STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRIAN CHRISTOPHER MANN,

Defendant-Appellee.

FOR PUBLICATION
February 2, 2010
9:10 a.m.

No. 288314
Barry Circuit Court
LC No. 07-100137-FC

Before: Beckering, P.J., and Markey and Borrello, JJ.

MARKEY, J.

Plaintiff appeals by leave granted from the trial court's decision to rescore a sentencing variable and adjust downward defendant's sentence for a conviction of armed robbery, MCL 750.529. We vacate and remand for reinstatement of the original sentences. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to armed robbery, along with unlawful imprisonment, MCL 750.349b. At the plea proceeding, defendant admitted that while armed with a knife he entered a store in Nashville and demanded money from an employee. Defendant further admitted that upon obtaining the money, he left the store, stopped a woman driving a car, and forced her to drive him to Battle Creek. In exchange for the plea, the prosecutor agreed to drop charges of carjacking, MCL 750.529a, and kidnapping, MCL 750.349, and to waive habitual offender enhancement. Additionally, the trial court agreed to impose a minimum sentence at the low end of the guidelines range.

The trial court initially sentenced defendant to serve concurrent terms of imprisonment of 171 months to 40 years for the robbery conviction and ten to 15 years for the unlawful imprisonment conviction. The trial court denied a motion for resentencing. On defendant's delayed application for leave to appeal, this Court entered an order vacating the judgment of sentence and remanding this case to the trial court with instructions to recalculate Offense Variable (OV) 9 in light of *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006) and MCL 777.39. Unpublished order issued May 21, 2008 (Docket No. 284628). On resentencing, the trial court changed the score of OV 9 from ten to zero points, resentenced defendant to 135 months to 40 years for the robbery conviction and ten to 15 years for the unlawful imprisonment conviction. The prosecutor now appeals by leave granted.

Offense Variable 9 addresses the number of victims. The trial court originally assessed ten points for that variable, which is the total prescribed where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c).

In the conflict resolution case of *Melton*, this Court held that OV 9 was to be scored solely according to the number of victims placed only in physical danger. Under *Melton*, no points are to be scored under OV 9 for victims placed in danger of financial injury. *Melton*, *supra* at 592 (Davis, P.J.), 597 (Neff, J., concurring). *Melton* was published on July 20, 2006. In apparent response to that decision, the Legislature amended MCL 777.39, effective March 30, 2007 (approximately one month before the crimes here at issue), to add persons threatened with danger of property loss to those threatened with physical injury or death as victims for purpose of scoring OV 9. 2006 PA 548.

In this case, however, plaintiff seeks to return defendant's score for OV 9 from zero to ten points solely on the basis that two victims were threatened with injury or death. Because plaintiff does not and has never relied on financial or other property-related criteria in maintaining that a score of ten points is proper, neither *Melton* nor the legislative response to it presents a reason for adjusting the original scoring of OV 9. Consequently, it does not now bar the reinstatement of that original score.

Other caselaw does come to bear, however. In *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), our Supreme Court held that for purposes of scoring OV 9, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 122.

Defendant protests that his armed robbery was completed with there being only one victim for purposes of OV 9 before he began the separate crime stemming from his commandeering a car and driver for his getaway. The applicable statutes, however, trump this empirical reasoning. MCL 750.530(1) sets forth robbery in general terms as a 15-year felony. Subsection (2) in turn adds that for purposes of that statute, the course of committing a larceny includes "flight or attempted flight after the commission of the larceny . . . ." MCL 750.529 incorporates MCL 750.530 by reference and enhances the penalty if the robbery is accomplished with the use of a dangerous weapon. Accordingly, the course of an armed robbery includes the robber's conduct in fleeing the scene of the crime. Thus, in the instant case, defendant's commandeering of a car immediately after taking money from the first victim and forcing the driver of the car to drive him to another community, created a second victim of the armed robbery. In other words, the carjacking incident constituted not only the commission of separate offenses, but was also a continuation of the armed robbery.

At the beginning of the resentencing proceeding, the trial court stated, "As I understand it, the Court of Appeals has indicated that OV 9 should have been scored zero. Is that correct?" Defense counsel agreed, but the prosecuting attorney protested that the variable was to be recalculated, not necessarily adjusted to zero. The trial court heard arguments, announced its decision to rescore OV 9 at zero, and invited the prosecuting attorney to appeal.

Defendant argues that the trial court correctly interpreted this Court's remand order in this regard and that the result demands respect now as the law of the case. We disagree.

We conclude that the trial court inaccurately inferred from this Court's remand order that this Court demanded it to score zero for OV 9. This Court instead expected only that the question would be considered anew, applying *Melton*, to the extent that it was relevant. Upon further review, we now conclude that the trial court correctly scored OV 9 at ten points in the first instance.

Because the original sentences of 171 months to 40 years for the armed robbery conviction and ten to 15 years for the unlawful imprisonment conviction were within the appropriate guidelines sentence range of properly scored guidelines, resentencing is neither required nor permitted. MCL 769.34(10). Instead, we vacate the sentences imposed after this Court's initial remand and again remand with instructions to reinstate the original sentences.[1]

We vacate defendant's new sentences and remand for reinstatement of his original sentences. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Stephen L. Borrello

[1] The trial court should take this opportunity to correct an irregularity that the parties have not discussed. Although at resentencing the trial court stated from the bench its intention to retain the ten-to-fifteen year sentence for the unlawful imprisonment conviction, which was not at issue, the judgment of sentence that followed repeated for that conviction the sentence listed for the armed robbery conviction. Because there was no legal reason or justification for increasing both the minimum and maximum sentences for that conviction, we regard this irregularity as simple inadvertence but ask the trial court to correct it on remand.