

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 18, 2012

v

JORDAN LEWIS MCKENZIE,

Defendant-Appellant.

No. 308114
Calhoun Circuit Court
LC No. 2011-002293-FH

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

The trial court sentenced Defendant Jordan McKenzie as a third-offense habitual offender¹ to serve 30 to 96 months' imprisonment for his conviction of larceny in a building,² following a jury trial. McKenzie appeals as of right the trial court's sentence. We vacate McKenzie's sentence and remand for resentencing.

I. FACTS

A. TRIAL

Diana Grodin, who is both deaf and mute, testified that on June 6, 2011, her dog alerted to McKenzie's presence at the front door of her home. Grodin lives alone and did not recognize McKenzie. McKenzie gestured that he needed to use a telephone, and Grodin allowed him to enter her home. McKenzie then asked Grodin if he could have money for gasoline. Grodin gave McKenzie \$40 in cash, which she retrieved from her kitchen table. McKenzie then left.

Between 11:00 p.m. and midnight the same evening, McKenzie again came to Grodin's door and gestured that he needed to use the telephone. Grodin again allowed him to enter her home, and McKenzie went into the dining room to use the telephone. Grodin noticed that McKenzie "kept peeking through the doorway" at her. McKenzie took the remaining money from the kitchen table, which Grodin testified was "more than \$30," and left Grodin's home.

¹ MCL 769.11.

² MCL 750.360.

Grodin called the police. Officer Seth Holibaugh testified that Grodin appeared upset and anxious when he arrived at her home. He testified that communicating with Grodin was “tough,” but that he eventually used a pen and paper to obtain McKenzie’s description. Grodin later identified McKenzie in a lineup. The jury found McKenzie guilty of larceny in a building.

B. SENTENCING

In her victim’s impact statement, Grodin claimed that McKenzie stole between \$200 and \$300 and her food assistance card. The police report indicated that McKenzie took about \$300 from Grodin. Grodin also stated that the theft affected her daily life:

Prior to the incident, I liked to help people because I am caring. Now, after what has happened, I am nervous. I question who is walking around my home. I am scared when someone knocks on my door. I question the motives of strangers who say hello, or talk to me in public. In addition to emotional distress . . . I am now scared when I leave my home. This has affected my ability to do things such as walk around my block. I feel unsafe doing little things such as shopping.

The trial court scored McKenzie under the sentencing guidelines as follows: 25 points under Prior Record Variable (PRV) 1 for a prior high severity felony conviction;³ 10 points under Offense Variable (OV) 4 for a serious psychological injury to the victim;⁴ 10 points under OV 10 for exploiting a vulnerable victim;⁵ and 1 point under OV 16 for obtained, lost, or destroyed property.⁶ Consistent with the sentencing guidelines’ recommendation, the trial court sentenced McKenzie to serve 30 to 96 months’ imprisonment.

II. THE SENTENCING GUIDELINES SCORES

A. STANDARD OF REVIEW

This Court reviews the sentencing court’s scoring of a sentencing guidelines variable for clear error.⁷ A scoring decision is not clearly erroneous if the record contains any evidence supporting the decision.⁸ The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.⁹

³ MCL 777.51(1).

⁴ MCL 777.34(1).

⁵ MCL 777.40(1).

⁶ MCL 777.46(1).

⁷ *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

⁸ *Id.*

⁹ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

B. PRIOR HIGH SEVERITY FELONY CONVICTIONS

The trial court properly scores PRV 1 if the defendant has previous convictions for committing serious felony offenses, as defined in the statute.¹⁰ The prosecution concedes that McKenzie's prior convictions were not for any crimes that fall under this section's definition of "prior high severity felony conviction," and thus concedes that the trial court improperly scored McKenzie 25 points for PRV 1. We agree. Further, the prosecution also concedes that McKenzie is entitled to resentencing on the basis of this mistake because the mistake placed him in a higher guidelines range. When an "'appellate correction of an erroneously calculated guidelines range' results in a sentence that 'stands differently in relationship to the correct guidelines range,' a defendant is 'entitled to be resentenced.'"¹¹ Thus, we vacate McKenzie's sentence, and remand for the trial court to score him zero points for PRV 1 and to resentence him within the proper guidelines range.

C. PSYCHOLOGICAL INJURY TO THE VICTIM

McKenzie argues that there was no evidence that Grodin suffered from serious psychological injuries. The trial court must score 10 points for OV 4 if a "[s]erious psychological injury requiring professional treatment occurred to a victim."¹² Whether the victim has sought treatment does not determine whether the injury may require professional treatment.¹³ The trial court improperly scores OV 4 if there is *no* evidence of any psychological injury to the victim, because the trial court may not assume that an injury occurred.¹⁴ But "the victim's expression of fearfulness is enough to satisfy the statute[.]"¹⁵

Here, Grodin expressed that McKenzie's crime affected her ability to undertake daily activities, and characterized her fear and anxiety as "emotional distress." Grodin did not indicate whether she has sought professional treatment. But whether Grodin actually sought treatment is not determinative.¹⁶ We conclude that the trial court did clearly err when it scored McKenzie 10 points under OV 4, when Grodin stated that the incident emotionally distressed her and it affected her daily life.

¹⁰ MCL 777.51.

¹¹ *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010), quoting *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

¹² MCL 777.34(1)(a).

¹³ MCL 777.34(2).

¹⁴ *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012).

¹⁵ *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

¹⁶ MCL 777.34(2).

D. EXPLOITING VULNERABLE VICTIMS

McKenzie argues that the trial court improperly scored 10 points for OV 10 because he did not exploit Grodin. The trial court scores 10 points under OV 10 if “[t]he offender exploited a victim’s physical disability”¹⁷ A defendant has exploited a victim if the defendant “manipulate[d] a victim for selfish or unethical purposes.”¹⁸

We conclude that the trial court did not clearly err when it determined that McKenzie exploited Grodin’s physical disability. Here, McKenzie visited Grodin and asked her for money to purchase gasoline. Grodin is physically disabled because she is both deaf and mute, and McKenzie was aware of her disability because he communicated with her through gestures. McKenzie returned much later in the evening and again asked to use Grodin’s phone. McKenzie went into the dining room while Grodin continued to watch television, and Grodin testified that McKenzie kept “peeking” at her from the dining room.

The trial court could determine from this evidence that McKenzie was aware that Grodin, because of her disability, would not be able to hear whether he was on the phone in the dining room or was in the kitchen. This could make it easier for him to take the money from the kitchen table undetected. It could also determine McKenzie was aware that Grodin’s disability would make it more difficult for her to call the police to report to theft, and communicate with them. Thus, we conclude that the trial court did not clearly err when it scored McKenzie 10 points for OV 10, because there was evidence that McKenzie exploited Grodin’s disability.

E. VALUE OF LOST PROPERTY

McKenzie argues that there was no evidence that Grodin lost property that valued \$200 or more. We disagree. The trial court scores one point under OV 16 if the defendant obtained, damaged, lost, or destroyed property that “had a value of \$200.00 or more but not more than \$1,000.00.”¹⁹ Grodin testified at trial that she lost *more than* \$30, and both the victim’s impact statement and police report indicated that McKenzie stole property worth between \$200 and \$300 dollars. Thus, we conclude that the trial court did not clearly err, because the evidence supported its determination that the property was worth at least \$200.

III. FACTS IN THE PRESENTENCE REPORT

A. STANDARD OF REVIEW AND PRESERVATION

Generally, an issue is not preserved if the defendant does not challenge the issue before the trial court.²⁰ This Court reviews unpreserved claims of error for clear error affecting a

¹⁷ MCL 777.40(1)(b).

¹⁸ MCL 777.40(3)(b).

¹⁹ MCL 777.46(1).

²⁰ *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

defendant's substantial rights.²¹ An error is plain when that error is clear or obvious.²² Defense counsel failed to challenge the factual errors. Thus this issue is unpreserved because McKenzie failed to raise it before the trial court. We will review the issue for clear error affecting his substantial rights.

B. LEGAL STANDARDS

The trial court may consider all the record evidence when sentencing, including the contents of a presentence investigation report.²³ Because the trial court relies on the information in the presentence report, it is important that the information in the report is accurate.²⁴ The trial court may presume that the information in the report is accurate, and the defendant has the burden to show that it is inaccurate.²⁵

C. APPLYING THE STANDARDS

As an initial matter, we note that McKenzie includes additional facts in his brief on appeal that are not included in the record below. This Court does not generally allow a defendant to expand the record on appeal.²⁶ Thus, we will not consider these additional facts.

From the record, there is no clear or obvious error in the information contained in the presentence report. We conclude that McKenzie has not shown that clear error in the information contained in the presentence report affected his substantial rights. But because we vacate McKenzie's sentence and remand for resentencing, McKenzie may challenge the alleged factual errors at resentencing.²⁷

D. EFFECTIVE ASSISTANCE OF COUNSEL

We note that McKenzie argues that his counsel was ineffective for failing to challenge the factual inaccuracies in the presentence report. McKenzie did not raise this issue in his statement of questions presented, and devotes only one sentence to this argument. A party abandons an issue if he or she does not raise it in the statement of questions presented.²⁸ Further,

²¹ *Id.* at 764.

²² *Id.* at 763.

²³ *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987).

²⁴ *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2007).

²⁵ *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2012); see *Walker*, 428 Mich at 268.

²⁶ *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990); MCR 7.210(A)(1).

²⁷ *People v Rosenberg*, 477 Mich 1076, 1076; 729 NW2d 222 (2007).

²⁸ MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Remand)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

a party abandons an issue by giving it cursory treatment on appeal.²⁹ We conclude that McKenzie has abandoned this claim because he did not raise it in his statement of questions presented and gives it cursory treatment on appeal.

IV. CONCLUSION

We vacate McKenzie's sentence and remand for resentencing. The trial court improperly scored PRV 1, and the prosecution concedes that this error requires resentencing. Otherwise, we affirm. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

²⁹ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).