

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 23, 2014

v

JONATHON ROBERT MATTSON,  
  
Defendant-Appellant.

No. 312906  
Genesee Circuit Court  
LC No. 11-29868

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Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Following his plea of guilty, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Defendant was sentenced to a term of 180 months to 30 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony firearm conviction, with credit for 101 days served. Defendant now appeals his sentence by leave granted. This Court vacates defendant's sentence and remands for resentencing.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

On November 11, 2011, defendant, wearing a black ski mask over his head, approached the three victims as they exited their vehicle. He pointed a gun at the victims and asked for their money, wallets, and the female victim's purse. Defendant then fled the scene with the stolen items. Upon his apprehension, defendant was originally charged with eight felony counts: three counts of armed robbery, MCL 750.539, three counts of firearm possession during the commission of a felony (felony-firearm), MCL 750.227b, one count of possession of a firearm by a felon, MCL 750.224f, and one count of carrying a concealed weapon, MCL 750.227. Pursuit to a plea agreement, defendant pleaded guilty to one count of armed robbery (amended to name all three victims in the single count), MCL 750.529, and one count of felony firearm, MCL 750.227b, while the other six charges were dropped. There was no sentencing agreement.

At sentencing, the prosecution stated that it and defense counsel had originally calculated the sentencing guidelines as 108 months to 180 months. The presentencing investigation report (PSIR) listed the minimum guideline range as 126 months to 210 months. Defense counsel did not object to any offense variable (OV) scorings at that time.

After sentencing, defendant filed a motion for resentencing, arguing that OV 12 had been improperly scored. The trial court held a hearing and denied the motion, explaining that, “there were two counts of armed robbery that were dismissed pursuant to a plea agreement. They are two contemporaneous crimes against a person that would not result in separate convictions. The guidelines, accordingly, were appropriately scored . . . .” Defendant applied for leave to appeal, seeking correction of OV 12 and re-sentencing, and leave was granted by this Court.<sup>1</sup>

## II. STANDARD OF REVIEW

A sentence within the appropriate guidelines is only appealable if a scoring error occurred or if the sentence was based on inaccurate information. *People v Kimble*, 470 Mich 305, 310-11; 684 NW2d 669 (2004). The issue must also have been “raised at sentencing, in a motion for resentencing, or in a motion to remand.” *Id.* at 311. In applying the statutory sentencing guidelines, this Court reviews for clear error a trial court’s factual determinations. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). This Court reviews de novo whether the facts are sufficient to satisfy the scoring conditions prescribed by a statute. *Id.*

## III. ANALYSIS

Defendant argues that OV 12 was scored incorrectly, and that therefore the sentencing guidelines on which the trial court relied were inaccurate. This Court agrees.

Offense Variable 12 is codified by MCL 777.42. OV 12 provides scoring guidelines for a trial court to use in determining whether the defendant engaged in any “contemporaneous felonious criminal acts.” Further, “[a] felonious criminal act is defined to be contemporaneous if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction.” *People v Brener*, 286 Mich App 26, 32-33; 777 NW2d 464 (2009). If the defendant engaged in such acts, the trial court must evaluate the number of acts, consider whether the acts were crimes against a person or another crime, and then assign the appropriate point value. *Id.* Moreover, “a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.” *People v Light*, 290 Mich App 717, 724-25; 803 NW2d 720 (2010).

In defendant’s case, the trial court determined that, although the other two charges of armed robbery had been dropped, they nonetheless constituted contemporaneous felonies against a person, resulting in a score of 10 points for OV 12. However, while that finding arguably might be correct in other circumstances, the circumstances here indicate that the single count of defendant’s armed robbery conviction was amended to include the names of all three victims. Thus, the act(s) against each of the victims were included in the conviction and cannot be used to establish contemporaneous felonies because they were not separate from the sentencing offense. *Light*, 290 Mich App at 724-725; *Brener*, 286 Mich App at 32-33.

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<sup>1</sup> See *People v Mattson*, unpublished order of the Court of Appeals, issued July 31, 2013 (Docket No. 312906).

Excluding the other two charges of armed robbery as contemporaneous felonious criminal acts lowers the scoring of OV 12. There are still, however, two other contemporaneous felonious criminal acts to take into consideration, carrying a concealed weapon, MCL 750.227, and felon in possession, MCL 750.224f, which are both public safety crimes and together result in a score of 5 points under OV 12. See MCL 777.42. With an OV 12 score of 5, defendant's Offense Variable total is 35 points, which lowers the OV level from III to level II, reducing his sentence guidelines from a range of 126 months to 210 months down to a range of 108 months to 180 months. When sentencing is based on an inaccurate calculation, the case must be remanded for resentencing pursuant to the correct guidelines range. *People v Francisco*, 474 Mich 92; 711 NW2d 44 (2006). Thus, we vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Christopher M. Murray  
/s/ Mark T. Boonstra