

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LLOYD MCGRAW,

Defendant-Appellant.

---

UNPUBLISHED

November 16, 2006

No. 264052

Saginaw Circuit Court

LC No. 03-022840-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant pleaded guilty to breaking and entering a building with intent to commit larceny, MCL 750.110, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 30 years in prison. This Court originally denied defendant's application for leave to appeal, but our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v McGraw*, 473 Mich 877; 701 NW2d 744 (2005). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

**I. FACTS**

In 2003, defendant was charged in the Saginaw Circuit Court with breaking and entering; conspiracy to commit breaking and entering, MCL 750.157a; possession of burglar's tools, MCL 750.116; and third-degree fleeing or eluding, MCL 750.479a(3). Defendant faced similar charges in two other pending cases. On June 3, 2003, defendant pleaded guilty to breaking and entering in each case and admitted his status as an habitual offender in exchange for dismissal of all other charges.

Defendant appeared for sentencing on August 14, 2003. Breaking and entering is a ten-year class D felony subject to the statutory guidelines. The guidelines as scored placed defendant in the E-IV category, for which the minimum sentence range is 29 to 57 months. For an habitual offender fourth, the upper limit is doubled, making the guidelines range 29 to 114 months. Defense counsel stated that the guidelines "appear to be correct," and defendant did not take issue with that statement. The court imposed a minimum sentence of nine years (108 months), which was within the guidelines.

**II. OFFENSE VARIABLE 9**

On appeal, defendant first contends that the trial court erred in scoring ten points for offense variable (OV) 9 of the sentencing guidelines, MCL 777.39. He also contends that defense counsel was ineffective for failing to challenge the 10-point score. We disagree with both claims.

#### A. Standard of Review

Defendant did not raise this issue at or before sentencing; the issue has not been preserved for appeal. MCR 6.429(C); *People v McGuffey*, 251 Mich App 156, 165-166; 649 NW2d 801 (2002). Further, given counsel's statement to the trial court, it appears that the issue has been waived. *People v Carter*, 462 Mich 206, 216, 219-220; 612 NW2d 144 (2000); *People v Witherspoon*, 257 Mich App 329, 333-334; 670 NW2d 434 (2003). Nevertheless, plain error in the scoring of the guidelines can be raised and corrected on appeal, at least where "the trial court's error resulted in a sentence that was not within the appropriate legislative guidelines range." *People v Kimble*, 252 Mich App 269, 276-277 n 5; 651 NW2d 798 (2002), aff'd 470 Mich 305, 312-313 (2004). The issue may also be reviewed under an ineffective assistance of counsel theory. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Relief is not available unless defendant shows that counsel's representation was unreasonable and counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003).

A trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

#### B. Analysis

OV 9 is to be scored at 10 points if two to nine victims were involved. MCL 777.39(1)(c). The instructions state that "each person who was placed in danger of injury or loss of life" is counted as a victim. MCL 777.39(2)(a). The term "injury" refers to physical injury; financial injury alone is not enough. *People v Melton*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 257036, issued July 20, 2006), slip op at 3. Only those persons involved in the criminal transaction itself may be counted as victims, *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994), but they need not be the complainant. Bystanders and persons who intervene after the fact may be considered victims if placed in danger of injury. See, e.g., *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004); *Kimble*, *supra* at 269; *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988). In other words, "where the crimes involved constitute one continuum of conduct as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

"A sentencing court may consider all record evidence before it when calculating the guidelines, including . . . the contents of a presentence investigation report . . . ." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). The presentence report indicates that, in leaving the scene of the crime, defendant was pursued by a

police officer for whom he had failed to stop. He ultimately crashed his car, and he and the two other occupants ran off. Defendant did not challenge the contents of the presentence report as it relates to the description of the offenses and that description discloses that two or more persons were placed in danger of injury during the criminal transaction.<sup>1</sup> Thus, the record supports the trial court's scoring of OV 9.

"To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). Trial counsel is not ineffective for failing to make a meritless objection. *Id.* at 58.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Bill Schuette

---

<sup>1</sup> Although defendant did not plead guilty to fleeing and eluding, the scoring of the guidelines need not be consistent with the ultimate verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003.)