

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MARTIN JONES,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 246626

Wayne Circuit Court

LC No. 02-006769-02

Before: Sawyer, P.J., and Gage and Owens, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, and was sentenced to a term of 66 months to 20 years in prison. Defendant appeals as of right. We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction was based on testimony by Frank Ryan and Verna Zahernick, who alleged that defendant pulled a knife on Ryan and demanded money. There was nothing in the record to suggest that either Ryan or Zahernick suffered psychological injury as a result of this incident. However, ten points were scored for Offense Variable 4 to reflect such an injury to the victim. See MCL 777.34. Based on this error (which the prosecutor concedes on appeal), the trial judge was working with an erroneous minimum sentence range of 51 to 85 months. Had this variable been properly scored, the minimum sentence range would have been 42 to 70 months. See MCL 777.16d; MCL 777.62.

Defendant argues that he should be resentenced. Since he failed to object to the scoring, we review for plain error affecting a substantial right. *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003). This would require a showing of prejudice, and a showing that the error affected "the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003), the Supreme Court affirmed this Court's determination that a scoring error would not require resentencing where the trial court's comments at sentencing indicated that the same sentence would have been imposed regardless of the error. Unlike the trial judge in *Mutchie*, *supra*, the trial judge in this case did not make any comments at sentencing that would suggest one way or the other that he would have imposed the same sentence.

Although the 66-month minimum sentence is within the corrected range, it cannot be said with any certainty that the judge would have imposed the same minimum sentence had he been aware of the proper sentencing range. We conclude that defendant would be prejudiced and that the fairness of the sentencing would be called into question if the sentencing judge would have given defendant a lesser sentence. Accordingly, we conclude that a remand for resentencing is necessary.

Given this disposition, we need not address whether counsel's failure to object constituted ineffective assistance of counsel.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Hilda R. Gage

/s/ Donald S. Owens