

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY YOUNG, JR.,

Defendant-Appellant.

UNPUBLISHED
September 17, 2020

No. 349999
Berrien Circuit Court
LC No. 2016-003942-FH

Before: REDFORD, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 7509.84; and two counts of possession of a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b(1). Defendant previously appealed his convictions and sentences, and this Court affirmed defendant's convictions but reversed and remanded for resentencing.¹ The trial court resentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 71 to 180 months' imprisonment for his AWIGBH convictions to be served consecutively to each 2-year sentence for his felony-firearm convictions. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arose from defendant's shooting of two women at his residence early in the morning on September 11, 2016.² The two victims testified that they heard defendant fire multiple shots and saw defendant go behind his house after shooting them. When police officers arrived on the scene, one of the victims informed the officers that defendant went to his backyard where she claimed he hid his gun. An officer testified that he located a gun under a shed in defendant's

¹ See *People v Young*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2018 (Docket No. 338613), pp 1, 3-4.

² This Court provided a detailed summary of the facts in its previous opinion. *Young*, unpub op at 1-2.

backyard. A firearm examiner for the Michigan State Police testified that the gun was operational, and a forensic scientist testified that defendant's DNA profile matched the DNA profile found on the gun. A jury convicted defendant of two counts of AWIGBH and two counts of felony-firearm, and the trial court sentenced defendant to concurrent terms of 120 to 180 months' imprisonment for his AWIGBH convictions following two consecutive terms of 2 years' imprisonment for his felony-firearm convictions.

Defendant appealed his convictions and sentences, arguing in relevant part that the trial court erred by sentencing him as a second-offense habitual offender and that the sentence imposed by the trial court was disproportionate.³ This Court affirmed the trial court's sentencing of defendant as a second-offense habitual offender because, although "defendant's attempted crime was a misdemeanor, because the crime was punishable by a maximum of two years' imprisonment, it served as an 'attempt to commit a felony' " under the second-offense habitual offender statute.⁴ However, this Court held that the trial court failed "to justify why the substantial upward departure sentence it imposed was more proportionate to the offense and the offender than the minimum sentence range calculated under the guidelines" for defendant's AWIGBH convictions.⁵ Therefore, this Court affirmed defendant's convictions but reversed and remanded for resentencing.⁶ This Court explained that the trial court "abused its discretion by imposing its upward departure sentence of a 120-month minimum sentence when the 29-month-to-71-month minimum sentence range calculated under the guidelines adequately took into account all of the variables relied upon by the trial court for its imposition of a substantial, unjustifiable upward departure."⁷

At defendant's resentencing, the prosecution argued that defendant should be assessed 10 points for Offense Variable (OV) 19 because defendant hid the gun that he used to commit the charged offenses. Defendant objected to the proposed scoring of OV 19. The trial court determined that defendant should properly be assessed 10 points for OV 19, which increased defendant's overall OV score from 76 to 86, but left his sentencing guidelines minimum range of 29 to 71 months unchanged. The trial court resentenced defendant to a minimum sentence of 71 months imprisonment.

II. ANALYSIS

Defendant first argues that the trial court erred by assessing 10 points for OV 19. We disagree.

"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

³ *Id.* at 1, 3-4.

⁴ *Id.* at 4-5, 7.

⁵ *Id.* at 5-6.

⁶ *Id.* at 1, 7.

⁷ *Id.* at 7.

an appellate court reviews de novo.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A trial court must support its factual determinations by a preponderance of the evidence, and this Court reviews those determinations for clear error. *Id.* However, “[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) (citation omitted).

A trial court may assess 10 points for OV 19 if the offender interferes with or attempts to interfere with the administration of justice. MCL 777.49(c). “OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense.” *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016). For example, the act of disposing of a weapon used to commit a crime supports a finding that the defendant interfered with a police investigation and, thus, “interfered with or attempted to interfere with the administration of justice.” *People v McKewen*, 326 Mich App 342, 358; 926 NW2d 888 (2018).

In this case, both victims testified at trial that they saw the defendant go behind his house after he shot them. An officer testified that he found a gun under a shed in defendant’s backyard, and a forensic scientist testified that defendant’s DNA profile matched the DNA profile found on the gun. A preponderance of the evidence, therefore, supported the trial court’s finding that defendant hid the gun that he used to shoot the victims under a shed in his backyard immediately after committing the assaults to evade being caught and held accountable for the sentencing offense. Because evidence established that defendant hid the gun, the trial court did not err by finding that defendant attempted to interfere with the administration of justice and properly assessed 10 points for OV 19. See MCL 777.49(c); *McKewen*, 326 Mich App at 358. Moreover, both parties in this case agreed that assessing zero points rather than 10 points for OV 19 would not alter defendant’s minimum sentencing guidelines range. Therefore, defendant lacks entitlement to resentencing even if the trial court improperly scored OV 19. See *id.*

Next, defendant argues that the sentences imposed by the trial court for defendant’s AWIGBH convictions were disproportionate because the trial court failed to account for numerous mitigating factors when sentencing defendant at the very top of his minimum sentencing guidelines range. We disagree.

Under MCL 769.34(10), “[i]f 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.” “[A] sentence within the guidelines range is presumptively proportionate.” *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A defendant may only overcome this presumption by demonstrating that the trial court erroneously scored the sentencing guidelines or relied on inaccurate information. See MCL 769.34(10); *Francisco*, 474 Mich at 88.

In this case, the trial court’s 71-month minimum sentences were within defendant’s minimum sentencing guidelines range of 29 to 71 months’ imprisonment for his AWIGBH convictions. Therefore, defendant’s sentences were presumptively proportionate. See *Powell*, 278 Mich App at 323. Defendant failed to overcome this presumption of proportionality because no scoring error occurred and defendant does not argue that the trial court relied on any other inaccurate information when sentencing defendant. See MCL 769.34(10); *Francisco*, 474 Mich

at 88. In fact, defendant only argues that the trial court failed to adequately take into account various positive factors related to defendant, and such an argument was insufficient to overcome the presumption of proportionality in this case. See *Francisco*, 474 Mich at 88. Therefore, we must affirm defendant’s within-the-guidelines sentences. See MCL 769.34(10).

Defendant’s arguments made in his Standard 4 brief similarly fail. First, defendant’s argument that his sentence was disproportionate because the trial court improperly sentenced him as a second-offense habitual offender is barred by the law-of-the-case doctrine. See *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). “Under the law of the case doctrine, an appellate court’s determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same.” *Id.* In defendant’s previous appeal, defendant asserted that the trial court improperly sentenced him as a second-offense habitual offender. This Court held that the trial court properly sentenced defendant as a second-offense habitual offender.⁸ Because nothing that occurred at resentencing materially changed the facts related to defendant’s second-offense habitual offender status, defendant’s argument regarding this issue is barred by the law-of-the-case doctrine. Similarly, defendant cannot appeal his convictions again because this Court previously affirmed them and his claims of error are barred by the law-of-the-case doctrine.

Further, we also decline to review defendant’s challenges to his convictions because his arguments fall outside the scope of this appeal. See *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Under circumstances “where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand.” *Id.* Therefore, “the scope of the second appeal is limited by the scope of the remand.” *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975).

In this case, this Court affirmed defendant’s convictions in his prior appeal and remanded to the trial court solely for the limited purpose of resentencing.⁹ Therefore, this second appeal is limited to the issues addressed at resentencing. See *Kincade (On Remand)*, 206 Mich App at 481. Consequently, to the extent that defendant raises arguments regarding his trial and convictions, such arguments fall outside the scope of this appeal. See *Jones*, 394 Mich at 435-436; *Kincade (On Remand)*, 206 Mich App at 481.

Affirmed.

/s/ James Robert Redford
/s/ Jane M. Beckering
/s/ Michael J. Kelly

⁸ *Young*, unpub op at 4-5.

⁹ See *id.* at 7.