

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JACOB FIX,

Defendant-Appellant.

UNPUBLISHED

October 25, 2007

No. 273448

Oakland Circuit Court

LC No. 2005-202894-FH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Following defendant's guilty plea, he was sentenced to 51 months to 20 years for first-degree home invasion, MCL 750.110a(2), and to a concurrent term of one to four years for felonious assault, MCL 750.82. This Court granted his delayed application for leave to appeal. We vacate defendant's sentence for first-degree home invasion and remand for a determination of whether there are facts to support the scoring of Offense Variable (OV) 10 at 5 points and, if not, for resentencing on that conviction only. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that OVs 8 and 10 were improperly scored. Although there was no objection, an error in the calculation of the sentencing guidelines range that increases the length of a defendant's sentence constitutes plain error affecting substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717, rev'd on other grds 474 Mich 876 (2005). Although a defendant who voluntarily and understandingly enters into a plea agreement that includes a specific sentence that exceeds the guidelines range waives appellate review of the sentence, *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005), we conclude that this rule does not apply where the specific sentence was based on an improper scoring of the guidelines. Accordingly, defendant is entitled to relief if there was a scoring error.

We conclude that OV 8 was properly scored at 15 points since the victims were "held captive beyond the time necessary to commit the offense." See MCL 777.38. Defendant entered the dwelling without permission and with the intent to steal, the victims were lawfully present, and defendant committed an assault while armed with a knife while in the dwelling, all of which occurred before he tied up the victims. Thus, all the elements of home invasion were present, see MCL 750.110a(2), before defendant bound the victims and "held [them] captive beyond the time necessary to commit the offense." Accordingly, there was no error in the scoring of this variable. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant next argues that he was improperly scored five points for OV 10. If these points had not been scored, the offense variable level would have been IV, as opposed to V, and the recommended sentencing range would have been 45 to 75 months. See MCL 777.63. It appears that the trial court would have imposed a sentence at the lowest end of this range. Therefore, a scoring error, if any, would be plain error that would require resentencing. See *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003); *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *Brown, supra* at 66-67.

Five points is to be scored for OV 10 when “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” MCL 777.40. However, “the mere existence of 1 or more of these factors ... does not automatically equate with victim vulnerability.” MCL 777.40(2). To be vulnerable, the victim must have “a readily apparent susceptibility” “to injury, physical restraint, persuasion or temptation.” Moreover, “[e]xploit’ means to manipulate a victim for selfish or unethical purposes.” MCL 777.40(b).

The only indicium of a reason supportive of this score is the fact that defendant was 6 feet, 2 inches tall and weighed 170 pounds. Other than a presumed difference in size between defendant and his female victims, there is nothing to indicate that exploitation of defendant’s size played a role in this crime. There is no indication that the differences in size were significant, or that the victims had “a readily apparent susceptibility” “to injury, physical restraint, persuasion or temptation” based on a size differential. In other words, there is no indication that defendant used his size to “manipulate a victim for selfish or unethical purposes.” It appears more likely that the victims responded to defendant’s knife rather than his size. Thus, we conclude that this modicum of evidence was not an adequate basis for this score, see *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and that the score constituted plain error.

We find no merit to defendant’s remaining arguments, or conclude that the issues were not preserved. Since the minimum sentence of an indeterminate sentence was at issue, it is irrelevant that defendant did not acknowledge and that a jury did not find the facts underlying the scoring of the sentencing guidelines. See *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Also, if OV 10 had been properly scored and the sentence was within the recommended minimum range, the sentence would be presumed to be proportionate, and could not be regarded as cruel and unusual. See *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003); *People v Drohan*, 264 Mich App 77, 91; 689 NW2d 750 (2004), *aff’d* on other grds 475 Mich 140 (2006). Moreover, since defendant declined to withdraw his guilty plea with knowledge of the sentence, he would not be entitled to appellate relief on the basis of disproportionality. *Wiley, supra* at 154, citing *Cobbs, supra* at 285. Regarding alleged inaccuracies in the presentence investigation report, defendant did not preserve this issue by challenging them at the time of sentencing. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992). Regardless, it does not appear that the alleged inaccuracies had any bearing on the sentence imposed. Similarly, it does not appear that the trial court would have entertained a downward departure based on alleged mitigating factors; the record indicates that the trial court intended to impose the minimum sentence recommended by the guidelines. Thus, except for the scoring of OV 10, there is no indication that the outcome of the sentencing would have been different and, accordingly, these other matters do not establish ineffective assistance of counsel. See *People v Frazier*, 478 Mich 231, 733 NW2d 713 (2007).

Defendant's sentence for first-degree home invasion is vacated, and this case is remanded to the trial court for a determination of whether there are facts to support the scoring of five points for OV 10 and, if not, for resentencing on that conviction only. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis