

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELVIS LEE OSLER,

Defendant-Appellant.

UNPUBLISHED

January 10, 2013

No. 308079

Berrien Circuit Court

LC No. 2011-004302-FH

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of resisting or obstructing a police officer, MCL 750.81d(1), and reckless driving, MCL 257.626. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 28 to 180 months imprisonment for the resisting or obstructing offense, and 93 days in jail for reckless driving with credit for 84 days served. For the reasons set forth in this opinion, we affirm defendant's convictions, vacate his prison sentence, and remand for resentencing.

At about 3:15 a.m. on September 27, 2011, defendant was driving a car north on Colfax Avenue in Benton Harbor. State Troopers Steve Vrablic and Ryan Schoonveld were on patrol in a fully marked squad car driving south on the same road. Vrablic was driving and saw defendant's car drift over the middle of the road and both troopers estimated defendant's speed to be 35 to 40 miles-per-hour in a 25 mile-per-hour zone. After the two vehicles passed, Vrablic turned his vehicle around and began to follow defendant. Defendant accelerated away from the patrol car. Defendant turned down an alley, and drove onto the yard of a residence on Colfax Avenue where he struck a tree. Defendant subsequently ran from the car, passing 10 to 15 feet in front of the troopers' vehicle, while the troopers followed him for a short distance. Defendant slipped and fell, at which point Schoonveld, who was in uniform, exited the car and yelled as loudly as he could, "stop, state police!" As defendant was getting to his feet, he looked back toward the troopers, then resumed running. Schoonveld gave chase and yelled "taser, taser, taser." Vrablic continued driving south down the alley, putting his vehicle in front of defendant's direction of travel. Schoonveld caught up with defendant and shot him with a taser. The troopers arrested defendant. Defendant was convicted and sentenced as set forth above.

Defendant first argues that there was insufficient evidence to support his conviction of resisting or obstructing a police officer. We review a challenge to the sufficiency of the evidence

de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

The offense of assaulting, resisting, or obstructing a police officer is proscribed in MCL 750.81d(1), which provides in relevant part:

[A]n individual who . . . resists, obstructs, opposes, or endangers a person^[1] who the individual knows or has reason to know is performing his or her duties is guilty of a felony. . . .

To sustain a conviction of resisting or obstructing, the trier of fact must “determine whether the facts and circumstances of the case indicate that when resisting, defendant had reasonable cause to believe the person he was [resisting or obstructing] was performing his or her duties.” *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004) (quotation omitted). “[B]ecause it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Relevant to this case, “obstruct” is defined by statute as, among other things, “a knowing failure to comply with a lawful command.” MCL 750.81d(7)(a).

In this case, there was sufficient evidence that would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant obstructed a police officer. At trial, the officers testified that defendant looked at the police vehicle after he drove his car into a tree. Schoonveld testified that, after the vehicles came to a stop, he exited the patrol car and yelled as loudly as he could, “stop, state police!” Defendant did not adhere to the officer’s command and instead ran from police. Following his arrest, defendant admitted that he ran from the police. This evidence would allow a rational juror to conclude beyond a reasonable doubt, that defendant obstructed a police officer. *Kanaan*, 278 Mich App at 622; *Nichols*, 262 Mich App at 413; MCL 750.81d(7)(a).

Next, defendant contends that he is entitled to resentencing because the trial court erroneously scored two offense variables (OVs). Defendant failed to preserve this issue for appellate review when he did not object to the scoring of the challenged variables in the trial court. *People v Wilson*, 252 Mich App 390, 392; 652 NW2d 488 (2002). We review unpreserved objections to the scoring of offenses variables for plain error. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). “This Court reviews a trial court’s scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its

¹ A “person,” for purposes of the statute, is defined in part as a police officer of the state. MCL 750.81d(7)(b).

discretion and whether the record evidence adequately supports a particular score.” *People v Johnson*, 293 Mich App 79, 84; 808 NW2d 815 (2011) (quotation omitted). “A trial court’s scoring decision for which there is any evidence in support will be upheld.” *Id.* (quotation omitted). “To the extent that a scoring challenge involves a question of statutory interpretation, this Court reviews the issue de novo.” *Id.*

Defendant contends that the trial court erred in scoring 15 points for OV 19, interference with the administration of justice. MCL 777.49 governs the scoring of OV 19, and directs a trial court to assess 15 points where “the offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.” MCL 777.49(b). In this case, there is no evidence at all to support that defendant used force to interfere with or that resulted in the interference with the administration of justice. The prosecutor’s argument that defendant used force when his vehicle crashed into a tree lacks all merit where there is no evidence to show that defendant intentionally crashed into a tree in an effort to use force. Moreover, nothing suggests that the crash somehow interfered with the administration of justice or the rendering of emergency services. Rather, the accident facilitated the administration of justice because it slowed defendant down and allowed police to pursue him on foot, taser him, and arrest him. In sum, the trial court erred in scoring OV 19 at 15 points.

Defendant also contends that the trial court erred in scoring OV 10, exploitation of a vulnerable victim, at 10 points. MCL 777.40 governs the scoring of OV 10 and directs a trial court to assess 10 points where “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). Here, there is no record evidence to support the scoring of OV 10 and the prosecutor agrees that the trial court ruled improperly in scoring the variable. However, the prosecutor argues that the scoring error is harmless because the 10 points should have been assessed under OV 9, which, in relevant part, directs a trial court to score 10 points where an offender places two to nine victims “in danger of physical injury or death” during commission of the sentencing offense. MCL 777.39(1)(c). However, the prosecutor did not raise this issue in the trial and the trial court therefore did not have the opportunity to determine whether record evidence supports that both officers were placed in danger of physical injury or death when defendant disregarded one of the officer’s verbal commands (i.e. obstructed an officer). See *People v Wiggons*, 289 Mich App 126, 128; 795 NW2d 232 (2010) (the scoring of offense variables requires the trial court to make a factual inquiry to determine whether record evidence supports a particular score). As such, the issue of whether OV 9 should have been scored at 10 points is not properly before this Court and we decline to address it. See *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007) (appellate review is limited to issues decided by the trial court); *People v Gioglio (On Remand)*, 296 Mich App 12, 17; 815 NW2d 589 (2012) (this Court is an error-correcting court, not a fact-finding court).²

² Our ruling does not preclude the trial court from considering the propriety of scoring OV 9 on remand.

In sum, the trial court erred in scoring OV 19 at 15 points and erred in scoring OV 10 at 10 points. Reducing defendant's total OV score by 25 points results in a total OV score of zero as opposed to 25 and a recommended minimum sentencing range of 0-22 months as opposed to 2-34 months. See MCL 777.16d (resisting and obstructing is a Class G offense); MCL 777.68 (Class G sentencing grid); MCL 777.21(3)(c) (sentencing for habitual offender, fourth offense). Defendant is therefore entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra