STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 275908 Oakland Circuit Court
KEITH JACKSON SR., Defendant-Appellant.	LC No. 06-209892-FH

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

A jury convicted defendant of knowingly attending an animal fight, MCL 750.49(2)(f), and contributing to the delinquency of a minor, MCL 750.145. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent terms of two to eight years' imprisonment for attending an animal fight, and 90 days in jail for contributing to the delinquency of a minor. Defendant now appeals by right. We affirm.

I. Basic Facts

On July 24, 2006, at approximately 3:00 a.m., Pontiac police responded to a second report of dog fighting in a detached garage of a vacant home in Pontiac. The first report was made at approximately 2:30 a.m. Upon approaching the closed garage, officers heard the sounds of dogs fighting, applause, and several male voices talking, yelling, and laughing. One unidentified male stated, "Don't kill my bitch; don't kill her, don't kill her; it's over, stop, no." An officer also heard someone say, "That dog is getting it." Through a small crack in a boarded window, an officer observed two dogs fighting in a "makeshift pit." Concerned that they were "outnumbered" by the individuals inside the garage, the officers called for backup and waited outside the garage for 10 to 15 minutes.

Before backup could arrive, the garage door was opened from the inside. Defendant was in the garage with his 12-year-old son and his live-in girlfriend's 15-year-old son.[1] Six other men, two additional minors, and two pit bull dogs were also in the garage. The dogs were

[1] Defendant's girlfriend is the mother of both children, but defendant is the father of only the 12-year-old.

covered in blood and had "extensive" "fresh injuries" on their faces, necks, and torsos; one dog's throat was mangled. An officer described that one dog went to defendant, lay next to him, and "brushed up against him," leaving blood on defendant's clothing. The walls for the makeshift pit were comprised of a couch, a pallet, a plank board, and a refrigerator, which was covered in blood. As officers were arresting the individuals, the two dogs went outside and resumed fighting. An officer fatally shot the dogs.

Codefendant Ricky Brown,[2] who resided next to the vacant house, testified that the garage was a known location for dogfights. According to Brown, defendant and codefendant Urel Robinson owned both male and female pit bulls. Before the incident, defendant and Robinson had argued about which male dog was tougher. Subsequently, on July 24, 2006, defendant's and Robinson's male dogs fought in the garage. An extension cord from Brown's house supplied electricity to the garage. Brown explained that after defendant's male dog won the fight, the men challenged each other to a second fight between their female dogs. Defendant and Robinson took their male dogs and returned within 30 to 45 minutes with their female dogs for the second fight. Brown claimed that after the fight, defendant picked up his dog, but dropped him when the door opened and the police appeared.

Defendant testified at trial. He denied owning a fighting dog or purposely attending a dogfight. Defendant claimed that he was at home in bed when his live-in girlfriend asked him to check on their two sons. When defendant noticed that the boys were not in their room, he left the house to search the neighborhood. At one point, he heard dogs barking in the back of Brown's house, noticed an extension cord running from Brown's house into a garage, and "heard kids" in the garage. When defendant opened the garage door and walked inside to collect the boys, someone allegedly closed the door and ordered him to "get out of the way." Defendant immediately gathered the boys and opened the garage door to leave, but the police had arrived. Defendant claimed that Brown owned fighting dogs, and that while he was in the garage, Brown was "running the dog fight." Defendant's live-in girlfriend also testified that defendant had left the house to find the boys and that he did not own any fighting dogs.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. Knowingly Attending an Animal Fight

[2] Brown pleaded guilty to animal fighting.

MCL 750.49(2)(f) provides that a person shall not knowingly

> [b]e present at a building, shed, room, yard, ground, or premises where preparations are being made for an exhibition described in subdivisions (a) to (d) [animal fighting], or be present at the exhibition, knowing that an exhibition is taking place or about to take place.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to conclude that defendant knowingly attended an animal fight. There was no dispute that defendant was inside the garage where a dogfight was occurring. Defendant acknowledged that he was present during a dogfight, and other evidence also showed that a dogfight was taking place on the premises. Officers testified that while standing outside the garage, they heard dogs fighting and men yelling, laughing, and making comments consistent with dog fighting. When an officer looked through a boarded window, he observed two dogs "actually intertwined, fighting with each other." When the garage was opened, officers observed defendant and others, two bloody pit bulls with extensive fresh injuries, a makeshift fighting pit, and blood on various items throughout the garage. In addition, the jury viewed photographs showing the dogs' injuries and the condition and layout of the garage.

From this evidence, the jury could reasonably conclude that defendant knowingly attended a dogfight. Although defendant testified that he only briefly entered the garage to get his 12-year-old son and his son's 15-year-old brother, two officers testified that they were outside the garage waiting for backup for 10 to 15 minutes and no one went into the garage during that time. Also, Brown, who admittedly was attending the dogfight, testified that defendant owned one of the dogs that had fought his male dog earlier. In addition, an officer testified that as the suspects were being arrested, one of the ferocious dogs walked over to defendant and got down next to him, leaving blood on defendant's clothing. He then went outside to resume fighting the other dog. In sum, the evidence was sufficient to enable the jury to infer that defendant knowingly attended a dogfight. *Nowack*, *supra*.

B. Contributing to the Delinquency of a Minor

MCL 750.145 provides:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, . . . whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to conclude that defendant contributed to the delinquency of a minor. It is undisputed that defendant's 12-year-old son and his son's 15-year-old half-brother are minors, that defendant and the boys were in the garage during a dogfight, and that the two minors were arrested and charged with attending an animal fight. Defendant's only challenge is that he did not approve of the minors' presence in the garage and was only there to retrieve them. As explained previously, however, the evidence showed that defendant was in the garage during a

dogfight for at least ten minutes and that defendant actually participated in it. From the circumstantial evidence, the jury could reasonably infer that defendant knew and approved of the minors' presence in the garage to attend a dogfight. Thus, the evidence was sufficient to sustain defendant's conviction of contributing to the delinquency of a minor.

III. Sentence

A. Scoring of Offense Variables

Defendant also argues that the trial court abused its discretion in scoring offense variables 12, 14, and 19 of the sentencing guidelines. Defendant did not object below to the scoring of OV 19. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, plain error in the scoring of the guidelines can be raised and corrected on appeal where the error results in a sentence outside the appropriate legislative guidelines range. *Id*. at 312.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

1. OV 12

MCL 777.42(1)(d) directs a score of five points when a "contemporaneous felonious criminal act involving a crime against a person was committed." One point should be score if "one contemporaneous felonious criminal act involving any other crime was committed." MCL 777.42(1)(f). "A felonious criminal act is contemporaneous" if the act "occurred within 24 hours of the sentencing offense" and "has not and will not result in a separate conviction." MCL 777.42(2)(a). The trial court scored OV 12 at five points because there was evidence that defendant was involved in two dogfights on the night of the incident. The prosecutor concedes that OV 12 should not have been scored at five points because animal fighting is not a crime against a person. Consequently, OV 12 should have been scored at one point.

If OV 12 is correctly scored at one point, defendant's total OV score decreases from 35 to 31 points. With the corrected OV total, defendant remains in OV level III, and his properly scored guidelines range remains the same (5 to 25 months). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); MCL 769.34(10). Although we will not disturb defendant's sentence because it is within the appropriate guidelines range, we reverse the trial court's scoring of OV 12 and remand for correction of defendant's guidelines score. See *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006).

2. OV 14

MCL 777.44(1)(a) instructs the trial court to score ten points for OV 14 if the defendant was a leader in a multiple offender situation. The entire criminal transaction should be

considered. MCL 777.44(2)(a). There was testimony that defendant was the owner of one of the fighting dogs, that he and Robinson had fought their male dogs earlier, and that he and Robinson arranged the second dogfight between their female dogs. Defendant argues that this evidence is insufficient to support ten points for OV 14 because the jury did not find him guilty of the greater offense of conducting an animal fight. However, because a different burden of proof applies to the establishment of a minimum sentence, "the scoring of the guidelines need not be consistent with the jury verdict . . . ." *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003). "[S]ituations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing." *Id.* at 713. The evidence was sufficient to support a finding that defendant was a leader in this situation, so OV 14 was properly scored.

