

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL LEE SANDERS, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 25, 2013

No. 310093

Wayne Circuit Court

LC No. 11-012210-FC

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of six counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to six concurrent prison terms of 72 to 120 months for the assault convictions and to a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, challenging the trial court's 25-point score for offense variable (OV) 12 of the sentencing guidelines. We remand for further proceedings consistent with this opinion.

Following an altercation in the hallway of an apartment building, defendant retrieved a shotgun from an apartment and went back into the hallway. Individuals who had been involved in the incident fled down the stairs to a van that was parked outside. Defendant's convictions arose from his actions of firing three shots from the building at the van occupied by the complainants.

Defendant argues that the trial court erred in assessing 25 points for OV 12. Defendant preserved the issue by raising it in a motion to remand, which this Court denied. See *People v Jackson*, 487 Mich 783, 796; 790 NW2d 340 (2010). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). This Court reviews the trial court's decision for clear error. *People v Nelson*, 491 Mich 869, 870; 809 NW2d 564 (2012). However, to the extent that a scoring challenge involves a question of statutory interpretation, this Court's review is de novo. *Osantowski*, 481 Mich at 106-107.

MCL 777.42(1)(a) directs a court to assess 25 points for OV 12 when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed[.]" MCL 777.42(1)(b) directs a court to assess ten points when "[t]wo contemporaneous felonious

criminal acts involving crimes against a person were committed.” For purposes of OV 12, “[a] felonious criminal act is contemporaneous” if “[t]he act occurred within 24 hours of the sentencing offense” and “[t]he act will not result in a separate conviction.” MCL 777.42(2)(a)(i) and (ii). OV 12 distinguishes between the “act” that occurred and the “sentencing offense.” *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010), quoting MCL 777.42(2)(a)(i). “[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.” *Light*, 290 Mich App at 723. Indeed, “the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense.” *Id.* at 726.

The basis for the trial court’s scoring of OV 12 is not apparent from the record. The record does suggest that individuals other than the complainants were in the hallway and apartment when defendant retrieved the shotgun. However, the record does not plainly indicate that, apart from the sentencing offense, defendant committed three or more separate acts that amounted to felonious crimes against a person and that were not used to score OV 13, for which defendant also received 25 points. See MCL 777.43(2)(c) (except in limited circumstances not alleged to be applicable here, conduct used to score OV 11 or OV 12 cannot be used to score OV 13). We cannot determine whether the trial court’s scoring of OV 12 at 25 points was proper because the court’s rationale is not apparent.

If OV 12 is scored at zero points, defendant’s offense-variable level will change from Level VI to Level V, thereby reducing the guidelines range from 43 to 76 months to 38 to 76 months. MCL 777.65. This would require resentencing. *People v Francisco*, 474 Mich 82, 89 n 5; 711 NW2d 44 (2006). Under the circumstances, we remand for reconsideration of the scoring of OV 12. See *People v Cannon*, 481 Mich 152, 162-163; 749 NW2d 257 (2008). If the trial court determines that it improperly scored the variable and that the error affects the appropriate guidelines range, defendant shall be resentenced. *Id.* We note that the prosecutor agrees with this conclusion.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio