

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 13, 2013

v

JOSHUA BENNETT UNREIN,

Defendant-Appellant.

No. 311715
Emmet Circuit Court
LC No. 12-003623-FC

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of seven felonies, including torture, MCL 750.85, unlawful imprisonment, MCL 750.349b, assault with intent to do great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon, MCL 750.82, and domestic violence, MCL 750.81a(2). Defendant was sentenced as a habitual offender, MCL 769.11, to serve 30 to 60 years' imprisonment for torture, 20 to 30 years' imprisonment for unlawful imprisonment, 156 months to 20 years' imprisonment for assault with intent to do great bodily harm less than murder, 5 to 8 years' imprisonment for each assault with a dangerous weapon conviction, and one year in jail for domestic violence. Defendant appeals as of right. His sole claim of error is that the trial court erred in scoring prior record variable (PRV) 5. Because we agree, we vacate defendant's sentence and remand for resentencing.

Defendant did not raise the issue at sentencing, but an error in calculating a defendant's sentencing guidelines range that results in an increase in defendant's sentence constitutes plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 313 n 5; 684 NW2d 669 (2004).

PRV 5 addresses prior misdemeanor convictions and prior juvenile adjudications. MCL 777.55(1). The trial court must assess 10 points if an offender has three or four prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1)(c). A prior misdemeanor conviction may be considered only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. MCL 777.55(2)(a); *People v Crews*, 299 Mich App 381, 397; 829 NW2d 898 (2013). A prior conviction of another state constitutes a prior misdemeanor conviction for purposes of scoring the sentencing guidelines. MCL 777.55(3)(a); *Crews*, 299 Mich App at 397.

According to defendant's pre-sentence information report (PSIR), he had three prior misdemeanor convictions from Colorado: a 2001 conviction for driving under the influence of liquor, a 2010 conviction for disorderly conduct-offensive gesture, and a 2010 conviction for vehicle theft under \$1,000. On appeal, defendant only argues that the 2010 disorderly conduct was improperly considered by the trial court. We agree that including the disorderly conduct conviction for scoring PRV 5 was improper. In *Crews*, this Court held "the information contained in the PSIR indicates that defendant's disorderly conduct convictions are not offenses 'against a person or property, a controlled substance offense, or a weapon offense,' and accordingly, cannot be scored under PRV 5." *Id.* at 398.

We decline the prosecution's invitation to "assume", based on the inclusion of the descriptive phrase "offensive gesture" in the PSIR, that defendant's 2010 disorderly person conviction involved conduct directed at another person. The PSIR does not contain any details about the specific conduct underlying the disorderly conduct violation. There is nothing on the record detailing the conduct underlying defendant's conviction, and we will not assume a crime against a person based on such a tenuous textual deduction.

If a sentencing error results in a different sentencing guidelines range, the defendant is entitled to resentencing. *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010). Here, a score of five points for PRV 5 would have lowered defendant's sentencing guidelines range from 225 to 562 months or life to 171 to 427 months.

The prosecution argues that resentencing is unnecessary where defendant's PSIR failed to include his prior misdemeanor conviction for criminal mischief. The prosecution has provided a "Register of Action Worksheet, Misdemeanor/Traffic/Infractions" from a Colorado court. The document indicates that defendant was charged with domestic violence and criminal mischief, and that on August 22, 2001, he was convicted by plea of "crim mis." Additionally, the probation order accompanying the prosecution's exhibit indicates that defendant was convicted of criminal mischief. However, the document is not a certified record of conviction and defendant has not had an opportunity to challenge it. See MRE 201(b)(2).

Accordingly, we vacate defendant's sentence and remand the matter to the trial court for preparation of a new PSIR and for resentencing. At resentencing, the prosecutor may argue that defendant's previously unreported misdemeanor conviction for criminal mischief constitutes a basis for scoring 10 points under PRV 5 and defendant may respond accordingly. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher