

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVORY BLACK,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 203691

Recorder's Court

LC No. 96-008183

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Following a bench trial, defendant was convicted of attempted possession of less than twenty-five grams of cocaine, MCL 750.92; MSA 28.287; MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced to one to two years' imprisonment to be served consecutively to a previous sentence. Defendant appeals as of right. We affirm defendant's conviction, but we vacate defendant's sentence and remand for resentencing.

Defendant first contends that the trial court erred in ordering defendant's sentence to be served consecutively to a previous sentence. The prosecution concurs that it was error to impose a consecutive sentence. Accordingly, we remand this case for resentencing with instructions that the trial court sentence defendant to serve whatever sentence it hands down concurrently with defendant's previous sentence. See *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997).

Defendant's second argument is that offense variable eight was misscored. However, appellate review is unavailable for claimed errors premised on misinterpretation or misapplication of the scoring guidelines. *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998). Accordingly, defendant has failed to present a cognizable claim on appeal.

Defendant next argues that the trial court precluded his counsel from demonstrating that a hearsay statement satisfied the criteria for admission as a statement against interest pursuant to MRE 804(b)(3). However, our review of the record reveals that the trial court afforded defense counsel the

opportunity to make a record of the basis for the admission of the evidence, but defense counsel merely represented that the statement was against the declarant's penal interest and did not make an offer of proof. The failure to make an offer of proof renders this issue unpreserved, MRE 103(a)(2), and we find that manifest injustice will not result if we withhold our review of this issue.

Defendant last contends that the verdict was against the great weight of the evidence because the trial court based its findings of fact and conclusions of law on the perjured testimony of a police officer. This Court will grant a new trial based upon the great weight of the evidence only where the evidence preponderates heavily against the verdict and a miscarriage of justice would result if a new trial were not granted. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Where an issue involves a credibility determination, the responsibility for resolving the credibility question falls upon the trier of fact. *Id.* In this case, the trial court, as the trier of fact, found that the officer did not commit perjury but was mistaken as to certain details, thereby precluding a conviction on the charged offense but providing sufficient evidence for conviction of a lesser offense. Because the evidence does not weigh heavily against the verdict but hinges on the trier of fact's assessment of credibility, the verdict was not against the great weight of the evidence. *Id.*

Defendant's conviction is affirmed, defendant's sentence is vacated, and this case is remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage