

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 15, 2015

v

OTIS JACKSON, JR.,

No. 322858
Jackson Circuit Court
LC No. 13-004406-FC

Defendant-Appellant.

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In exchange for his guilty plea, the trial court agreed to not exceed the sentencing guidelines recommendation, and the prosecution dismissed one charge of kidnapping, MCL 750.349, one charge of carrying a concealed weapon, MCL 750.227, and three additional felony-firearm charges. The trial court sentenced defendant within the guidelines as scored for a second-offense habitual offender, MCL 769.10, to a prison term of 7 to 20 years on the first-degree home invasion conviction, and to a consecutive term of two years on the felony-firearm conviction.

Defendant does not challenge his convictions, but asserts that the trial court improperly scored offense variables (OV) 12 and 13. The prosecution concedes that OVs 12 and 13 were scored incorrectly, but opposes resentencing. We vacate defendant's sentence and remand for resentencing.

The trial court found that defendant waived his challenge to the scoring of OVs 12 and 13. We disagree. MCL 769.34(10) reads in relevant part as follows:

A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Our Supreme Court has interpreted this provision as a statement of “*how* a party must preserve a challenge to a sentence that is within the appropriate guidelines sentence range[.]” *People v Kimble*, 470 Mich 305, 311; 684 NW2d 669 (2004) (emphasis in the original). Thus, the statute

provides “a defendant with three separate opportunities to raise a scoring error: at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court.” *People v Hershey*, 303 Mich App 330, 353; 844 NW2d 127 (2013). Here, defendant raised the scoring error in a motion for resentencing. Accordingly, the issue was preserved, not waived.¹

OV 12 addresses contemporaneous felonious criminal acts. MCL 777.42(1). The trial court scored OV 12 at 10 points for three contemporaneous felonious criminal acts involving “other crimes,” MCL 777.42(1)(c), which it identified as kidnapping, felon in possession of a firearm, and carrying a concealed weapon. Because kidnapping is defined as a “crime against a person,” MCL 777.16q, not as an “other crime,” the trial court erred in using it to score OV 12. See *People v Bonilla-Machado*, 489 Mich 412, 425-428; 803 NW2d 217 (2011) (recognizing the distinction between “crimes against a person” and “other crimes” when scoring the sentencing guidelines).

The prosecution concedes that the trial court erred when it decided to score 10 points for OV 12 pursuant to MCL 777.42(1)(c) and 25 points for OV 13 pursuant to MCL 777.43(1)(c). However, the prosecution argues that defendant’s sentence should be upheld because a score of 25 points was proper pursuant to MCL 777.42(1)(a), which provides that 25 points must be assessed if “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed.” The prosecution invites us to use two felonious assaults and the dismissed kidnapping charge to support a score of 25 points under OV 12. The prosecution asserts that if OV 12 were scored at 25 points and OV 13 were scored at zero, then defendant’s corrected OV level would remain unchanged. The prosecution also contends that resentencing is unnecessary under *People v Lockridge*, 498 Mich 358; ___ NW2d ___ (2015).

However, it is clear that defendant, who challenged whether the first uncharged felonious assault was supported by a preponderance of the evidence, was not provided the opportunity to raise the same challenge with respect to the second one. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007) (stating that “[a] trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence”). Indeed, the trial court has made no factual determinations about either uncharged crime, so we have nothing to review for clear error. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Moreover, to the extent that the trial court failed to make findings regarding the criminal activity to be used in scoring the OVs, this is not a case governed by *Lockridge*.

Defendant’s OV score was 90 points, placing him in OV Level VI (75+ points). If OV 12 was scored at zero points and OV 13 was scored zero points, then his score would be 65 points, which would place him in OV Level V (50 to 74 points). Accordingly, because correction of the sentencing guidelines results in a lower guidelines range, we remand for

¹ Given our conclusion that the issue was not waived, we need not address defendant’s claim that defense counsel was ineffective for failing to object to the scoring of OV 12 and OV 13 at sentencing.

resentencing. See *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006) (holding that where correction of a scoring error alters the sentencing guidelines range, a defendant is entitled to resentencing, even if the original sentence falls within the appropriate range, because the original sentence was based on inaccurate information).

Defendant's sentence is vacated and we remand for resentencing. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder