

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS RENARDO WHITFIELD,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2009

No. 286962

Wayne Circuit Court

LC No. 08-005422-FC

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant was convicted of kidnapping, MCL 750.349, after a bench trial, and was sentenced as a fourth habitual offender, MCL 769.12, to 180 to 450 months in prison. The trial court granted defendant's motion for directed verdict on the charges of carjacking, MCL 750.529a, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that Offense Variable (OV) 12, MCL 777.42, was improperly scored because he received points for contemporaneous acts for which he was acquitted. However, in *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), our Supreme Court stated that the scoring of sentencing variables is governed by the standard of preponderance of the evidence. Defendant does not argue that the prosecutor failed to establish the subject acts by a preponderance of the evidence. Moreover, the score was supported by the evidence. Accordingly, the contemporaneous acts were properly considered in scoring OV 12.

Defendant next challenges the score of 25 points for OV 13, MCL 777.43, which was based on the conclusion that the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person, which took place within a five-year period. Defendant asserts that there were not three crimes because of the directed verdict on the two other charges. This argument has no merit. First, a "crime" can be established by a preponderance of the evidence. *Osantowski*, *supra* at 111. Moreover, MCL 777.43(2)(a) provides that, "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction.*" (Emphasis added.) Thus, the statute provides that the term "crime" is not tied to whether there was a conviction for felonious criminal behavior.

Alternatively, defendant correctly asserts that the charged offenses for which he was acquitted should not have been scored for OV 13 because they were scored for OV 12. MCL 777.43(2)(c) (“Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.”). The minimum sentencing guidelines range used below was 135 to 450 months, and defendant was sentenced within the guidelines to a minimum prison term of 180 months. If the scoring of OV 13 were reduced by 25 points as argued by defendant, the guidelines range, keeping in mind defendant’s status as a fourth-habitual offender, would be 126 to 420 months. MCL 777.62; MCL 777.21(3)(c). Thus, the minimum sentence of 180 months that was imposed against defendant would still fall within the sentencing guidelines range. In *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), our Supreme Court, citing MCL 769.34(10), ruled that, “if [a] sentence is within the appropriate guidelines sentence range, it is only *appealable* if there was a scoring error . . . and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.” (Emphasis added.)<sup>1</sup> The particular issue raised on appeal relative to OV 13 that we are currently addressing was not raised below at sentencing, in a motion for resentencing, or in a motion to remand.<sup>2</sup>

Moreover, had defendant raised the issue below, a separate assault on an unknown female and a conviction for armed robbery that was within the five-year window could have been scored. Additionally, for purposes of scoring OV 13, the sentencing offense is one of the crimes

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<sup>1</sup> In *Kimble*, the guidelines range used at sentencing was 225 to 375 months, the minimum sentence imposed was 360 months (within range), and the appropriate guidelines range was actually 180 to 300 months (pushing minimum sentence outside the range), after the Supreme Court concluded that OV 16 had been scored incorrectly. The Court held, “Because defendant’s sentence is outside the appropriate guidelines sentence range, his sentence *is appealable* under § 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand.” *Kimble, supra* at 312 (emphasis added). However, even though the scoring challenge was appealable, because the defendant had not properly preserved the issue, the Court reviewed the scoring challenge under the plain-error standard. *Id.*

<sup>2</sup> In *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), our Supreme Court, finding a scoring error, remanded for resentencing where it addressed a *properly preserved* scoring error that altered the guidelines range, even though the minimum sentence imposed fell within both the range used below *and* the appropriately scored range. Consistent with *Kimble*, the *Francisco* Court stated:

Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. Finally, if the defendant *failed* to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel. [*Francisco, supra* at 89-90 n 8 (citations omitted; emphasis added).]

that comprises the pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c) and (2)(a). Thus, a score of 25 points would have been appropriate.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Jane M. Beckering