

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYREE HORTON,

Defendant-Appellant.

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UNPUBLISHED

July 17, 2001

No. 221862

Wayne Circuit Court

LC No. 99-002111

Before: Saad, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury found him guilty of the lesser offense of larceny from a person, MCL 750.357; MSA 28.589, and not guilty of felony-firearm. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to life in prison. Defendant appeals his sentence as of right. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Larceny from a person is a class D felony. MCL 777.16r; MSA 28.1274(26r). The scoring of the variables placed defendant in the D-IV range. The minimum sentence range for D-IV for a class D felony is nineteen to thirty-eight months. MCL 777.65; MSA 28.1274(75). As an habitual offender fourth, the upper limit of the minimum sentence range is doubled, MCL 777.21(3)(c); MSA 28.1274(31)(3)(c), making the minimum sentence range 19 to 76 months. The court failed to note the increase for defendant's habitual offender status and thus believed that the guidelines range was nineteen to thirty-eight months. Finding that range too low under the circumstances, the court departed upwards from the guidelines.

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); MSA 28.1097(3.4)(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); MSA 28.1097(3.4)(3). The court may not depart from the guidelines for discriminatory reasons or for an offense or offender characteristic already considered under the guidelines "unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(a), (b);

MSA 28. 1097(3.4)(3)(a), (b). If this Court finds that the trial court did not have a substantial and compelling reason to depart from the guidelines, it must remand for resentencing. MCL 769.34(11); MSA 28.1097(3.4)(11).

Apart from miscalculating the minimum sentence range, the court found an upward departure necessary because the proofs showed that defendant had committed a robbery. The court cannot make an independent finding of guilt as to a crime for which the defendant was acquitted and then sentence the defendant on the basis of that finding. It may, however, consider the evidence admitted at trial as an aggravating factor, “including other criminal activities established even though the defendant was acquitted of the charges.” *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998); *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997). In this case, the trial court did not simply consider various circumstances established by the evidence but considered the fact that defendant obtained the property by force, the one element that distinguished the charged offense from the offense of which defendant was convicted, *People v Bart (On Remand)*, 220 Mich App 1, 14; 558 NW2d 449 (1996), and used the fact that it believed defendant had committed a robbery to increase the sentence. That was improper. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993). But see *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Given that, plus the fact that the court found it necessary to depart from the guidelines because it had miscalculated them, we remand for resentencing. *Fortson, supra*. In addition, pursuant to the standards set forth in *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), we order that the resentencing be carried out by another judge. This resolution renders it unnecessary for us to address defendant’s argument that his sentence was disproportionate. *Fortson, supra*.

Reversed and remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Donald E. Holbrook, Jr.  
/s/ William B. Murphy