

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLARD JACKSON DUTY,

Defendant-Appellant.

UNPUBLISHED
December 4, 2003

No. 241759
Jackson Circuit Court
LC No. 01-002999-FH

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant appeals from his conviction of two counts of assault upon a prison employee. MCL 750.197. Defendant was sentenced to concurrent terms of three to six years' imprisonment. We affirm but remand for resentencing.

Defendant first seeks reversal of his conviction alleging that the trial court erred in delivering jury instructions pertaining to the specific intent required for the crime of assault upon a prison employee. In the alternative, defendant seeks reversal by alleging that trial counsel was ineffective for failing to object.

Before charging the jury, the trial judge held a conference in which he discussed the proposed jury instructions with both the prosecution and defendant. Among them was CJI2d 3.9, the instruction specifically alleged to be deficient in defendant's appeal. At the end of the conference, defendant's attorney specifically stated that he had no objections to the proposed instructions. Moreover, after they were given, defendant's counsel again stated that he had no objections to the instructions. "This action effected a waiver. Because defendant waived . . . his rights under the rule, there is no 'error' to review." *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Therefore, we review the sufficiency of the jury instructions only as they relate to defendant's claim of ineffective assistance of counsel.

The prosecution alleges that defendant's claim of ineffective assistance of counsel has not been preserved because defendant made neither a motion for a new trial nor a request for an evidentiary hearing prior to appeal. "However, the absence of a motion for new trial or an evidentiary hearing is not fatal to appellate review where the details relating to the alleged deficiencies of the defendant's trial counsel are sufficiently contained in the record to permit this Court to reach and decide the issue." *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). In the present case, defendant's claim of ineffective counsel relates to a failure to

object to jury instructions read by the trial court. As these instructions are contained in the present record, defendant's failure to make a motion for a new trial or request an evidentiary hearing does not preclude our review of this issue. We review claims of ineffective assistance of counsel de novo. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002).

Defendant's claim centers on his trial counsel's failure to object to the trial judge's instruction that:

The crime of assault upon a prison employee requires proof of a specific intent. This means, the Prosecution must prove not only that the Defendant did certain acts, but he did the acts with the intent to cause a particular result.

For the crime of assault upon a prison employee, this means the prosecution must prove each of the elements I'm going to set forth in the instruction on that to you.

According to defendant, the judge's instructions, although instructing the jurors that they must find specific intent, were deficient in that they never informed them of the result defendant must have specifically intended. Accordingly, defendant argues that the trial judge, instead of stating that "the prosecution must prove each of the elements I'm going to set forth in the instruction on that to you," should have stated "the prosecution must prove that the defendant intended to [injure, harm or embarrass the victims]," which is how CJI2d 3.9, dealing with specific intent, would have read.

As to the sufficiency of jury instructions, this Court has stated that:

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction. [*People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002) (citations omitted).]

The instructions in this case, taken as a whole, are sufficient under the standard set forth in *Kurr*. The trial judge clearly stated, "The crime of assault upon a prison employee requires proof of a specific intent. This means, the Prosecution must prove not only that the Defendant did certain acts, but did the acts with the intent to cause a particular result." Thereafter, the trial judge informed the jurors:

To prove that there was an assault, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant committed a battery on Marlis Cargo and/or David DeLong. A battery is a forceful, violent or offensive touching of the person or something closely connected with the person of another. The touching

must have been intended by the Defendant; that is, not accidental, and must have been against Marlis Cargo and/or David DeLong's will. It does not matter whether the touching caused an injury.

Second, that the Defendant intended either to commit a battery upon Marlis Cargo and/or David DeLong or make Marlis Cargo and/or David DeLong reasonably fear an immediate battery.

As used in these instructions, the words "force" and "violence" mean any use of physical force against another person so as to harm or embarrass him or her.

For a battery to occur, the touching must have been intended by the Defendant; that is, not accidental, and it must have been against Marlis Cargo and/or David Cargo's [sic] will. It does not matter whether the touching caused an injury.

An assault does not have to cause an actual injury; however, if there is an injury, you may consider the injury with the other evidence in determining whether there was an assault.

If the Defendant intended to assault one person, but, by mistake or accident, assaulted another person, the crime is the same as if the person had—the first person had been assaulted.

The above instructions, although they may not be a verbatim reading of CJI2d 3.9, nonetheless fairly presented the issues and included all the elements of the crime charged. *Kurr*, *supra*, 253 Mich App 327. Not only did the trial judge make numerous references to the intent required, but also clearly stated the elements of both assault and battery. As such, the trial court's instructions are sufficient under *Kurr*.

Since defendant's claim that the jury instructions were deficient is meritless, "It is similarly without merit to impute error to . . . trial counsel for failure to object to the trial court's instructions when the instructions themselves were not erroneous. Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next seeks resentencing due to an error in the sentencing proceedings. Specifically, defendant was charged as a second habitual offender and should have received a minimum sentence of twelve to thirty months. However, due to a clerical error, the trial court unintentionally applied the range applicable to a third habitual offender and imposed a minimum sentence of thirty-six months. At a post-trial motion for resentencing, the prosecutor argued that defendant had waived this argument by not objecting at trial, and that defendant was not entitled to resentencing because the prosecution could have charged him as a third felony offender based on his prior convictions for armed robbery and the sale of a controlled substance. The trial judge, although admitting the error, denied defendant's motion for resentencing, reasoning that defendant had waived this argument by failing to object during trial or at sentencing. In his appeal to this Court, defendant alleges that the error constitutes an unintended and unjustified

departure from the sentencing guidelines and, in the alternative, that his trial counsel was ineffective for failing to notice and object to the error.

The prosecution argues that the sentencing issue has not been properly preserved for appeal citing MCR 6.429(C), which precludes appeals challenging the accuracy of a presentence report unless the issue was raised at or before sentencing. Alternatively, defendant argues that the matter has been preserved due to its motion for resentencing under MCL 769.34.

In resolving the conflict between MCL 769.34 and MCR 6.49(C), this Court held in *People v McGuffey*, 251 Mich App 155, 165-66; 649 NW2d 801 (2002) that:

[T]he issue of when a guidelines scoring error must be brought to the trial court's attention falls squarely within the 'practice and procedure' aspect of our legal system. In addition, by imposing reasonable limitations, the court rule aids in the efficient administration of justice. Accordingly, we conclude that the court rule, MCR 6.429(C), must prevail over the conflicting statutory provision, MCL 769.34(10).

Moreover, this Court has previously stated that there is no basis for treating scoring issues different from issues relating to inaccurate information. See, *People v Kimble*, 252 Mich App 269, 276-277 n 5; 651 NW2d 798 (2002). Thus, Defendant's assertion that he was sentenced incorrectly due to an inadvertent clerical error rather than improper scoring will not affect this Court's review of this issue.

Therefore, in light of this Court's holdings in *McGuffey* and *Kimble*, Defendant has not properly preserved this issue for appeal. However, "defendant's failure to assert this argument before the trial court does not preclude appellate review under the plain error doctrine." *Kimble*, *supra*, 252 Mich App 275.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when . . . an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted), quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).]

This case is not unlike *Kimble*, *supra*, 252 Mich App 276, where this Court found plain error where "the prosecutor, defense counsel, and the trial court all failed to realize" that a certain offense variable did not apply to the defendant's charge. In the present instance, there is no dispute among the parties that an error occurred. Moreover, a review of the sentencing information report shows that the mistake was "clear and obvious." Defendant was clearly listed as a second habitual offender, but the guideline range was inappropriately filled out to show a

minimum guidelines range of twelve to thirty-six months instead of twelve to thirty months. Finally, there is no doubt that substantial rights were affected, as the error resulted in defendant receiving an additional minimum sentence of six months for each offense. *Carines, supra*, 460 Mich 763.

The critical issue in this case, however, is the fourth requirement of the plain error test which provides that “[r]eversal is warranted only when the plain, forfeited error . . . “ ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Carines, supra*, 460 Mich 763, quoting *Olano, supra*, 507 US 736-737. As noted above, the trial court in *Kimble* applied an offense variable that did not apply to defendant’s offense. *Kimble, supra*, 252 Mich App 276. Thus, this Court held that the fourth requirement had been met. *Id.* at 279.

However, the situation in the present case is distinguishable because the range of twelve to thirty-six months was not wholly inapplicable to defendant. Instead, as the prosecution argues and the presentencing investigation report shows, the defendant in this case *could have* been charged as a third habitual offender. Therefore, defendant’s sentence was not enhanced due to an inapplicable variable. Rather, it was enhanced by the inadvertent use of a variable that, although applicable, was not included in the prosecution’s information.

In light of this distinction, the prosecution argues that *United States v Cotton*, 535 US 625; 122 S Ct 1781; 152 L Ed 2d 860 (2002), is relevant. In *Cotton*, the defendants were indicted with, and convicted of, conspiracy to distribute and possess “a detectable amount” of cocaine. *Id.* at 627-628. However, at sentencing, the defendants received enhanced maximum sentences due to the quantity of cocaine involved. *Id.* at 627-628. Thus, the Supreme Court addressed “whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” *Id.* at 627. In resolving this issue under the plain error analysis, the Court held that because there was “‘overwhelming’ and ‘essentially uncontroverted’” evidence establishing the amount of cocaine involved, the erroneous omission from the indictment did not “substantially affect the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 632-633.

Therefore, the prosecution argues that, under *Cotton*, defendant’s being sentenced as a third habitual offender should not constitute plain error because, although he was only charged as a second habitual offender, there is “essentially uncontroverted” evidence that he could have been charged as a third habitual offender. Thus, upholding the present sentence would not threaten “the fairness, integrity, or public reputation of judicial proceedings.” *Cotton, supra*, 535 US 632-633. Instead, the prosecution insists that:

The real threat then to the “fairness, integrity, and public reputation of judicial proceedings” would be if [the criminal defendant], despite the overwhelming and uncontroverted evidence . . . were to receive a sentence prescribed for those committing less substantial . . . offenses because of an error that was never objected to at trial. [*Id.* at 634.]

However, *Cotton*, like *Kimble*, contains an important factual difference from the present case. Most noteworthy is that the challenged indictment omissions used to enhance the

defendants' sentences in *Cotton*, the quantity of cocaine, were directly tied to the underlying offense of which the defendants were convicted. Thus, the defendants' sentences were being enhanced due to "'overwhelming' and 'essentially uncontroverted'" evidence related to the severity of their crime, *Cotton, supra*, 535 US 633. However, the omitted sentence enhancing factor in the present case, the defendant's prior felonies, are unrelated to the crime charged.

In light of this distinction, we decline to apply the Supreme Court's holding in *Cotton* to the facts of this case. Moreover, the distinction between this case and *Kimble*—that the sentence enhancing factor was not wholly inapplicable—does not affect our prior holding that this Court "simply cannot . . . sanction a sentence imposed outside the appropriate guidelines range that is arrived at through a mistake of law." *Kimble, supra*, 252 Mich App 280. To do so would seriously affect "'the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." *Olano, supra*, 507 US 736-737. Thus, we find that, under *Kimble*, plaintiff has met the burden of showing plain error.

Accordingly, defendant's conviction is affirmed, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael R. Smolenski