STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v	No. 245438 Wayne Circuit Court
ANTOINE B. RANSOM a/k/a ROBERT KINNEY, Defendant-Appellant.	LC No. 02-003089

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender to seven to fifteen years' imprisonment for the assault conviction, two to five years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction.[1] On appeal, defendant argues that the trial court erred in finding that the prosecution exercised due diligence in attempting to locate and produce three endorsed eyewitnesses to the crime, thus allowing the prosecution to strike the witnesses without defendant being permitted a requested missing-witness instruction. Defendant also argues that the trial court coerced a verdict by telling the jury, which had indicated it was deadlocked, that deliberations could take a month. Further, defendant contends that the trial court erred in denying a request for a jury instruction on self-defense "against more than one person acting in concert." Finally, defendant argues that trial counsel was ineffective for failing to challenge two offense variables at sentencing that were incorrectly scored and which effected the minimum guidelines range. We affirm.

I. BASIC FACTS

Defendant and the victim, Bruce Williams, became engaged in a verbal altercation in the street that escalated into a fistfight and finally resulted in defendant shooting Williams. There

[1] The assault and felon-in-possession convictions are to be served concurrently to each other and consecutive to the felony-firearm conviction.

were numerous onlookers and bystanders, some of whom were friends and acquaintances of defendant and others of Williams. Various accounts were given on the events that transpired, with claims that Williams threatened and hit defendant with a pipe or pole and that someone in Williams' "entourage" displayed a firearm, to claims that defendant fired at an unarmed Williams and that Williams had no pole, nor his friend a firearm.

Williams was the prosecutor's main witness. Williams testified that he and defendant were next door neighbors with a history of conflicts, including conflicts regarding defendant's "homies." [2] Two to three days before the shooting, Williams attempted to talk to defendant in a respectful manner in order to smooth over their differences in light of the fact that they had children and were neighbors. Williams indicated that defendant hesitantly shook hands as a sign of truce.

On the day of the shooting, Williams had people over for a barbecue and it was his child's birthday. Williams testified that he left his home for a short time with his now ex-girlfriend, and as they left, defendant was sitting in the back of his truck staring at Williams and his girlfriend. Williams just laughed and asked defendant why he was looking so mad; defendant did not respond. Williams returned to his home shortly with four other people, and they all stood around the front of Williams' home. Defendant, with an angry demeanor, then came running over to Williams and demanded that they talk privately. Williams testified that he stepped away from his friends and went down to the street curb and met defendant face to face. Defendant said: "N, why'd you tell my mother and father what you said, you B, you mother F'er." Defendant proceeded to punch Williams in the face. Williams claimed that his girlfriend jumped in between him and defendant but then got out of the way when friends of defendant and Williams told her to let them fight.

Williams took off his coat, and he and defendant engaged in fisticuffs for ten to fifteen minutes.[3] Williams described it as a boxing match in the middle of the street with "straight up blows." Defendant's mother then intervened in an effort to break up the fight. Williams asserted that he backed off out of respect, but defendant kept talking trash and pushed his mother away when she tried to grab defendant. Williams was offended by the way defendant treated his own mother. Defendant and Williams recommenced cussing at each other and Williams landed the final punch, striking defendant in the mouth. Williams testified that defendant then drew a .38 caliber revolver and started shooting Williams.

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[2] It appears that one of defendant's friends spit on Williams' van, which incident was the root of the events and problems that soon developed. The record is unclear whether the spitting incident occurred before the day of the crime or on the day that Williams was shot. The record indicates that the spitting incident led to a confrontation in which defendant flashed a gun at Williams from under a newspaper. A girl from across the street came running out and told Williams to put his gun away, but Williams asserted that he had no gun, only defendant, and that the girl may have believed he had a gun because of the way he was holding himself. Williams testified that no fight or shooting ensued and that he and defendant went on their respective ways.

[3] Testimony reflected that Williams is 6'3" and 185 pounds and defendant is 5'9" or 5'10".

According to Williams, he was hit twice by gunfire before he had a chance to turn and run away, at which time he was again struck by gunfire in the back. Williams contended that he did not have any weapons whatsoever and that there were no other weapons at the scene aside from the firearm used by defendant. He testified that one of defendant's "boys," who stood close to defendant throughout the fight, handed defendant the gun that was used to shoot Williams. Williams' close friend, Deon,[4] rushed him to the hospital for treatment.

On cross-examination, Williams acknowledged that his statement to police contained no claim that one of defendant's friends handed defendant the firearm; however, Williams insisted he told the police of the gun transfer. Williams stated that defendant had two friends at the crime scene and that he had four friends present. Williams did not know what his "homies" were doing during the fight. One of Williams' friends, apparently Deangelo Jones, was standing next to the trunk of a car at the time of the fight, and the trunk, while initially open, was then closed. Williams insisted that the trunk did not contain any weapons. Williams did not know what his friend was doing near the car at the time of the fight.

Gwendolyn Gunn, defendant's mother, testified that she witnessed defendant and Williams in the middle of the street cussing at each other but not physically fighting. Gunn stepped in between defendant and Williams in an attempt to separate them and stop the altercation. Gunn testified that defendant had a firearm and that Williams' friend, a dark-skinned man, also had a gun. She originally told police that defendant did not have a gun. Gunn further contended that Williams was holding a long pole. She acknowledged that in her police statement there was no assertion that Williams had a pole, nor any claim that Williams' friend had a firearm. In fact, according to the police report, Gunn was specifically asked by police whether Williams had an object or a gun, and she replied "no." Gunn claimed that, before her statement was taken, she had told police about Williams carrying a pole and Williams' friend carrying a gun. She insisted that, despite the police statement, Williams had a pole and his friend had a gun.

Gunn additionally testified that she observed defendant shooting toward the direction of Williams. She then acknowledged her statement to police that she saw defendant fire directly at Williams. On cross-examination, Gunn stated that when she was standing between defendant and Williams, Williams grabbed and pushed her. Gunn indicated that Williams then punched defendant, and seconds later, defendant pulled out his gun as did Williams' friend. She acknowledged her statement to police that guns came out and bullets were flying. Gunn testified that Williams' friend was three steps behind Williams, that the friend pulled out a weapon, that she was unsure whether the friend discharged the weapon, that eight people were at the scene of the shooting, that two of those persons were standing next to the open trunk of a car, and that she heard three to four shots.

Defendant's sister, Shenita Gunn, testified that she never saw defendant, nor anyone for that matter, with a gun; however, she left the scene before shots were fired. Shenita indicated that she did not see the shooting, but she did observe, before leaving, that Williams was carrying

[4] Subsequent testimony suggests that Deon is Deangelo Jones.

a pipe or pole in his hands. She asserted that she immediately went into her home with two child cousins on seeing Williams with the pipe. Although Shenita did not see the shooting, she did hear four gunshots once inside the house. Shenita was confronted with a statement she made to police indicating that she saw Williams actually hit defendant in the head with the pipe before she retreated to her home. Shenita agreed that she had made the statement, and she then testified that Williams indeed had hit defendant in the head with the pipe.

Officer Patricia Lofton testified that police did not go to the scene of the shooting and that no physical evidence was collected in the case.

Defendant was charged with assault with intent to commit murder, MCL 750.83, along with the firearm charges for which he was convicted. The jury returned a guilty verdict on the lesser crime of assault with intent to do great bodily harm less than murder, MCL 750.84.

II. ANALYSIS

A. Missing Witnesses and Due Diligence

Defendant maintains that the trial court erred in finding that the prosecution exercised due diligence in attempting to locate and produce three endorsed eyewitnesses to the crime, thus allowing the prosecution to strike the witnesses without defendant being permitted a requested missing-witness instruction. The witnesses at issue, Deangelo Jones, who defendant believes was the man carrying a gun and standing next to Williams, Dawn Gibson, and Leteerse Stevens, who was Williams' ex-girlfriend, were all endorsed on the prosecutor's witness list.

The trial court conducted two separate "due diligence" hearings outside the presence of the jury.[5] The first hearing concerned endorsed witnesses Jones and Gibson. Officer Patricia Lofton, the officer in charge of the investigation, testified that she sought to have subpoenas served on Jones and Gibson but could not locate them. Efforts to find the desired witnesses included attempted phone contacts, personally going to the last known address twice (house appeared vacant),[6] contacting the telephone company to try and obtain another number and address, contact with a possible employer, an attempt to contact a sister, and checking with the victim. Lofton's failed attempts to locate the witnesses began in May 2002 and ended in June 2002, a week before trial. Lofton testified that she made at least five attempts per witness, through phone calls and physical visits, to locate them but to no avail. The trial court found that due diligence was exercised and declined to give a missing-witness instruction.

[5] Before the first due diligence hearing, the prosecutor asserted that Jones and Gibson were "and/or" witnesses and they "weren't checked, specifically." The witness list does have the words "and/or" scribbled in next to the three witnesses at issue. However, the box to the left of all three witnesses is in fact marked with an "X." The witness list states that "[t]he witnesses the People intend to produce at trial, pursuant to MCLA 767.40a(3), are designated by an 'X' in the boxes to the left." Moreover, the prosecutor was agreeable to having a due diligence hearing.

[6] The witness list suggests that the two witnesses had provided the same address.

With respect to Leteerse Stevens, who was subpoenaed for trial, a due diligence hearing was held after she failed to appear and after unsuccessful efforts were made to obtain her presence. Officer Lofton again testified and first noted that she had personally served Stevens with the trial subpoena at the home of Stevens' grandfather. Stevens indicated to Lofton that she would appear although she was reluctant to do so. Lofton left a message for Stevens, through Stevens' mother, on the Saturday before trial, reminding her of the trial and the need to appear. There was no indication that Stevens would not show. After Stevens failed to appear for trial, Lofton placed multiple calls to Stevens' cell phone, the only number that Lofton had for Stevens, and the calls reflected that the number was not in service. A call to Stevens' sister failed as the number was disconnected. The parties presented brief arguments with defendant arguing that Stevens was an important eyewitness and the police could have tried to pick her up or arrest her after she failed to appear for trial. The trial court found that due diligence was exercised and declined to give a missing witness instruction.

Recently, a panel of this Court in *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004), addressed the issue of due diligence and witness endorsement, stating:

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness for trial. *People v Cummings*, 171 Mich App 577, 583-585; 430 NW2d 790 (1988). A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. CJI2d 5.12; see also *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

MCL 767.40a(3) provides that "the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(4) permits a prosecutor to add or delete witnesses from the list of witnesses he or she intends to call at trial only "upon leave of the court and for good cause shown or by stipulation of the parties." See also *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). "CJI2d 5.12 may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused." *Id.*[7] The test regarding whether due diligence or good faith was exercised "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390

[7] We note that this Court in *People v Perez*, 255 Mich App 703; 662 NW2d 446 (2003), had ruled that CJI2d 5.12 was no longer viable in light of the 1986 amendments of MCL 767.40a and *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995). This led to a deletion of CJI2d 5.12 by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions. Our Supreme Court, however, reversed this Court's holding in *Perez* in regard to the continuing viability of CJI2d 5.12, thereby resurrecting the instruction. *Perez, supra*, 469 Mich at 420-421.

(1998)(citations omitted).[8] Due diligence requires an attempt to do everything that is reasonable, not everything that is possible, in order to obtain the presence of a witness. *Eccles, supra* at 391.

This Court reviews for an abuse of discretion a trial court's finding regarding the issue of due diligence and the court's determination on whether a missing-witness instruction should be given. *Id.* at 389. An abuse of discretion occurs when a court's decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but rather the exercise of passion or bias. *People v Yost*, 468 Mich 122, 126-127; 659 NW2d 604 (2003).

We hold that the trial court did not abuse its discretion in finding that the police exercised due diligence in regard to endorsed witnesses Gibson and Jones. Officer Lofton's attempts to locate these witnesses, which included use of the phone, visits to an address, checking with the phone company, and attempts to find the witnesses through an employer, a sister, and the victim, were reasonable, although other search mechanisms could possibly have been used. Minimally, there was no abuse of discretion. Defendant's reliance on *Bean* is misplaced, where there the Supreme Court found a lack of due diligence predicated on the fact that the police had reliable information that the witness and the witness' mother had moved to the Washington D.C. area, yet police made no attempts whatsoever to find a Washington phone number or address, and they did not visit the witness' grandmother's Detroit-area home, where he was known to have lived in the past. *Bean, supra* at 685-690. Here, no such information existed on which police could follow up.

With respect to Stevens, the question of due diligence is a closer call. We conclude, however, that the trial court did not abuse its discretion in finding due diligence. Considering that Stevens had been personally served with a trial subpoena and that Lofton checked on Stevens through her mother before trial, thus showing good faith on the part of the police and prosecution to bring her to trial, and further considering that, in the context of a short trial, extensive search efforts are limited, the numerous phone calls made by Lofton were reasonable and sufficient. Even if arguably the police could have pursued different avenues to locate Stevens, we cannot conclude that the court's decision was so palpably and grossly violative of fact and logic that it evidenced not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but rather the exercise of passion or bias. We note the following comments by our Supreme Court in *People v Jackson*, 467 Mich 272, 279; 650 NW2d 665 (2002), where the Court reversed the trial court's denial of a prosecution request for a continuance, which request was made because a witness did not appear for trial, and where the trial court suggested that the prosecution failed to make diligent efforts to produce the witness for trial:

[8] *Bean* discussed due diligence with respect to police and prosecutorial efforts to procure a witness in the context of determining whether a witness was "unavailable" as envisioned by MRE 804(a)(5).

> The police here successfully served [the witness with] the [trial] subpoena. [The witness] had previously cooperated with the police and prosecution, and they had no reason to expect that his cooperation would not continue. . . . We do not require the prosecutor to assume that every witness is a flight risk who must be monitored to ensure his attendance at trial.

Under the circumstances here, an instruction pursuant to CJI2d 5.12 would not have been appropriate.

B. Deadlocked-Jury Instruction

Defendant argues that the trial court coerced a verdict by telling the jury, which had indicated it was deadlocked, that deliberations could take a month.

The jury began deliberating at 11:15 a.m. on June 18, 2002. The jury later broke for lunch and then subsequently reconvened in the afternoon following lunch. Shortly before 4:00 p.m. on the 18th, the trial court read a note that was received from the jury which indicated that the jurors could not reach agreement on the assault charge. On stipulation of the parties, the trial court sent a message to the jury to simply continue deliberations. The jury was excused around 4:00 p.m. so that a transcript of some testimony could be prepared for the jurors' review the next day pursuant to a jury request. On the 19th, the jury resumed deliberations in the morning and at approximately noon, the jury delivered a note to the court that read:

> Your Honor, we cannot agree, we would like a hung jury. We don't know what we can tell you, but we cannot agree with a charge under count one [assault charge]."

The trial court released the jury for lunch but required them to return afterward and continue deliberating. The court read the standard deadlocked-jury instruction, CJI2d 3.12, but then concluded by adding:

> Now, you haven't even been deliberating a full day. Sometimes it takes an hour, sometimes it takes a day, sometimes it takes a week, sometimes it takes a month. But I'm going to allow you to go to lunch, now, and come back and continue deliberating. And follow the guidelines that I have just given you.

The jury deliberated, following lunch, until about 4:00 p.m. on the 19th without reaching a verdict. The jury returned on the morning of the 20th, deliberated briefly, and reached a verdict at approximately 9:30 a.m.

Any substantial departure from the standard deadlocked-jury instruction found in CJI2d 3.12 is grounds for reversal. *People v Pollick*, 448 Mich 376, 382; 531 NW2d 159 (1995). Whether a deviation from the standard instruction requires reversal depends on whether the deviation renders the instruction unfair because it might have been unduly coercive; coercion is a relevant inquiry. *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). Also relevant is whether the trial court threatened to require the jury to deliberate for an unreasonable length of time. *Id.* The instruction cannot cause a juror to abandon his or her opinion and defer to the majority opinion solely for the sake of reaching an agreement. *Id.* at 314.

Here, there was no objection to the trial court's instruction; therefore, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We conclude that the trial court's instruction was not unduly coercive. The instruction, when read in context, would not cause a juror to abandon his or her opinion and defer to the majority opinion solely for the sake of reaching an agreement, especially considering that the court instructed the jury on CJI2d 3.12. This instruction included the admonition that "none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think, or only for the sake of reaching an agreement." Moreover, the challenged instruction merely reflects an attempt by the trial court to impart to the jury that deliberation is not always a quick process and may take longer under the particular circumstances of a given case. The trial court did not tell the jurors that it intended to or would keep them a month if they could not come to an agreement; there was no judicial threat. The jurors deliberated an entire afternoon and briefly the following morning after the challenged instruction was given, and there is no indication that the jurors felt compelled to render a verdict. There was no plain error affecting defendant's substantial rights.

C. Self-Defense – Persons Acting in Concert

Defendant contends that the trial court erred in denying a request for a jury instruction on self-defense "against more than one person acting in concert."

In general, challenges to jury instructions are reviewed de novo. *People v Heikkinen,* 250 Mich App 322, 327; 646 NW2d 190 (2002). The determination whether a jury instruction is applicable to the facts of the case, however, lies within the sound discretion of the trial court. *Id.* Jury instructions are reviewed for error in their entirety and must not exclude material issues, defenses, and theories if the evidence supports a particular instruction. *Canales, supra* at 574. It is necessary that there be evidence to support the giving of a requested instruction. *People v Johnson,* 171 Mich App 801, 804; 430 NW2d 828 (1988).

We first note that the jury was extensively instructed on the matter of self-defense. However, the trial court declined to instruct on "self-defense against persons acting in concert." CJI2d 7.24 provides:

> A defendant who is attacked by more than one person [or by one person and others helping and encouraging the attacker] has the right to act in self-defense against all of them. [However, before using deadly force against one of the attackers, the defendant must honestly and reasonably believe that (he/she) is in danger of being (killed/seriously injured/forcibly sexually penetrated) by that particular person.] [See also *People v Gregory Johnson,* 112 Mich App 483, 486-487; 316 NW2d 247 (1982).]

There was evidence that defendant was carrying a pipe or pole and that a friend of the victim had a gun. With regard to the victim's friend, the only testimony about him having a gun came from defendant's mother Gwendolyn Gunn. Her testimony is questionable considering that she did not tell police that the friend had a gun. Regardless, aside from stating that the friend had a gun, there was no testimony that he flashed it in an aggressive manner, nor, importantly, that he displayed the gun before defendant used a gun. Moreover, the evidence reflected that defendant fired his weapon at a particular person, i.e., the victim, not others in the

victim's group, and CJI2d 7.24 requires that a defendant, upon using self-defense against a particular person, have an honest and reasonable belief that the particular person is going to kill or injure the defendant. That matter was covered by the self-defense instructions given to the jury. The requested instruction was not supported by the evidence, and the trial court did not err in refusing to give the instruction.

D. Ineffective Assistance of Counsel – Scoring of Offense Variables

Defendant argues that trial counsel was ineffective for failing to challenge two offense variables at sentencing that were incorrectly scored and which effected the minimum guidelines range in regard to the assault conviction. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that is reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that trial counsel was ineffective by agreeing with the prosecutor that offense variable twelve (OV 12) should be scored at 1 point and OV 13 should be scored at 25 points when both should have been scored at zero.

The crimes at issue took place after January 1, 1999. Accordingly, the legislative or statutory sentencing guidelines are applicable. MCL 769.34(2). The initial calculation of the minimum guidelines range resulted in a prior record variable (PRV) score of 92 (level F) and an OV score of 66 (level V), which established the range at 38 to 95 months.[9] At the sentencing

[9] Assault with intent to do great bodily harm less than murder is a class D offense, MCL 777.16d. The range for a first time offender would have been 38 to 76 months, MCL 777.65 (continued…)

hearing, it was resolved that the PRV score should be 57 (level E) and the OV score 81 (level VI). Defense counsel specifically agreed that OVs 12 and 13 were properly scored at 1 point and 25 points respectively. The new scores still resulted in a minimum guidelines range of 38 to 95 months. If OVs 12 and 13 are scored at zero, as argued by defendant, and 26 points are deducted from the total OV score, the OV score would be 55 (level V). Keeping the PRV score at 57 (level E) and taking into consideration an OV score of 55 (level V), the minimum guidelines range would be 34 to 83 months. Defendant was sentenced to 7 to 15 years' imprisonment; therefore, assuming defendant's arguments to be legally sound, the 7-year minimum term (84 months) would constitute an upward departure from the guidelines range requiring substantial and compelling reasons for departure, MCL 769.34(3).

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Elliott,* 215 Mich App 259, 260; 544 NW2d 748 (1996). Statutory interpretation of the guidelines is a question of law that is reviewed de novo. *People v McLaughlin,* 258 Mich App 635, 671; 672 NW2d 860 (2003).

With respect to OV 12, MCL 777.42(1)(f) provides that 1 point is to be scored where "[o]ne contemporaneous felonious criminal act involving any other crime was committed." The statute further provides that a felonious criminal act is contemporaneous if the "act occurred within 24 hours of the sentencing offense" and the "act has not and will not result in a separate conviction." MCL 777.42(2)(a). A violation of the felony-firearm statute is not to be considered. MCL 777.42(2)(b). Although the record shines no light on the matter, the parties and the court may have been proceeding on the belief that the felon-in-possession criminal act supported a score of 1 point. That would not be appropriate, however, because defendant was actually convicted of being a felon in possession of a firearm. In part, this factor appears to require consideration of uncharged contemporaneous felonious criminal acts. See *McLaughlin, supra* at 677. Possibly, there were other uncharged crimes committed by defendant that were committed contemporaneously with the crimes he was charged and convicted upon. Regardless, it is unnecessary for us to interpret the language of MCL 777.42, nor to determine whether there was evidence of a contemporaneous felonious criminal act, because the deduction of 1 point from the OV score does not impact the OV level. Even assuming that OV 13 should have been scored at zero, the addition or subtraction of one more point does not effect the OV level to the extent that the level would be heightened or lowered. Accordingly, because prejudice is lacking, there is no ground to vacate defendant's sentence predicated on ineffective assistance of counsel.

In regard to OV 13, MCL 777.43(1)(b) provides for a score of 25 points where the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Our review of the record and defendant's

(…continued)

(class D grid), but because of defendant's habitual offender status, the range was 38 to 95 months, MCL 777.21(3)(upper limit of minimum range adjusted on the basis of the number of prior felonies). See also West's Michigan Criminal Law and Rules (2002), pp 1364-1365.

criminal history leads us to conclude that trial counsel's performance was not deficient in regard to the scoring of OV 13.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage