

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 15, 2015

v

DAVID GERARD HIEB,
Defendant-Appellant.

No. 321919
Wayne Circuit Court
LC No. 12-000766-FH

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of embezzlement of \$50,000 or more, but less than \$100,000, MCL 750.174(6), false pretenses involving a value of \$20,000 or more, but less than \$50,000, MCL 750.218(5)(a), and common-law fraud, MCL 750.280. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to a prison term of 76 months to 20 years' imprisonment for each conviction, to be served concurrently. Defendant appeals as of right. We affirm defendant's convictions for embezzlement and false pretenses, vacate his conviction for common-law fraud, and remand for further inquiry regarding defendant's sentences consistent with *People v Lockridge*, 498 Mich 358; ___ NW2d ___ (2015), and for a determination of the factual basis for the imposition of \$600 in court costs.

Defendant was convicted of embezzling funds and defrauding Michael Snow in 2007 and 2008. The prosecution presented evidence that after Snow sustained an investment loss with Jim Nichols in Texas, Nichols introduced Snow to defendant, a self-proclaimed "real estate guru," to give Snow an opportunity to recoup his lost funds and make an additional profit through real estate short sales in Michigan. Defendant told Snow that he would invest Snow's money in 45 foreclosed properties to buy the redemption rights to them, at a cost of \$2,000 each, and turn them around for a profit. Ultimately, Snow and Nichols created Butterscotch, LLC, in which Snow deposited \$90,000. In turn, the money was deposited into defendant's company, PR Management, LLC, ostensibly for defendant to use to purchase the redemption rights. The prosecution presented evidence that defendant did not invest Snow's money, but gradually drained the account of \$90,000 for his personal use.

I. DOUBLE JEOPARDY

Defendant argues that his conviction and sentence for common-law fraud should be vacated because the multiple convictions and sentences for both common-law fraud and false

pretenses violate the constitutional prohibition against multiple punishments for the same offense. Plaintiff concedes, and we agree, that defendant is entitled to this requested relief.

Defendant did not object in the trial court to his convictions as a violation of double jeopardy. Therefore, the issue is unpreserved. See *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). An unpreserved double jeopardy claim is reviewed for plain error affecting the defendant's substantial rights. See *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *McGee*, 280 Mich App at 682.

The United States and Michigan Constitutions both protect against double jeopardy, which includes protection against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. The validity of multiple punishments is generally determined under the "same-elements test," which requires a reviewing court to examine multiple offenses to determine "whether each provision requires proof of a fact which the other does not." *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007) (citation and quotation marks omitted). If the Legislature has clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. *Id.* at 316. The false pretenses statute, MCL 750.218, and the common-law fraud statute, MCL 750.280, do not contain any language indicating that multiple punishments either were or were not intended. Therefore, it is proper to consider the elements of the offenses. See *id.*

The statute proscribing common-law fraud, MCL 750.280, provides, "Any person who shall be convicted of any gross fraud or cheat at common law, shall be guilty of a felony" While the statute does not contain a definition of "gross fraud and cheat," prior caselaw has defined these terms in accordance with their dictionary meanings as follows: "'Fraud' is defined as '[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.' 'Cheat' is defined as '[to] defraud; to practice deception.' 'Gross' is defined as 'flagrant and extreme . . .'" *People v Dewald*, 267 Mich App 365, 383; 705 NW2d 167 (2005), abrogated in part on other grounds by *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006), superseded by statute as stated in *People v Mann*, 287 Mich App 283; 786 NW2d 876 (2010) (citations omitted; alterations in *Dewald*).

The relevant provisions of the statute proscribing false pretenses, MCL 750.218(1) and (5)(a), provide that "[a] person who, with the intent to defraud or cheat makes or uses a false pretense" is guilty of a felony if the amount involved is "\$20,000 or more but less than \$50,000." Regarding the meaning of "false pretense," the statute provides:

As used in this section, "false pretense" includes, but is not limited to, a false or fraudulent representation, writing, communication, statement, or message, communicated by any means to another person, that the maker of the representation, writing, communication, statement, or message knows is false or fraudulent. The false pretense may be a representation regarding a past or existing fact or circumstance or a representation regarding the intention to perform a future event or to have a future event performed. [MCL 750.218(11).]

