STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIN REY ALDRIDGE,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 349082
St. Clair Circuit Court
LC No. 18-002783-FH

ON REMAND

Before: BECKERING, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

This appeal arises from defendant Darin Rey Aldridge's guilty plea convictions for malicious destruction of a building valued at $1,000 or more but less than $20,000, MCL 750.380(3)(a), and third-offense attempted domestic violence, MCL 750.81(5). The trial court sentenced defendant, as a third-offense habitual offender, MCL 769.11, to concurrent terms of 4 to 10 years' imprisonment for the malicious destruction of a building conviction, and 40 months to 5 years' imprisonment for the third-offense attempted domestic violence conviction.

Defendant's appellate counsel filed a delayed application for leave to appeal defendant's sentences, raising an issue regarding the scoring of Offense Variable (OV) 13. This Court granted the delayed application, indicating in our order that the appeal was "limited to the issues raised in the application and supporting brief."[1] Appellate counsel briefed the OV 13 issue. Defendant later filed his own brief [2] challenging the scoring of OV 9, OV 10, OV 12, OV 13, and OV 19, and raising an ineffective assistance argument based on his trial counsel's failure to object to the

[1] *People v Aldridge*, unpublished order of the Court of Appeals, entered July 10, 2019 (Docket No. 349082).

[2] Defendant's brief was filed pursuant to Administrative Order No. 2004-6.

scoring of OV 9, OV 10, and OV 12.[3] The majority opinion of this Court limited its analysis to OV 13 and concluded that it was properly scored at 25 points because defendant engaged in a pattern of criminal activity involving three crimes against a person within a five-year period.[4] The concurring opinion agreed with the majority's analysis of OV 13, but chose to address defendant's additional arguments; it ultimately came to the same guidelines range conclusion as the majority opinion. *Aldridge*, unpub op at 1 (SHAPIRO, J., concurring).[5]

Defendant filed an application for leave to appeal with our Supreme Court. In lieu of filing an answer, the prosecution filed a motion to remand to the trial court for resentencing.[6] On October 29, 2021, the Supreme Court vacated the judgment of this Court, stating, in pertinent part:

> In upholding the trial court's scoring of Offense Variable (OV) 13 at 25 points, the Court of Appeals failed to consider this Court's order in *People v Nelson*, 491 Mich 869 (2012). In addition, the defendant challenged his OV 19 score in the trial court and in his Standard 4 brief in the Court of Appeals. The Court of Appeals did not consider this argument, but concurring Judge Shapiro concluded OV 19 was improperly scored. If successful on his challenges to OV 13 and OV 19, the defendant's sentencing guidelines range would change, entitling him to resentencing. *People v Francisco*, 474 Mich 82, 87 (2006). Therefore, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to the Court of Appeals for reconsideration of the defendant's challenge to OV 13 in light of *Nelson* and for consideration of the issues raised in the defendant's Standard 4 brief. [*Aldridge*, 965 NW2d at 507 (Mem).]

For the reasons explained in this opinion, we conclude that OV 13 and OV 19 were improperly scored, and there is currently insufficient evidence to support the score for OV 12. Our conclusions entitle defendant to a remand for resentencing.

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[3] The Prosecutor filed no brief in response to either defense counsel's or defendant's arguments.

[4] *People v Aldridge*, unpublished opinion of the Court of Appeals, issued June 4, 2020 (Docket No. 349082), p 3.

[5] Judge SHAPIRO agreed with defendant's assertion that OV 12 (contemporaneous felonious criminal acts) and OV 19 (interference with the administration of justice) were improperly scored at 5 points and 15 points, respectively. *Id.* at 2. However, Judge SHAPIRO ultimately determined that correction of these errors would not result in a change in defendant's sentencing grid, so resentencing was not required. *Id.*

[6] The prosecution noted that defendant raised challenges to five offense variables, but only two variables were challenged previously in the trial court. As a result, there was no factual record on the remaining variables. The prosecution recommended a remand to the trial court for resentencing, as it would allow the parties to develop a more detailed factual record that would facilitate appellate review, if that became necessary.

I. BASIC FACTS

Defendant's convictions arise from an incident that occurred in the home that defendant shared with his girlfriend, DP, and her daughter, AB. Defendant, who had been drinking, became enraged after DP refused his request for her car keys. He started grabbing furniture and throwing it out of various windows in the home, causing $1,300 in damages. Specifically, defendant threw a coffee table through a large window in the living room, a printer through a kitchen window, and multiple chairs through a sliding glass door in the kitchen. AB became fearful and called the police. Before the police arrived, AB's boyfriend SO arrived. SO attempted to calm defendant and offered to give him a ride. At some point, defendant stated that "he was going to pummel everyone" and "that when police arrived, he was going to go after them with a knife and get shot, committing suicide by cop." Defendant then left the home before the police arrived. He was located by the electronic tether device that he was wearing and apprehended a short time later.

Defendant pleaded guilty to the previously referenced counts. In exchange for his guilty plea, the prosecution agreed to reduce defendant's status from a fourth-offense habitual offender to a third-offense habitual offender. The prosecution also agreed to not proceed with an additional charge of witness interference. Defendant was sentenced as mentioned earlier in this opinion. This case is again before us following a remand from the Supreme Court.

II. ANALYSIS

A. SENTENCING

1. OV 13

We first address defendant's challenge to the 25-point score for OV 13. Because the sentencing offense, malicious destruction of a building, was not a crime against a person, OV 13 was improperly scored.

This Court reviews de novo issues involving the interpretation and application of the legislative sentencing guidelines. *People v Reynolds*, 334 Mich App 205, 208; 964 NW2d 127 (2020), aff'd in part and rev'd in part on other grounds by ___ Mich ___; ___ NW2d __ (Issued December 7, 2021, Docket No. 162331). "The trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). "When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination." *Id*. "The question [w]hether 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." *Reynolds*, 334 Mich App at 208 (quotation marks and citation omitted; alteration in original). This Court reviews unpreserved sentencing issues for plain error affecting substantial rights. *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018).

The Supreme Court directed this Court to reconsider whether OV 13 was properly scored in light of its order in *Nelson*, 419 Mich at 869. In *People v Nelson*, unpublished per curiam opinion of the Court of Appeals, (issued July 19, 2011, Docket No. 296932), p 1, the defendant

was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possessing a firearm when committing or attempting to commit a felony, MCL 750.227b. This Court upheld the scoring of OV 13 at 25 points on the basis of the defendant's "lengthy criminal history, including at least three crimes against a person in the five-year period preceding the sentencing offense." *Id*. at 2. In an opinion concurring in part and dissenting in part, Judge SHAPIRO stated:

> As to OV 13, it is captioned "continuing pattern of criminal behavior" and was scored at 25 points based on a finding that "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). However, the crime for which defendant was charged and convicted was not a "crime against a person" under the guidelines, but rather a "crime involving a controlled substance." Thus, the crime for which he was convicted could not have been part of a *pattern* of crimes against persons. While there do not appear to be any published cases dealing precisely with this question, the language of the statute and the Supreme Court decision in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006) strongly suggest this view. In *Francisco*, the Court concluded that the relevant five year period to be considered under OV 13 must include the sentencing offense since "in order for the sentencing offense to constitute a part of the pattern it must be encompassed by the same five-year period as the other crimes constituting the pattern." *Id*. at 86-87. By the same logic, in order for the sentencing offense to be part of a pattern of crimes against persons, it must itself be a crime against a person. [*Id*. at 1-2 (SHAPIRO, J., concurring in part and dissenting in part).]

The Supreme Court reversed this Court's judgment regarding the scoring of OV 13 for the reasons stated in the dissenting opinion, and remanded to the trial court for resentencing. *Nelson*, 491 Mich at 869.

Pursuant to the Supreme Court's order in *Nelson*, in order for the sentencing offense to be "part of a pattern" of crimes against persons for purposes of scoring OV 13 at 25 points under MCL 777.43(1)(a)[7], it must itself be a crime against a person. In our initial ruling in this case, we counted three crimes against a person by using defendant's lesser crime class conviction of third-offense attempted domestic violence, MCL 750.81(5).[8] However, defendant's third-offense attempted domestic violence conviction was not the sentencing offense in this case. "The sentencing offense is the crime of which the defendant has been convicted and for which he or she is being sentenced." *People v McGraw*, 484 Mich 120, 122 n 3; 771 NW2d 655 (2009). When a defendant is sentenced to concurrent sentences, a sentencing information report is only required to

[7] Formerly MCL 777.43(1)(b).

[8] This Court concluded that, while the sentencing offense of malicious destruction of a building could not be used to score OV 13, "the sentencing offense of third-offense attempted domestic violence" could be considered. *Aldridge*, unpub op at 3.

be prepared for the crime of the highest crime class. See *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005); MCL 771.14(2)(e). See also *People v Lopez*, 305 Mich App 686, 691-692; 854 NW2d 205 (2014) (explaining that "[g]iven that the sentences are to be served concurrently, the guidelines range for the highest-crime-class offense would subsume the guidelines range for lower-crime-class offenses, and there would be no tangible reason or benefit in establishing guidelines ranges for the lower-crime-class offenses").[9]

In this case, the crime of the highest crime class was malicious destruction of a building valued at $1,000 or more but less than $20,000, which is a Class E felony, MCL 777.16s, and a sentencing information report was prepared for that crime only.[10] Therefore, third-offense attempted domestic violence was not the sentencing offense and could not be used as the basis to score OV 13. Rather, the trial court was required to score the guidelines for the malicious destruction of a building offense only. See *McGraw*, 484 Mich at 133 ("Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable"). Because the sentencing offense was not a crime against a person, OV 13 was improperly scored at 25 points.[11] However, because the sentencing offense was a crime against property, OV 13 should be assessed 10 points under MCL 777.43(1)(d) for a combination of three or more crimes against a person or property.

2. OV 9

Defendant argued in his Standard 4 brief that the trial court improperly assessed 10 points for OV 9. We disagree.

"OV 9 is number of victims[,]" and 10 points are to be scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). MCL 777.39(2)(a) instructs: "Count each person who was placed in danger of physical injury or loss of life or property as a victim."

Defendant asserts that AB was not a victim because she was not in proximity to the broken window. However, both DP and AB were present and both were threatened by defendant. The presentence investigation report (PSIR) indicates that both DP and AB were present during defendant's "tirade" and were in fear of an assault by defendant. It further indicates that defendant "screamed at the named victims" and "continued to scream expletive and threats at those present." Accordingly, a preponderance of the evidence supports the finding that two victims were placed

[9] The Supreme Court has since clarified that all crimes in the highest crime class must be scored. *Reynolds*, __ Mich at __ (slip op 4, 6-7).

[10] While domestic violence is also a Class E felony, MCL 777.16d, attempted domestic violence is a Class H felony, MCL 777.19(3)(b).

[11] We note that the defendant in *Nelson* had not committed any crime against a person. Here, in contrast, defendant did in fact commit a crime against a person; it just was not the sentencing offense.

in danger of physical injury and OV 9 was properly scored at 10 points. See *McChester*, 310 Mich App at 358.

3. OV 10

Defendant next contends that the 10-point assessment for OV 10 was improper. We disagree.

"OV 10 is exploitation of a vulnerable victim[,]" and 10 points are to be scored if "[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).

According to defendant, there was no domestic relationship between himself and DP. However, defendant acknowledged at the plea hearing that he and DP lived together. As a result, this claim is without merit as OV 10 was properly scored 10 points. See *McChester*, 310 Mich App at 358.

4. OV 12

Next, defendant argues that the five-point score for OV 12 was improper. We agree.

OV 12 "is contemporaneous felonious criminal acts[,]" and five points are to be assessed if "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed," MCL 777.42(1)(d), or "[t]wo contemporaneous felonious criminal acts involving other crimes were committed," MCL 777.42(1)(e). MCL 777.42(2)(a) provides:

> A felonious criminal act is contemporaneous if both of the following circumstances exist:
>
> (*i*) The act occurred within 24 hours of the sentencing offense.
>
> (*ii*) The act has not and will not result in a separate conviction.

We agree with defendant that the offense of third-offense attempted domestic violence could not be used to score OV 12 because that offense resulted in a separate conviction. In its response to defendant's written objections to the scoring of the guidelines in the trial court, the prosecution argued that OV 12 was properly scored at five points on the basis of defendant's felonious conduct toward AB who was present during the assault, but was not named as a victim in the charging document.

However, the prosecution's position was rejected by this Court's recently published opinion in *People v Stoner*, ___ Mich App ___; ___ NW2d ____ (issued December 2, 2021, Docket No. 355317). In that case, the defendant "approached three people outside a gas station, pointed a handgun at the group, and said, '[Y]ou better watch yourself.' Soon thereafter, [the defendant] again approached the group, this time holding the gun in the air above his head." *Id.* at ___; slip op at 1. The defendant was charged with one count of carrying a concealed weapon (CCW), MCL 740.227, three counts of assault with a dangerous weapon (felonious assault), and

five other firearm offenses. *Id*. at ___; slip op at 1. He pleaded guilty to the CCW charge in exchange for dismissal of the other charges. *Id*. at ___; slip op at 1. He admitted he carried a concealed weapon without permission as the factual basis for his plea. *Id*. at ___; slip op at 1. The trial court assessed 25 points for OV 12 for "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person." *Id*. at ___; slip op at 1-2; MCL 777.42(1)(a). The trial court denied the defendant's motion for resentencing, finding OV 12 was properly scored because the defendant committed three separate criminal acts when he pointed the gun at three separate people. *Stoner*, ___ Mich App at ___; slip op at 2.

This Court disagreed, explaining that "only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts." *Id*. at ___; slip op at 4. This Court observed that although pointing a gun at a group of people could give rise to multiple felonious assault charges, it constituted only one felonious act based on the record. *Id*. at ___; slip op at 4-5. In particular, there was no evidence that the defendant specifically pointed the gun at each individual or specifically targeted any of the individuals. *Id*. at ___; slip op at 5. Thus, this Court concluded that it was error to find three separate acts for purposes of scoring OV 12. *Id*. at ___; slip op at 5. At most, the court could have found one additional act based on the defendant's second approach. *Id*. at ___; slip op at 5. As a result, because the change in the scoring for OV 12 altered the minimum sentencing guidelines, this Court concluded that the defendant was entitled to resentencing. *Id*. at ___; slip op at 5.

In this case, as previously noted, defendant's third-offense attempted domestic violence conviction could not be considered under OV 12 because it resulted in a separate conviction. Specifically, defendant was convicted of third-offense attempted domestic violence related to DP. Moreover, under *Stoner*, defendant's threatening actions toward DP and AB likely constituted a single felonious criminal act. While the PSIR indicates that both felt threatened, there is no evidence that defendant specifically targeted either. As in *Stoner*, it might be possible that another act could be found on the basis of defendant subsequently threatening to "pummel everyone." However, the record is not clear regarding the amount of time that had passed and whether this could be considered a separate felonious act. Ultimately, because the removal of five points does not alter the minimum sentencing guideline range, the scoring for OV 12 does not alter the outcome of this appeal. However, given that this Court is remanding the case to the trial court for resentencing, the court is directed to explain its factual basis when scoring OV 12.

5. OV 19

Finally, defendant asserts that OV 19 was erroneously scored at 15 points. We agree.

OV 19 "is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services[,]" and a score of 15 points is proper when "[t]he 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 assessing points under OV 19, a court may consider the offender's conduct after the completion of the sentencing offense." *People v Smith*, 318 Mich App 281, 285; 897 NW2d 743 (2016). This Court has "previously determined that an offender's threat to kill his or her victim to prevent the

victim from reporting a crime would warrant a score of 15 points for OV 19." *Id*. at 286. "Moreover, it is axiomatic that an offender's actual use of force, such as restraining or physically harming a victim, would also justify a score of 15 points if the force was used to prevent the victim from reporting a crime." *Id*.

In this case, there is no allegation that force was used. Rather, it was alleged that defendant made a threat of force when he stated, before the police arrived, that he would attack them with a knife so they would shoot him.[12] This statement is plainly a threat of force against the police. However, the question is whether the threat was made "to interfere with" or "attempt to interfere with," or actually resulted in the interference with, the administration of justice. MCL 777.49(b). "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *Smith*, 318 Mich App at 286 (quotation marks and citation omitted; alteration in original). "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *Id*. (quotation marks and citation omitted).

There is no evidence that defendant's threat was communicated to police officers at a time that it would have any effect on their actions. In the prosecution's response to defendant's written objections to the guideline scoring, it argued that the threat was communicated to the police, but did not provide any citation to the PSIR or other record evidence in support of that argument. In the PSIR, the "Agent's Description of the Offense" section discusses statements made by DP, AB, and SO during "interviews." Those interviews were presumably with the police because the agent also noted that DP and AB had not returned the agent's calls. Furthermore, it can be inferred from the PSIR that the information regarding the threat was relayed to the police during those interviews. However, it is unclear when the interviews occurred. Even if the threat was communicated to the police at the scene, there is no evidence that it affected their actions.

Similarly, there is no evidence that the threat had any effect on the actions of others, such as by preventing someone from calling the police. Thus, there is no evidence that the threat actually interfered with the administration of justice. Moreover, there is no evidence that defendant made the statement in order to interfere with or attempt to interfere with the administration of justice. Defendant apparently made the statement after the police had already been called, so he could not have intended to prevent anyone from calling the police. There is also no indication that defendant made the threat in order to get away. Thus, the 15-point score for OV 19 was improper.

In addition, a 10-point score would not have been appropriate under OV 19. A sentencing court must score 10 points when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Thus, a 10-point score does not require the use of force or threat of force. This Court has concluded that "[h]iding from the police constituted an interference with the administration of justice because it was done for the purpose of hindering or hampering the police investigation." *Smith*, 318 Mich App at 286.

[12] Defendant did not in fact confront police in this fashion when they later tracked him down, and he was taken into custody without difficulty.

In this case, defendant left before the police arrived. However, it is unclear whether he left in order to hide or avoid being caught. In fact, defendant was wearing an electronic tether, so he was quickly located and apprehended by the police. Because there is no evidence in the record regarding why defendant left the scene, a preponderance of the evidence does not support a finding that defendant interfered with or attempted to interfere with the administration of justice by leaving. Therefore, considering the current record, OV 19 should have been scored at zero points. See *McChester*, 310 Mich App at 358.

Accordingly, defendant is entitled to resentencing because correction of the aforementioned errors would change his minimum sentence guidelines range. *Francisco*, 474 Mich at 90-91. Defendant's total prior record variable (PRV) score was 80 points and his total OV score was 70 points, placing him in cell F-V of the Class E sentencing grid. MCL 777.66. The minimum sentence range for that cell is 22 to 38 months; however, as a third-offense habitual offender, defendant's range was increased to 22 to 57 months. Defendant's OV score of 70 points placed him at level V, which covers the range of 50 to 74 points. Thus, in order for his OV level to change, his OV score would have to be reduced by more than 20 points. For the reasons discussed earlier in this opinion, OV 13 should have been scored at 10 points (a reduction of 15 points) and OV 19 should have been scored at 0 points (a reduction of 15 points). Defendant's correct OV score of 40 points (a reduction of 30 points) would place him at level IV, which covers the range of 35 to 49 points. MCL 777.66. Thus, defendant is entitled to resentencing.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues in his Standard 4 brief that his trial counsel was ineffective by failing to challenge the scoring of OV 9, OV 10, and OV 12. We disagree.

Defendant did not move in the trial court for a new trial or for an evidentiary hearing; therefore, his claim of ineffective assistance of counsel is unpreserved. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). "Generally, an ineffective-assistance-of-counsel claim presents a mixed question of fact and constitutional law. Constitutional questions are reviewed de novo, while findings of fact are reviewed for clear error. This Court reviews an unpreserved ineffective-assistance-of-counsel claim for errors apparent on the record." *People v Hoang*, 328 Mich App 45, 63; 935 NW2d 396 (2019) (quotation marks and citations omitted).

"To demonstrate ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Id*. at 64 (quotation marks and citation omitted). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019) (quotation marks and citation omitted). For the reasons discussed above, OV 9 and OV 10 were properly scored. Therefore, trial counsel was not ineffective by failing to object to the scoring of those OVs because such argument would have been meritless. See *id*. In addition, because those OVs were properly scored, trial counsel's failure to object did not affect the outcome of sentencing. See *Hoang*, 328 Mich App at 64. Further, to the extent that counsel was deficient for failing to object to the scoring for OV 12 at defendant's sentencing hearing, the absence of the five-point score for this variable would not alter defendant's sentencing guideline range. MCL

777.66. See *Hoang*, 328 Mich App at 64. Therefore, defendant has failed to established that he was denied the effective assistance of counsel at his sentencing hearing.

We vacate defendant's sentence, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro