

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 22, 2014

v

ERIK PAUL GUTIERREZ,  
  
Defendant-Appellant.

No. 315236  
St. Joseph Circuit Court  
LC No. 12-017655-FH

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Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2) (unlawful entry of dwelling and commission of assault therein), and breaking and entering a vehicle with larceny and damage, MCL 750.356a(3). He was sentenced as a second-habitual offender, MCL 769.10, to 6 to 30 years' imprisonment for the home invasion conviction and to time served, 104 days, for the vehicle breaking and entering conviction. On appeal, defendant first argues that trial counsel was ineffective for having made a highly prejudicial and inflammatory remark in front of the jury while defendant was on the stand. Defendant further challenges the home invasion sentence imposed by the trial court, contending that the court erred in scoring 15 points for offense variable (OV) 19, MCL 777.49 (interference with the administration of justice), and that he was deprived of his constitutional rights to have scoring factors adjudicated by a jury and proven beyond a reasonable doubt. We reject defendant's arguments and affirm.

Evidence was presented at trial showing that, on the night of January 4, 2012, defendant unlawfully entered the vehicle of a female acquaintance, stealing items from the car, damaging the vehicle, and urinating in the car.<sup>1</sup> When the incident occurred, the female acquaintance had been at the apartment of a female friend who lived across the street from defendant, and her friend, who was also an acquaintance of defendant's, called the police and directed them to defendant as the likely perpetrator based on various circumstances. Defendant, who was visibly intoxicated, was confronted by the police and denied any involvement, although he changed

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<sup>1</sup> One of defendant's own witnesses testified that defendant had admitted to damaging the vehicle.

aspects of his story three times. The police did not arrest him at that juncture. Within 30 minutes of leaving the scene, the police returned, given that the second female acquaintance, the one who lived in the apartment across the street from defendant, reported that defendant had burst into the apartment uninvited and absent permission, slapped her, and grabbed her by the throat. Photographs of marks on the victim's throat were admitted into evidence. The female acquaintance whose car had been broken into and damaged earlier was also at the apartment, and, while she did not personally observe defendant and the commission of the assault, she could hear defendant yelling, "snitching-ass bitch."

In order to understand the nature and context of defendant's first argument on appeal based on ineffective assistance of counsel, it is necessary to initially explain what transpired at trial in relationship to defendant taking the stand to testify on his own behalf. Before testifying, the trial court explained to defendant his constitutional rights, and defense counsel expressed that it had been his recommendation that defendant not testify; however, counsel acknowledged that it was ultimately defendant's call. Defense counsel then stated:

In light of things that have been said throughout the case and review of the file, I'm not going to do the direct examination of [defendant]. I've discussed that with him. I will ask him his name and ask him to explain what happened on January 4th of 2012. I'll remain at the podium, but I will not be part of the give and take dialogue of his testimony.

Defendant continued to insist on testifying on his own behalf, and he took the stand. Counsel asked him his name and then asked defendant, "Would you please tell the Court this morning what happened on January 4th, 2012." Defendant then began a long, rambling, and incredulous narrative regarding the day in question, denying any involvement in the crimes. Defendant concluded, stating, "I guess that's all I got right now." The following colloquy then took place:

*The Court:* Okay. Thank you. Anything further?

*Defense Counsel:* I'm just standing here, your Honor.

*The Court:* Are you done questioning?

*Defense Counsel:* Are you done with your – with your testimony, Mr. Gutierrez?

*Defendant:* Yes, sir.

*Defense Counsel:* Yes.

*The Court:* Okay. Any –

*The Prosecutor:* Nothing, your Honor.

*The Court:* No cross-exam?

*The Prosecutor:* No.

On appeal, defendant argues that his Sixth Amendment right to the effective assistance of counsel was violated by defense counsel's highly prejudicial and inflammatory remark – "I'm just standing here, your Honor." Defendant claims that the comment was highly prejudicial in that it invited speculation and signaled that defendant had either been lying or that defendant had something to say that counsel did not want revealed. Defendant further contends that counsel's conduct implicitly relayed information that could only come from confidential communications. Defendant explains, "By presenting [defendant's] testimony in the narrative and reminding the jury that he was 'just standing there' rather than presenting that testimony in question/answer format as every other witness had done, defense counsel conveyed the very privileged information that [defendant] had told the attorney something bad and had thus been advised not to testify." We conclude that it would require absolute speculation on our part to find that the manner of examination and counsel's remarks were actually construed by the jury consistent with the implications asserted by defendant.

We review de novo the constitutional question whether defendant was denied his Sixth Amendment right to the effective assistance of counsel; however, underlying factual findings are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted.]

Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant fails to establish either prong of the two-part test relative to a claim of ineffective assistance. The challenged remark and the manner of the examination did not fall below an objective standard of reasonableness. The fact that defense counsel only asked a single open-ended question leading to the narrative response may have been motivated by an entirely acceptable reason, such as trying to provide the best vehicle, under the circumstances, for defendant to convey his side of the story without giving the prosecutor extra ammunition on cross-examination to target narrowly-tailored responses to specific questions. Given the failure to preserve the issue, our review for ineffective assistance of counsel is limited to mistakes

apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). With respect to the “I’m just standing here” comment, it appears benign on its face and could potentially be interpreted in so many different ways that it would be entirely speculative to attribute to the remark the particular implications argued by defendant. Defendant simply cannot establish the factual predicate for his ineffective assistance claim.

On the basis of the record, we in the legal profession might speculate that defense counsel took the particular approach in order to avoid or attempt to avoid suborning perjury, and while perhaps a juror had the same thought, which ultimately appears to be the crux of defendant’s argument, we can only guess that such was the case. Moreover, the jury did not hear the discussion about counsel’s effort to dissuade defendant from testifying, nor counsel’s comment that he would not in engage in “give and take dialogue.”

Additionally, even assuming deficient performance, defendant has not established the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. Again, the challenged remark appeared benign, and the direct and circumstantial evidence of defendant’s guilt was very strong. Had counsel conducted a typical direct examination of defendant, there is nothing to support a conclusion that the resulting testimony would have been any more persuasive or believable than the actual testimony provided in narrative form. Therefore, a different result would be unlikely. Reversal is unwarranted.

Next, defendant argues that the trial court erred in scoring 15 points for OV 19, MCL 777.49. Defendant claims that OV 19 should have been scored at zero points. The trial court approved the score of 15 points for OV 19 on the basis of the home invasion and physical assault, which the court viewed as the use of force to intimidate and interfere with the administration of justice.

Application and interpretation of the sentencing guidelines are legal questions subject to de novo review. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). The trial court’s factual determinations in regard to the scoring factors are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the facts, as found, are adequate to satisfy a particular score is a question of statutory interpretation, reviewed de novo. *Id.*

“If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” MCL 769.34(10). Resentencing is required if a scoring error results in an alteration of the minimum sentence range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). Here, if defendant’s scoring argument is correct, the previously-determined minimum sentence range of 72 to 150 months would be reduced to 57 to 118 months. MCL 777.16f; MCL 777.63; MCL 777.21(3)(a).

Under OV 19, 15 points are to be scored when “[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice . . . .” MCL 777.49(b). The administration of justice process commences when an underlying crime has occurred that invokes the process.

*People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). “The investigation of crime is critical to the administration of justice.” *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). “Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice[.]” *Id.* Threats that are made during the commission of the sentencing offense can support a score of 15 points under OV 19. *People v McDonald*, 293 Mich App 292, 299; 811 NW2d 507 (2011); *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006).

Defendant contends that OV 19 should not have been scored at 15 points and should have been scored at zero points, given that, by the time of the home invasion and assault, both complainants had given statements accusing defendant of damaging the vehicle, the police had detained and questioned defendant and conducted an investigation, the police had indicated that a report would be submitted to the prosecutor’s office, with charges likely to be forthcoming, and the police had left the scene. According to defendant, anything that he did thereafter could not have been done for the purpose of interfering with the administration of justice, as it was too late to interfere because the police were already fully involved and had pretty much concluded their efforts. Defendant posits that this was not a situation in which he engaged in conduct or made a threat to prevent the female acquaintances from involving the police in the first place.

We initially address a preservation issue. Defendant claims that he preserved the sentencing issue relative to the scoring of OV 19 by objecting during the sentencing hearing, but the prosecution claims that defendant expressly waived his argument. A review of the record reveals that the guidelines were scored for both the breaking and entering conviction and the home invasion conviction. We note that it had only been necessary to score the guidelines for the home invasion conviction, as it was in a higher crime class. See *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005) (guidelines generally need only be scored for the felony conviction in the highest crime class). When the court reviewed the score for OV 19 relative to the breaking and entering conviction, defendant approved of a score of 15 points. But when the court reviewed OV 19 for purposes of the home invasion conviction, defendant objected to a score of 15 points, as defendant believed that any interference could only be connected to the breaking and entering conviction. At a continued sentencing hearing, which was necessitated to explore some Indiana assaults committed by defendant, OV 19 was again mentioned, with defendant agreeing with the score of 15 points for OV 19 in regard to the home invasion conviction. Considering that we find that there is no substantive basis to order resentencing, we shall ignore any possible preservation or waiver problems.

We reject any notion or suggestion that the process of administering justice can no longer be interfered with by way of threats or infliction of harm to a person after the person has contacted the police and the police have conducted an investigation. The administration of justice is not concluded at that point, as prosecutorial proceedings in court are yet to come, culminating in a trial, where justice is ultimately administered. For example, a threat of violence on the day of trial should a witness testify against a defendant would constitute a threat of force employed with the goal of interfering with the administration of justice. See *Smith*, 488 Mich at 200 (“[P]ostoffense conduct may be considered when scoring OV 19.”). Considering defendant’s remark during the home invasion and assault, i.e., “snitching-ass bitch,” defendant was clearly exercising some retribution for the earlier call to police and the accusations made against him. But, in addition, the assault and accompanying remark could reasonably be

construed as sending a message to the complainants that further involvement of or cooperation with the police and authorities would result in harm. Indeed, the fact that defendant inflicted harm after having just been confronted by the police less than 30 minutes earlier reflected a complete disregard for the administration of justice or the justice system and would have been extremely intimidating to anyone who contemplated working further with the police or prosecutors. The trial court did not err in scoring 15 points for OV 19.

Moreover, we note that a score of ten points for OV 19 is proper when an offender simply “interfered with or attempted to interfere with the administration of justice,” MCL 777.49(c), and ten points is appropriately scored when, as occurred here, a defendant flees from the police contrary to an order to freeze, *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474 (2013), vacated in part on other grounds \_\_ Mich \_\_; 838 NW2d 687 (2013). A reduction of five points in defendant’s total OV score would not alter his OV level and the minimum sentence range, making resentencing unnecessary. Resentencing is unwarranted.

Finally, defendant, citing *Alleyne v United States*, \_\_ US \_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013), maintains that he was deprived of his constitutional rights to have scoring factors adjudicated by a jury and proven beyond a reasonable doubt. In *Alleyne*, the United States Supreme Court held that facts that increase a mandatory minimum sentence must “be submitted to the jury and found beyond a reasonable doubt.” *Id.* at 2163. In *People v Herron*, \_\_ Mich App \_\_; \_\_ NW2d \_\_, issued December 12, 2013 (Docket No. 309320), slip op at 7, this Court rejected application of *Alleyne* to Michigan’s sentencing scheme:

In essence then, defendant's . . . argument is reduced to reliance on *Alleyne* alone. We conclude that defendant's argument fails in light of the pains the Supreme Court took in Part III–C of its opinion to distinguish judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's guidelines falls within the wide discretion accorded a sentencing judge in the sources and types of evidence used to assist . . . [a court] in determining the kind and extent of punishment to be imposed within limits fixed by law. Michigan's sentencing guidelines are within the broad sentencing discretion, informed by judicial factfinding, . . . [that] does not violate the Sixth Amendment. [Citations and internal quotation marks omitted.]

We are bound by *Herron* under MCR 7.215(J)(1); therefore, we reject defendant’s argument.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O’Connell  
/s/ Kirsten Frank Kelly