To establish false pretenses, in general, the prosecution must show: “(1) a false representation as to an existing fact; (2) knowledge by [the defendant] of the falsity of the representation; (3) use of the false representation with an intent to deceive; and (4) detrimental reliance on the false representation by the victim.” *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (citation and quotation marks omitted).

A comparison of the elements of common-law fraud and false pretenses reveals that conduct prohibited by the common-law fraud statute is encompassed in the false pretenses statute. Both statutes have the common element of intent to defraud. As plaintiff observes, both require deception or fraud from the outset, and use similar terms, i.e., fraud, defraud, and cheat. For the common-law fraud statute, cheat is defined as “to defraud, or to practice deception.” *Dewald*, 267 Mich App at 383. The common-law fraud statute, applying the dictionary definition approved in *Dewald*, requires that the victim be induced “to act to his or her detriment.” *Id.* Similarly, “detrimental reliance on the false representation by the victim” is an element of false pretenses. *Bearss*, 463 Mich at 627. Under the common-law fraud statute, inducing someone to act to their detriment clearly can include any of the conduct prohibited in the false pretenses statute. The false pretenses statute has additional elements depending on the level of harm suffered. In sum, because the offense of common-law fraud does not have an element that the offense of false pretenses does not, defendant’s convictions of both common-law fraud and false pretenses violate the double jeopardy protection against multiple punishments for the same offense. See *Smith*, 478 Mich at 315-316. Accordingly, we vacate defendant’s conviction and sentence for common-law fraud.

II. COURT COSTS

Next, relying on *People v Cunningham*, 496 Mich 145, 158; 852 NW2d 118 (2014), superseded by statute as stated in *People v Konopka (On Remand)*, 309 Mich App 345; 869 NW2d 651 (2015), defendant argues that the trial court lacked the authority to impose \$600 in court costs because costs are not authorized by the statutes defining the offenses of which he stands convicted. We disagree, but conclude that remand is necessary in order for the trial court to establish the factual basis for the court costs imposed.

A defendant preserves a challenge to the trial court’s imposition of court costs by objecting when the trial court orders the payment of court costs. See *Konopka (On Remand)*, 309 Mich App at 356. Because defendant did not challenge the trial court’s imposition of court costs before the trial court, this issue is not preserved, and our review is limited to plain error affecting defendant’s substantial rights. See *Carines*, 460 Mich at 752-753, 763-764; *Konopka*, 309 Mich App at 356.

At the time defendant was sentenced, MCL 769.1k(1)(b)(ii) authorized the trial court to impose costs. In *Cunningham*, our Supreme Court held “that MCL 769.1k(1)(b)(ii) does not provide courts with the independent authority to impose ‘any cost.’ ” *Cunningham*, 496 Mich at 158. “Instead, . . . MCL 769.1k(1)(b)(ii) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute.” *Id.* Defendant was convicted of violating MCL 750.174(6), MCL 750.218(5)(a), and MCL 750.280, none of which independently authorize an award of costs upon conviction. But after our Supreme Court decided *Cunningham*, the Legislature amended MCL 769.1k. See 2014 PA 352. As amended,

MCL 769.1k(1)(b)(iii) allows courts to impose “any cost reasonably related to the actual costs incurred by the trial court.” The amended statute became effective October 17, 2014, but applies to all fines, costs, and assessments imposed under MCL 769.1k before June 18, 2014, or after the effective date of the amendatory act. *Konopka (On Remand)*, 309 Mich App at 357. The amended statute “independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense.” *Id.* at 358. Because this case was on appeal when the amended version of MCL 769.1k was adopted, and defendant was sentenced on April 11, 2014, the amended version of MCL 769.1k applies to the present case. See *id.* at 357. Thus, the trial court’s cost award is authorized by the amended version of MCL 769.1k(1)(b)(iii). See *id.* However, the amended statute permits the trial court to impose costs only if the costs are “reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case.” See MCL 769.1k(1)(b)(iii). We cannot determine whether the court costs imposed were reasonably related to the actual costs that the trial court incurred since the trial court did not establish the factual basis for the court costs imposed. See *Konopka (On Remand)*, 309 Mich App at 359-360. Therefore, we remand to the trial court in order for the trial court to establish the factual basis for the \$600 in court costs. See *id.*

III. SCORING OF OV 10 AND OV 14

Defendant argues that the trial court erred in scoring offense variables (OVs) 10 and 14 of the sentencing guidelines because a preponderance of the evidence does not support the trial court’s scoring decisions. We disagree that the trial court erred in assessing 15 points for OV 10 and 10 points for OV 14, but remand for further inquiry concerning defendant’s sentences consistent with our Supreme Court’s decision in *Lockridge*.

When reviewing a trial court’s scoring decision, the trial court’s “factual determinations 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 the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.* In his reply brief, filed *in propria persona*, defendant argues that judicial fact-finding by the trial court when scoring the two variables entitles him to resentencing under *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Because defendant did not raise an *Alleyne* challenge below, we review this unpreserved claim for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392; *Carines*, 460 Mich at 763.

A. OV 10

OV 10 addresses exploitation of a vulnerable victim. MCL 777.40(1). Under MCL 777.40(1), 15 points must be assessed for OV 10 if “[p]redatory conduct was involved.” MCL 777.40(1)(a). “Predatory conduct” is defined as “preoffense conduct directed at a victim . . . for the primary purpose of victimization.” MCL 777.40(3)(a). Predatory conduct does not, however, “describe any manner of ‘preoffense conduct’ ”; “[f]ew criminal offenses arise utterly spontaneously and without forethought.” *People v Huston*, 489 Mich 451, 461; 802 NW2d 261 (2011). Rather, predatory conduct encompasses “only those forms of ‘preoffense conduct’ that are commonly understood as being ‘predatory’ in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or ‘preoffense conduct involving nothing more

than run-of-the-mill planning to effect a crime or subsequent escape without detection.’ ” *Id.* at 462 (citation omitted). The term “victimize” means “to make a victim of,” and a “victim” is “a person who suffers from a destructive or injurious action.” *Id.* at 463 (citations and quotation marks omitted). “Therefore, ‘predatory conduct’ under the statute is behavior that is predatory in nature, ‘precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action.’ ” *Id.* (citation omitted; alteration in original). “For a trial court to assess 15 points for OV 10, the defendant’s preoffense conduct only has to be directed at ‘a victim,’ not any specific victim, and the victim does not have to be inherently vulnerable.” *Id.* at 468. Instead, the defendant’s conduct alone can give rise to the vulnerability. *Id.* The victim’s vulnerability may arise out of the victim’s circumstances or relationships. *Id.* at 464. In determining whether a defendant engaged in predatory conduct, trial courts should consider: (1) whether the defendant engaged in conduct before committing the offense, (2) whether the defendant directed that conduct toward “one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation[,]” and (3) whether the defendant’s primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

A preponderance of the evidence supports that defendant engaged in preoffense conduct directed at a particular victim, Snow, with the intent to victimize him by swindling him out of his money. Snow was a freelance journalist who lacked real estate experience. There was evidence that defendant’s associate, Nichols, met Snow at a social event in Washington, D.C., and, after learning that Snow had a large sum of money from investing an inheritance, engaged him in an investment project in Texas, resulting in Snow losing more than \$100,000. Convincing Snow that he wanted to help him recoup his money, Nichols connected Snow with defendant for the purpose of investing in real estate in Michigan. Snow thereafter spoke to defendant, who described himself as a “real estate guru” several times on the telephone, and defendant ultimately lured Snow to Michigan for a meeting. During their face-to-face meeting, defendant convinced Snow—whom defendant knew had invested and lost a large sum of money with his associate—that he was not interested in making money and that he was more interested in spirituality. Two entities were thereafter created to ultimately separate Snow from his \$90,000 investment. Snow deposited his money into the entity that he and Nichols owned jointly, but those funds were moved to the entity controlled by defendant under the guise of the bogus real estate venture. This evidence showed (1) that defendant engaged in preoffense conduct as demonstrated by his various meetings with Snow and the formation of Butterscotch, LLC, a business entity to accomplish the transaction, (2) that defendant’s conduct was directed specifically toward Snow, who was particularly vulnerable and susceptible to persuasion or temptation considering (a) that he had recently lost a large sum of money and wanted to recoup his losses, and (b) that he admittedly had no experience with real estate, and (3) that defendant’s primary purpose in engaging in the preoffense conduct was to establish trust with Snow for the purpose of swindling him out of his investment money. In light of the foregoing, the trial court did not clearly err in finding that defendant’s conduct warranted the 15-point score for OV 10. See *Hardy*, 494 Mich at 438.

B. OV 14

MCL 777.44(1)(a) instructs the trial court to assess 10 points for OV 14 if the defendant was a leader in a multiple offender situation. This Court has explained that the phrase “multiple

offender situation” refers to “a situation consisting of more than one person violating the law while part of a group.” *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013). The other offender does not need to be charged with a crime in connection with the incident in order for the court to assess 10 points for OV 14. See *id.* The entire criminal transaction should be considered. MCL 777.44(2)(a). Given the evidence that defendant, who presented himself as a real estate expert, was the person who convinced Snow to invest in the real estate scheme and had exclusive control of the funds during the criminal transaction, a preponderance of the evidence supports that defendant was the leader of Nichols in this multiple offender situation. Accordingly, the trial court did not clearly err in finding that defendant’s conduct warranted the 10-point score for OV 14. See MCL 777.44(1)(a); *Hardy*, 494 Mich at 438.

C. JUDICIAL FACT-FINDING

In *Alleyne*, the United States Supreme Court held that because “[m]andatory minimum sentences increase the penalty for a crime,” any fact that increases the mandatory minimum is an “element” that must “be submitted to the jury and found beyond a reasonable doubt.” *Alleyne*, 570 US at ___; 133 S Ct at 2155, 2158; 186 L Ed 2d at 321, 324. Defendant argues that the trial court’s reliance on facts not found by the jury to score the sentencing guidelines, and thereby increase the minimum sentence range prescribed by the guidelines, violates *Alleyne*. In *Lockridge*, the Michigan Supreme Court held that *Alleyne* “applies to Michigan’s sentencing guidelines and renders them constitutionally deficient.” *Lockridge*, 498 Mich at 364. The Court explained that the deficiency “is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the ‘mandatory minimum’ sentence under *Alleyne*.” *Id.* To remedy this constitutional violation, the Court held that a sentencing guidelines range calculated in violation of *Alleyne* is to be deemed advisory only. *Id.* at 365.

In the context of addressing the application of its decision to other cases, our Supreme Court stated that if the facts “admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant’s score to fall in the cell of the sentencing grid under which he or she was sentenced,” then “an unconstitutional restraint [will have] actually impaired the defendant’s Sixth Amendment right.” *Lockridge*, 498 Mich at 395. In such a case, the defendant will have “establish[ed] a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry.” *Id.* On remand, the trial court is required to determine whether, now aware of the advisory nature of the guidelines, it would have imposed a materially different sentence. *Id.* at 397. If the court determines that it would have imposed a materially different sentence, then it shall order resentencing. *Id.*

Although a preponderance of the evidence supports the trial court’s scores for OV 10 and OV 14, this case is affected by *Lockridge* because the scores for OV 10 and OV 14 were based on “judge-found facts,” and not facts necessarily found by the jury or admitted by defendant. Defendant did not testify or present any witnesses, and the elements of the charged offenses did not require the jury to determine whether defendant engaged in predatory conduct or was the leader in a multiple offender situation. Furthermore, the scores for OV 10 and OV 14 affect

defendant's placement in the particular cell of the sentencing grid under which he was sentenced. See MCL 777.64. Therefore, defendant has "establish[ed] a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." See *Lockridge*, 498 Mich at 395. Accordingly, we remand this case for further inquiry concerning defendant's sentences consistent with *Lockridge*.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher