

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARCO MARCELL JAMERSON,

Defendant-Appellant.

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UNPUBLISHED

May 15, 2012

No. 303507

Saginaw Circuit Court

LC No. 09-032774-FC

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Demarco Marcell Jamerson appeals by leave granted his guilty plea conviction of larceny from a person<sup>1</sup> and delivery of cocaine less than 50 grams.<sup>2</sup> The trial court sentenced Jamerson as a habitual offender third offense<sup>3</sup> to serve concurrent terms of five to 20 years' imprisonment for the larceny conviction, and five to 40 years' imprisonment for the delivery of cocaine conviction with 417 days credit. We affirm.

Jamerson argues that the trial court improperly scored offense variables (OV's) 1, 2, 3, 4, 8, 11, 12, and 13 by using factual assertions pertaining to charges that were dismissed. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."<sup>4</sup>

A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence

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<sup>1</sup> MCL 750.357.

<sup>2</sup> MCL 333.7401(2)(a)(iv).

<sup>3</sup> MCL 769.11.

<sup>4</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.<sup>5</sup>

While a sentencing court is required to respond to challenges to the accuracy of information used for sentencing, it possesses “wide latitude” in responding to challenges to the accuracy of information used for sentencing.<sup>6</sup> “The court may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.”<sup>7</sup>

“[O]nce a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted” by the prosecution.<sup>8</sup> Whether an “effective challenge” is sufficiently demonstrated by “a flat denial of an adverse factual assertion, or whether an affirmative factual showing is required, will depend upon the nature of the disputed matter.”<sup>9</sup>

We find that Jamerson did not effectively challenge the validity of the facts supporting the scoring of OV’s 1, 2, 3, 4, 8, 11, 12 and 13.<sup>10</sup> Jamerson challenged the facts supporting the scoring of the above variables in his April 26, 2010, sentencing memorandum. The document, however, was self-serving, comprised of complete denials and was not supported by any evidence. In contrast, the trial court used preliminary examination testimony, which occurred under oath and was subject to cross-examination in its determination of the factual support for scoring the OV’s. Thus, Jamerson’s challenge to the validity of the facts was ineffective.<sup>11</sup>

Additionally, Jamerson waived his scoring objections at his June 9, 2010, sentencing.<sup>12</sup> A waiver is deemed to occur when a defendant “intentional[ly] relinquish[es] or abandon[s] [] a known right” and “extinguishes any error.”<sup>13</sup> A defendant who waives his rights is prohibited

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<sup>5</sup> *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

<sup>6</sup> *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

<sup>7</sup> *Id.*

<sup>8</sup> *Ratkov*, 201 Mich App at 125.

<sup>9</sup> *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003) (citation omitted).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Jamerson waived his scoring objections before filing a motion to correct an invalid sentence and memorandum of law citing the same objections previously waived.

<sup>13</sup> *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

from “seek[ing] appellate review of a claimed deprivation of those rights[.]”<sup>14</sup> Therefore, Jamerson impermissibly challenges the trial court’s scoring.

Although Jamerson is not entitled to appellate review of the OV scoring, this Court has reviewed the record and the trial court’s scoring of the OV’s and finds no error.<sup>15</sup> “We review a trial court’s scoring of a sentencing guideline variable for clear error.”<sup>16</sup> There is no clear error “if the record contains ‘any evidence in support of the decision.’”<sup>17</sup> “The interpretation and application of the legislative sentencing guidelines . . . involve legal questions that this Court reviews de novo.”<sup>18</sup>

“[T]o determine the appropriate minimum guidelines sentence range, the trial court must . . . [f]ind the offense category for the offense . . . , determine the offense variables to be scored for that offense category and score only those offense variables for the offender” as provided in the sentencing guidelines act.<sup>19</sup> “The sentencing offense determines which offense variables are to be scored . . . and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense.”<sup>20</sup> “[V]ariables are to be scored considering the sentencing offense alone” unless the variable addresses the scope of conduct beyond the sentencing offense to be considered.<sup>21</sup>

OV 1 assesses points for the aggravated use of a weapon.<sup>22</sup> The trial court assessed Jamerson five points on OV 1. OV 1 is scored at five points when a “weapon was displayed or implied.”<sup>23</sup> While Jamerson’s guilty plea did not reference the use of a weapon, as noted by the trial court the preliminary hearing testimony of the victim’s cousin supports that Jamerson displayed a knife while taking the victim’s cellular telephone. Additionally, while Jamerson

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<sup>14</sup> *Id.*

<sup>15</sup> Jamerson appears to be attempting to impermissibly apply the United States Supreme Court’s decision in *Blakeley v Washington*, 542 US 296, 303-305; 124 S Ct 2531; 159 L Ed 2d 403 (2004), which prohibits a trial judge from elevating the maximum sentence permitted by law based on facts found by the judge and not admitted to by the defendant or found by the jury. “Our Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan.” *People v Endres*, 269 Mich App 414, 423; 711 NW2d 398 (2006).

<sup>16</sup> *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

<sup>17</sup> *Id.* (internal quotation marks omitted).

<sup>18</sup> *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

<sup>19</sup> MCL 777.21; *People v Kimble*, 252 Mich App 269, 276; 651 NW2d 798 (2002).

<sup>20</sup> *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008).

<sup>21</sup> *McGraw*, 484 Mich at 127.

<sup>22</sup> MCL 777.31.

<sup>23</sup> MCL 777.31(1)(e); *People v Morson*, 471 Mich 248, 256-257; 685 NW2d 203 (2004).

contends that defense counsel's statements contradict that a weapon was used, counsel's statements are not evidence.<sup>24</sup> Thus, the trial court did not err in scoring OV 1 at five points.<sup>25</sup>

OV 2 "addresses the lethal potential of a weapon possessed or used by a defendant during the commission of the offense."<sup>26</sup> A trial court should score OV 2 at five points if the "offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."<sup>27</sup> As explained above, the preliminary hearing testimony supports that Jamerson possessed a knife. Additionally, Jamerson has failed to provide any valid authority to establish that the trial court scoring both OV 1 and OV 2 was improper. Thus, Jamerson's challenge to the trial court's scoring of OV 2 must fail.<sup>28</sup>

OV 4 is properly scored at ten points if the victim suffered "[s]erious psychological injury requiring professional treatment" or that "may require professional treatment."<sup>29</sup> Jamerson argues that OV 4 was improperly scored because there was no evidence a victim suffered psychological trauma, underwent ongoing treatment, or had plans for treatment. Jamerson's argument, however, must fail. To score OV 4 at ten points "[t]here is no requirement that the victim actually receive psychological treatment."<sup>30</sup> Here, the trial court noted that the nurse who examined the victim on the night of the larceny described the victim as upset, tearful and crying with tears running down her face. The victim also testified at the preliminary hearing that she was in fear of her safety and was crying on the night of the incident. OV 4 was properly scored at 10 points, as such scoring is appropriate when "the victim testified that she was fearful during the encounter with defendant."<sup>31</sup>

OV 8 is scored at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense."<sup>32</sup> Jamerson argues that his interactions with the victim and her cousin were consensual, so scoring OV 8 at 15 points was improper. Jamerson, however, did not provide evidence to the trial court to support this contention. The evidence relied on by the trial court was the victim's preliminary hearing testimony that on the day of the larceny Jamerson forced her to drive to an area and then allegedly sexually assaulted her. As the evidence relied on by the trial court

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<sup>24</sup> See *People v Adkins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

<sup>25</sup> *Hicks*, 259 Mich App at 522.

<sup>26</sup> MCL 777.32; *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

<sup>27</sup> MCL 777.32(1)(d).

<sup>28</sup> *Hicks*, 259 Mich App at 522.

<sup>29</sup> MCL 777.34(1)(a) and (2).

<sup>30</sup> *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

<sup>31</sup> *Id.*

<sup>32</sup> MCL 777.38(1)(a).

supports that the victim “was asported to another place of greater danger . . . beyond the time necessary” to commit the larceny, the scoring of OV 8 was not erroneous.<sup>33</sup>

OV 11 considers criminal sexual penetration.<sup>34</sup> OV 11 is properly scored at 25 points if “[o]ne criminal sexual penetration occurred” and arose “out of the sentencing offense.”<sup>35</sup> For the criminal sexual penetration to arise out of the sentencing offense, the penetration must have a “connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen.”<sup>36</sup> The trial court found that the criminal sexual penetration arose out of the larceny because the penetration occurred while “taking and moving” the victim’s cellular telephone. The victim testified that Jamerson sexually penetrated her the evening of the larceny and recited the events leading up to the penetration. We find that based on the victim’s testimony the “connective relationship” between the larceny and the criminal sexual penetration was sufficient to conclude that the penetration arose out of the larceny.<sup>37</sup> Thus, OV 11 was properly scored.

OV 12 addresses felonious criminal acts that were contemporaneous with the sentencing offense and is scored at 25 points if “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed.”<sup>38</sup> “A felonious criminal act is contemporaneous if” “[t]he act occurred within 24 hours of the sentencing offense” and “[t]he act has not and will not result in a separate conviction.”<sup>39</sup> The trial court found that the evidence demonstrated that Jamerson committed seven crimes against a person in addition to the larceny. We find that the preliminary examination testimony provides evidence of kidnapping,<sup>40</sup> armed robbery,<sup>41</sup> felonious assault,<sup>42</sup> assault with the intent to commit sexual penetration,<sup>43</sup> and first degree criminal sexual conduct.<sup>44</sup> Because the testimony demonstrates that Jamerson committed

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<sup>33</sup> MCL 777.38(1)(a); *Hicks*, 259 Mich App at 522.

<sup>34</sup> MCL 777.41.

<sup>35</sup> MCL 777.41(1)(b) and (2)(a).

<sup>36</sup> *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006).

<sup>37</sup> *Id.*

<sup>38</sup> MCL 777.42(1)(a).

<sup>39</sup> MCL 777.42(2)(a)(i) and (ii); *People v Light*, 290 Mich App 717, 722; 803 NW2d 720 (2010).

<sup>40</sup> *People v Mackle*, 241 Mich App 583, 594-595; 617 NW2d 339 (2000), quoting MCL 750.349.

<sup>41</sup> *People v Williams*, 288 Mich App 67, 73-74; 792 NW2d 384 (2010).

<sup>42</sup> *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

<sup>43</sup> *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004).

<sup>44</sup> *People v Perkins*, 468 Mich 448, 453; 662 NW2d 727 (2003).

at least three contemporaneous criminal acts, the trial court did not err in scoring OV 12 at 25 points.<sup>45</sup>

Finally, Jamerson asserts that OV 3 and OV 13 should not have been scored. The trial court agreed with Jamerson's assertions regarding these OV's, which Jamerson raised in his motion to correct an invalid sentence, but found that resentencing was not required. Resentencing is not required "[w]here a scoring error does not alter the appropriate guidelines range."<sup>46</sup> It is harmless error where reduction of an OV score fails to "alter the total [OV] score so as to change to the level at which defendant was ultimately placed in calculating the guidelines' range."<sup>47</sup> Because the reduction of Jamerson's OV score would not alter the appropriate guidelines range, remanding this case for resentencing is unnecessary.<sup>48</sup>

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter

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<sup>45</sup> MCL 777.42(1)(a); *Hicks*, 259 Mich App at 522.

<sup>46</sup> *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006).

<sup>47</sup> *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

<sup>48</sup> *Id.*