

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON LAMONT JOHNSON,

Defendant-Appellee.

UNPUBLISHED

May 11, 2004

No. 247618

Ingham Circuit Court

LC No. 02-000115-FH

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and assault or assault and battery, MCL 750.81. Defendant was sentenced to 57 to 120 months' imprisonment for the felonious assault conviction, 43 to 96 months' imprisonment for the possession of a firearm by a felon conviction, two years' imprisonment for the felony-firearm conviction, and 93 days' imprisonment for the assault or assault and battery conviction. All sentences to run concurrently except for the felony-firearm sentence. On appeal defendant argues that the trial court erred when it ordered defendant to pay restitution to the victim, and that he received ineffective assistance of counsel at sentencing. A review of the record reveals that the trial court properly ordered defendant to pay restitution to the victim, however, as the prosecutor admits, the record shows that defendant was sentenced incorrectly. We affirm and remand for resentencing.

Defendant first argues on appeal that the trial court erred when it ordered defendant to pay restitution to the victim. Defendant states that the restitution amount represented losses beyond those sustained in the offense for which defendant was convicted. The prosecution counters that the evidence shows that defendant is culpable for the entire criminal episode that resulted in the total loss to the victim and he should be required to make full restitution to the victim for the course of conduct that gave rise to his convictions under the applicable statutes. Defendant objected to the restitution order at the time of sentencing and, therefore, this issue is a preserved nonconstitutional issue, and defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The restitution statute states in relevant part:

when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. [MCL 769.1a(2).]

Further, the Crime Victim's Rights Act states that, when sentencing a defendant convicted of a crime, the court shall order the defendant to make full restitution to any victim of the defendant's course of conduct that gave rise to the conviction. MCL 780.766(2). Our Supreme Court has explicitly stated that the phrase "course of conduct" should be afforded a broad interpretation. *People v Gahan*, 456 Mich 264, 271-273; 571 NW2d 503 (1997). In that case, the Court stated that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Id.* at 272.

Here, the evidence at trial indicated that defendant befriended the victim, Hsiao-Ching Liu, when she went to the Police Athletic League (PAL) to take an aerobic boxing class in December 2000. Defendant gave Liu a fake name, Demetrious Johnson, and falsely represented himself as possessing a master's degree in computer science, that he was a co-owner of a business, and that he was associated with the PAL because his father was a retired police chief. Liu began giving defendant rides in her car. Soon after, defendant questioned Liu about her salary, how much money she had, and if she had interest in owning a business. When Liu expressed interest in owning a business, defendant said he would give her assistance. Defendant told Liu that he and his cousin were co-owners of a Fantastic Sam's and that his cousin had filed bankruptcy without defendant's knowledge. Explaining that a bankruptcy would ruin his credit, defendant told Liu that if she gave him \$30,000 she could bail out his business. Thinking that she was purchasing defendant's share of the business, Liu gave defendant \$26,000 in cash on February 20, 2001.

The following day, February 21, 2001, Liu drove defendant to meet with his attorney to get documentation on the bankruptcy. Defendant directed Liu to remain in the car. When defendant returned to the car he said that his attorney was in court and that a court date had been set to handle the bankruptcy and that he needed to borrow her car. Defendant did not return the car until the next day. After once again borrowing her vehicle and not returning it, defendant picked Liu up in her car on the evening of February 24, 2001 to watch boxing at his cousin's house.

While at the house defendant falsely claimed that his car was not working and repeatedly asked Liu to loan him money so he could purchase a car. When Liu continued to refuse and asked for her keys to leave, defendant accused her of embarrassing him in front of his cousins and then grabbed her and hit her repeatedly. Defendant then dragged her outside and hit her, stepped on her stomach, and kicked her. Defendant threw Liu into the passenger seat of her car and then sat in the driver's seat. Defendant called to someone inside the house and requested a gun. Upon receiving the gun, defendant took the bullets out of the weapon and showed them to Liu. Defendant began yelling and crying and falsely claimed his brother had died that morning. Defendant pointed the loaded gun at the front and back of Liu's head, at her eyes, and also put the gun in her mouth. At one point defendant cocked the gun and Liu believed she was going to die. After Liu stated she would help him in order to calm him down, defendant drove Liu to her

apartment, but kept her vehicle. Liu did not call the police because she was in shock and believed that defendant was associated with the police.

Two days later on Monday February 26, 2001, defendant picked up Liu in her car explaining that he wanted to shop for a car. Believing that she would be killed if she did not comply, Liu applied for and received a loan check in the amount of \$27,000 that she gave to defendant, albeit unsigned. After Liu dropped off defendant she cancelled the check and did not take his calls. After being prodded by a friend, Liu called the police.

At defendant's sentencing, defense counsel objected to the amount of restitution. The trial court welcomed comments from defendant, his counsel, and the prosecutor. The trial court also had access to the presentence investigation report that included a letter from Liu detailing her losses including \$23,500 in cash she gave to defendant, and \$660 in co-pays for psychological treatment. The trial court ordered \$24,000 in restitution.

We find that defendant has not established a miscarriage of justice under a "more probable than not" standard. *Carines, supra*, 460 Mich 774. After reviewing the evidence, we are certain that defendant is responsible for the total monetary loss suffered by Liu as a result of defendant's criminal enterprise. As such, due to defendant's course of conduct, the trial court properly ordered defendant to make full restitution to Liu under MCL 769.1a(2) and MCL 780.766(2).

Finally, defendant argues that the trial court erred in its scoring of the sentencing guidelines and trial counsel was ineffective in failing to object to the scoring. Because defendant did not raise this issue at or before sentencing, the issue has not been preserved for appeal. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). However, there is authority that the issue can be reviewed for plain error or ineffective assistance of counsel if a successful challenge to the guidelines would have altered the guidelines under which the defendant was sentenced. *People v Wilson*, 252 Mich App 390, 394, 396-397; 652 NW2d 488 (2002); *People v Kimble*, 252 Mich App 269, 276- 280; 651 NW2d 798 (2002).

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant's argument is limited to only one prior record variable. He claims the trial court erred when it scored twenty points for PRV 7, subsequent or concurrent convictions. The prosecution asserts that although the trial court correctly scored PRV 7, it submits that PRV 2, prior low severity felony conviction was improperly scored and should be zero. For that reason, the prosecution concedes that the case should be remanded for resentencing.

Our review of the record reveals that two of the prior record variables, PRV 2 and PRV 5, were erroneously scored. As the prosecution points out, PRV 2 should have been scored at zero points since defendant's subsequent conviction for delivery/manufacture of marijuana can not be

used to score both PRV 2 and PRV 7. Also, our review of the scoring shows that PRV 5, prior misdemeanor convictions or prior misdemeanor juvenile adjudications, should have been scored ten points and not fifteen points since defendant had only three qualifying prior misdemeanor convictions that were entered before the sentencing offense was committed. Also, as the prosecution declares, the trial court erred when it sentenced defendant as an habitual third offender. Citing *People v Poole*, 218 Mich App 702, 711; 555 NW2d 485 (1996), the prosecution states, and we agree, that defendant's subsequent conviction for delivery/manufacture of marijuana can not be used as one of the convictions for the habitual offender third since the repeat offender statutes require that a prior conviction precede the commission of the second offense. *Id.* citing MCL 769.10-769.12.

A reasonably competent attorney should have discovered that PRV 2 and PRV 5 were scored in error and that defendant should not have been sentenced as an habitual third offender. The corrections in defendant's PRV's resulted in a total score of sixty-five points,¹ a ten point drop from his previous score of seventy-five points. As a result of the PRV correction and properly sentencing defendant as an habitual offender second rather than third, defendant's sentencing guideline range should have been fourteen to thirty-six months, instead of nineteen to fifty-seven months. Defendant's minimum sentence of fifty-seven months was outside the proper guidelines range, and there is no suggestion of a substantial and compelling reason to deviate from the guidelines. We find that the length of the sentence imposed was a direct result of counsel's ineffectiveness in failing to challenge the guidelines scoring, and resulted in prejudice to defendant. Consequently, we vacate defendant's sentence and remand to the trial court for resentencing within the proper sentencing guidelines range or articulation of substantial and compelling reasons for departure.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio

¹ Our review of defendant's file indicates he should have received the following scores: PRV 1 = 25, PRV 5 = 10, PRV 6 = 10, PRV 7 = 20, resulting in a total score of 65 points.