3. OV 19

MCL 777.49(b) provides that the trial court may score 15 points under OV 19 if "[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice." The force or threatening of force addressed by OV 19 encompasses more than just acts against police officers. For example, in *Endres*, *supra* at 420-422, this Court affirmed a score of 15 points for OV 19 where the defendant threatened to kill the victim, knowing that the victim would be the primary witness against him should criminal charges be filed. The *Endres* Court explained "that because of [the] defendant's threats, his victim might have been dissuaded from coming forward with accusations and testimony, thus preventing the discovery and prosecution of [the] defendant's crimes." *Id.* at 421.

Here, there was evidence that defendant threatened force against Brown, who testified against defendant. Brown testified that defendant told him that "he was going to stab" Brown and that defendant had relatives serving life in prison. Because of defendant's threats, Brown may have been dissuaded from coming forward with his testimony. Because this evidence supports a score of 15 points for OV 19, the trial court's scoring decision was not plain error.

B. Proportionality

Defendant also argues that he is entitled to resentencing because his sentence for knowingly attending an animal fight is disproportionate. Defendant's sentence of two to eight years is within the sentencing guidelines range of 5 to 25 months. This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *Kimble*, *supra* at 310-311. Because defendant has not demonstrated a scoring error that affects the appropriate guidelines range, or shown that the trial court relied on inaccurate information, we must affirm his sentence.

C. *Blakely v Washington*

Defendant further argues that he must be resentenced because the facts supporting the trial court's scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In

Blakely, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

IV. Defendant's Supplemental Brief

In a supplemental brief filed in propria persona, defendant argues that defense counsel was ineffective for failing to challenge the unreasonable search and seizure and the lack of a valid arrest warrant. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Both the United States and the Michigan Constitution prohibit unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. In order for a defendant to attack the propriety of a search and seizure, he must have standing to challenge the search. In determining whether standing exists, the trial court must decide, upon consideration of the totality of the circumstances, whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable. *People v Parker*, 230 Mich App 337, 339-340; 584 NW2d 336 (1998). The pertinent factors in determining whether the police were required to obtain a search warrant before conducting a search of abandoned or vacant structures include, inter alia, the outward appearance, the overall condition, indications that the home is not being independently serviced with gas or electricity, the history surrounding the premises and prior use, and complaints of illicit activity occurring in the structure. *People v Taylor*, 253 Mich App 399, 407; 655 NW2d 291 (2002). The defendant has the burden of establishing standing. *Id*. at 406.

Here, defendant was arrested in a detached garage of a house. The only evidence adduced at trial concerning the premises was that the detached building was vacant. The responding officers testified that the dwelling appeared vacant and that the windows of the garage were boarded up. Brown, who resided next door to the property, testified that the house was vacant and that electricity for the premises came from his residence through an extension cord. He further testified that the dwelling was a known location for dogfights. The police received two reports at two different times on the day of the incident about dogfights on the premises. Moreover, defendant does not assert that anyone lived at the property, or suggest any reason why he would have an expectation of privacy on the premises. Because there is no basis

for finding that defendant had an expectation of privacy in the garage where he was arrested, he has no standing to challenge the search of that premises.

Defendant also challenges the lack of a valid arrest warrant. However, an arrest warrant is generally not required to accomplish a felony arrest "so long as there is probable cause to believe that [the] defendant committed a felony." *People v Johnson*, 431 Mich 683, 691-692; 431 NW2d 825 (1988). In reviewing a challenged finding of probable cause, a court must determine whether the facts available to an officer at the time of arrest would justify a fair-minded person of average intelligence's belief that the suspected person had committed a felony. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). The offense of knowingly attending an animal fight is a felony. The facts and circumstances available to the officers after they arrived at the garage as summarized in part II (A), *supra*, would justify fair-minded persons in believing that defendant was knowingly attending an animal fight. So, the police had probable cause to believe defendant was committing a felony, justifying his arrest without a warrant.

Because defendant has failed to demonstrate a meritorious search and seizure issue, he cannot establish that defense counsel was ineffective for not raising that issue. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

We affirm and remand for correction of defendant's guidelines score for OV 12. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey