convicted of resisting and obstructing a police officer in 2002. Resisting and obstructing is classified as a crime against a person. MCL 777.16x. Therefore, there was support in the record for a finding that defendant committed at least three or more crimes against a person or property within a 5-year period, including the sentencing offense.

OV 18, MCL 777.48, is for operator ability affected by alcohol or drugs. It is to be scored at ten points if the offender operated a vehicle when his bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood or 210 liters of breath, or while he was under the influence of intoxicating liquor. MCL 777.48(1)(c). Five hours after the accident, defendant had a blood alcohol content of 0.12 grams per 100 milliliters of blood. Therefore, there was record support for the trial court’s scoring of OV 18 at ten points.<sup>4</sup>

Defendant argues he should have received only five points for OV 18, pursuant to MCL 777.48(1)(d), which applies to offenders that operated a vehicle with a bodily alcohol content of 0.07 grams or more but less than 0.10 grams per 100 milliliters of blood or 210 liters of breath, or while he was visibly impaired by the use of an intoxicating liquor. Defendant argues that the trial court was not permitted to score OV 18 at ten points, because doing so contravened the jury’s verdict that defendant was not guilty of driving while intoxicated, which, defendant contends, indicates that the jury did not find that defendant had a blood alcohol level in excess of .08 grams per 100 milliliters of blood at the time of the accident. However, a trial court is required to assign the highest number of OV points that can be assessed under the statute. MCL 777.48(1); *People v Morson*, 471 Mich 248, 260; 685 NW2d 203 (2004). Therefore, where, as here, record evidence supports a finding that defendant had blood alcohol content greater than 0.10, the trial court is required to assign defendant ten points for OV 18. MCL 777.48(1); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 19, MCL 777.49, is for a threat to the security of a penal institution or court, or for interference with the administration of justice. It is to be scored at fifteen points if the offender “used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice.” Defendant argues that his conduct was not sufficient to warrant this score. However, there is ample evidence in the record that defendant both threatened to use force against the arresting officers and that he actually used force against police property while the officers were investigating the present offenses. Therefore, we conclude that there was record support for the trial court’s assessment of fifteen points on OV 19.<sup>5</sup>

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<sup>4</sup> We note that defendant’s presentence investigation report reflects that a preliminary Breathalyzer test administered to defendant at the scene indicated a blood alcohol content of 0.157 percent.

<sup>5</sup> Defendant also claims that his presentence investigation report erroneously states that he was on probation when he committed the four offenses listed for 1997 and the offense listed for 2002  
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Defendant also argues that his trial counsel was ineffective for failing to object to the alleged scoring errors. To establish a claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and that counsel's errors rendered the proceedings fundamentally unfair and unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Thus, in order to establish that his trial 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).

Because there was support in the record for the trial court's scoring of OVs 9, 12, 13, 18 and 19, any objection as to these variables would have been futile. Counsel is not ineffective for failing to make a futile objection. *Mack, supra* at 130. Further, any change in the scoring of OV 3 would not have altered defendant's recommended sentencing guidelines. Therefore, defendant cannot establish that he was prejudiced by his counsel's failure to object to the scoring of this variable. *Wilson, supra* at 396-397.

Defendant next argues that the trial court lacked jurisdiction to amend his sentence once he began serving it, and further, that, to the extent that the trial court's amendment of his judgment of sentence modified the jury's verdict from OWI to OUIL second offense, the trial court exceeded its authority. Defendant was charged with operating a vehicle while intoxicated in violation of MCL 257.625(1). He was convicted of driving while visibly impaired, in violation of MCL 257.625(3). Defendant's original judgment of sentence referred to his conviction as "Operating-Impaired" in violation of "257.6253A." The trial court subsequently amended defendant's judgment of sentence to refer to this offense as "Oper-OUIL/Per Se 3<sup>rd</sup> Offn" in violation of "257.6256D." Plaintiff notes that the defendant's judgment of sentence and amended judgment of sentence permissibly reference the Prosecuting Attorney Charging Codes (PACC) and not the Michigan Compiled Laws, and that 257.6256D is the correct PACC for defendant's OWI offense. Plaintiff argues that the trial court's amendment of the judgment of sentence to correct a clerical error in identifying the correct PACC for defendant's OWI offense did not operate to vacate or modify the jury's verdict, or to amend defendant's sentence. We agree with plaintiff.

The transcript of the proceedings below clearly reflects that defendant was convicted of, and sentenced for, OWI and not OUIL. Defendant's sentence is consistent with MCL 257.625(11), applicable when, as here, a defendant is convicted of OWI within ten years of two or more prior convictions. Contrary to defendant's assertions, the trial court's amendment of the judgment of sentence to correct a clerical mistake in the applicable PACC for defendant's OWI conviction did not operate to vacate or amend the jury's verdict, or to change defendant's

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and erroneously lists three juvenile adjudications when it should only have listed two. Defendant argues that this Court, at a minimum, should remand this case for correction of these errors. However, defendant failed to properly argue and support this claim of error. Therefore, we decline to address it. See *Martin, supra* at 315.

sentence in any substantive manner. Therefore, the trial court did not exceed its authority or jurisdiction in correcting defendant's judgment of sentence.

Finally, defendant argues that the trial court's order of restitution for damages caused by defendant in connection with his OWI conviction should be vacated or stayed until a civil suit filed against him for the same expenses is resolved.

Pursuant to MCL 780.766(2), the trial court was required to order defendant to make full restitution to any victim of his course of conduct giving rise to the conviction. The trial court did so, without objection from defendant. While a trial court is permitted to consider pending civil litigation in determining the amount of restitution to be paid, pending litigation alone is not a sufficient reason to order less than full restitution. *People v Avignone*, 198 Mich App 419, 423; 499 NW2d 376 (1993). Further, MCL 780.766(9) provides that any amount paid by defendant under an order of restitution shall be offset against any amount later recovered as compensatory damages by a victim in any civil proceeding. Therefore, contrary to his assertion, defendant is not at risk of having to doubly compensate the victims of his OWI offense. Thus, there is no need to vacate or stay the trial court's restitution order.

There were no errors warranting reversal.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray