

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALACHI LEE WALKER,

Defendant-Appellant.

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UNPUBLISHED

September 21, 2010

No. 290158

Muskegon Circuit Court

LC No. 08-056225-FH

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of felonious assault, MCL 750.82, one count of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury acquitted defendant of one count of carrying a concealed weapon, MCL 750.227. Defendant was sentenced as an habitual offender, third offense, MCL 769.11,<sup>1</sup> to concurrent terms of 50 to 96 months' imprisonment for the felonious assault conviction, 50 to 120 months' imprisonment for the felon in possession conviction, and consecutively to concurrent terms of two years' imprisonment for each felony-firearm conviction.<sup>2</sup> Defendant appeals as of right. We vacate defendant's sentences and remand for resentencing.

Defendant claims that the trial court made an improper upward departure from the minimum sentencing range recommended by the sentencing guidelines.

The interpretation and application of statutory sentencing guidelines are legal questions that we review de novo. Whether a factor justifying departure from the sentencing guidelines exists is a factual determination for the trial court,

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<sup>1</sup> The judgment of sentence erroneously states that defendant was sentenced as an habitual offender, second offense, and cites MCL 769.10; however, according to the sentencing information report and the sentencing transcript, defendant was sentenced as an habitual offender, third offense, MCL 769.11.

<sup>2</sup> The judgment of sentence does not accurately reflect that defendant's felony-firearm sentences run consecutive to his other sentences.

which we review for clear error. We review the issue of whether a particular factor is objective and verifiable as a matter of law. We review the determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the guidelines for an abuse of discretion. [*People v Lucey*, 287 Mich App 267, 270; \_\_\_\_ NW2d \_\_\_\_ (2010) (internal citations omitted).]

“Under the statutory sentencing guidelines, a trial court is generally required to impose a minimum sentence in accordance with the appropriate sentence range.” *Id.* at 269-270. However, “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). A departure may be appropriate “where the guidelines do not adequately account for important factors legitimately considered at sentencing.” *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992). “A sentencing court may consider the facts underlying uncharged offenses, pending charges, and acquittals” in deciding whether to depart from the guidelines. *Id.* However, a trial court may not base a departure on characteristics of the offense or the offender already considered in scoring the guidelines offense variables absent a finding that the characteristic was given inadequate or disproportionate weight. See *People v Young*, 276 Mich App 446, 454-455; 740 NW2d 347 (2007).

In this case, the recommended minimum sentence range under the legislative guidelines was 14 to 43 months’ imprisonment. The trial court made a seven-month upward departure from the guidelines, which it based on defendant’s conduct after he committed the offenses in this case. Specifically, after assaulting the victim, defendant had returned to the victim’s home with some armed men, where they kicked in the victim’s door, held the victim at gunpoint, and eventually took personal property from the victim’s home. Defendant was not charged for this conduct. The trial court reasoned that the conduct was not taken into consideration during the scoring of the sentencing guidelines offense variables (OVs). However, we conclude that the conduct was taken into account for the purposes of scoring OV 13 (pattern of felonious activity of three or more crimes against a person), and thus, the trial court’s departure on that basis was improper.

MCL 777.43 governs the scoring of OV 13 and provides that a trial court assess 25 points where the sentencing offense “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). The statute further provides, “[f]or 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). In this case, none of defendant’s prior convictions involved a crime against a person; therefore, defendant’s prior criminal record could not have been used for the purpose of scoring OV 13. MCL 777.43(1)(c). In this case, the only crime against a person for which defendant was convicted was felonious assault. MCL 777.16d. At trial, however, evidence showed that defendant committed an uncharged armed robbery, MCL 750.529, about one year before the offenses in this case. An armed robbery is classified as a crime against a person. MCL 777.16y. Further, as stated above, the evidence at trial showed that defendant perpetrated at least two other crimes against a person when he returned to the victim’s house, including first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. See MCL 777.16d; MCL 777.16f. The aforementioned acts had to have been considered in the

scoring of OV 13. There is no other evidence on the record or in defendant's criminal history that supports scoring OV 13 at 25 points. Because the court relied on factors that were already considered by the guidelines and did not articulate that the characteristic was given inadequate weight, we find that the trial court failed to articulate a substantial and compelling reason for departing from the recommended minimum sentencing range. *Young*, 276 Mich App at 454-455; *Lucey*, 287 Mich App at 270. Because the trial court clearly erred and thus abused its discretion in imposing a sentence outside the recommended minimum sentencing range, defendant's sentences must be vacated, and he is entitled to resentencing. *Young*, 276 Mich App at 454-455, 459.

Defendant raises two other sentencing issues on appeal, which we address because they may arise at resentencing. Defendant argues that the trial court erred in scoring OV 19, interference with the administration of justice, at ten points. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, this issue also involves a question of statutory interpretation, which we review de novo. *Id.*

MCL 777.49 governs the scoring of OV 19, and provides in relevant part that the trial court assess ten points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). At sentencing, defendant did not dispute that while he was incarcerated in jail awaiting trial, he wrote a letter to his girlfriend and requested that she contact the victim and offer to pay him if he would refuse to testify. The trial court assessed ten points for OV 19 based on this conduct. Defendant argues that the trial court erred because it considered conduct that occurred after the completion of the sentencing offense. We agree.

In *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009), our Supreme Court held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." In this case, the trial court considered conduct that occurred after the sentencing offense was completed. In addition, there is no language in OV 19 that specifically instructs the sentencing court to consider conduct occurring after the completion of the sentencing offense. *Id.* Thus, pursuant to *McGraw*, OV 19 should have been scored at zero.<sup>3</sup>

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<sup>3</sup> In *People v Smith*, 485 Mich 1133; 780 NW2d 293 (2010), our Supreme Court granted leave to address "whether points may be assessed pursuant to MCL 777.49 (OV 19) for conduct that occurs after the sentencing offense is completed." We note that our Supreme Court's decision in *McGraw*, as currently understood, precludes the trial court from considering defendant's attempt to bribe the victim to not testify at trial when scoring OV 19. However, we also recognize that since *McGraw* precludes this interference with the administration of justice from being accounted for by the sentencing guidelines, such interference might justify an upward departure from the sentencing guidelines. Regardless, it is up to the trial court to determine whether defendant's attempt to bribe the victim to not testify at trial constitutes a substantial and compelling reason justifying an upward departure from the sentencing guidelines, and we express no opinion with regard to this matter.

However, we reject defendant's argument that he is entitled to a separate sentencing information report and recommended minimum sentencing range for both his felonious assault conviction and his felon in possession conviction. Because defendant was subject to concurrent sentences, the trial court was required to prepare a sentencing information report and calculate a recommended minimum sentencing range for the highest-class felony only. MCL 771.14(2)(e)(i)-(iii); MCL 777.21(2). In this case, the felon in possession offense was the highest-class felony. The trial court did not err in preparing a report solely for that offense. See MCL 771.14(2)(e)(i)-(iii); MCL 777.16d; MCL 777.16m; MCL 777.21(2); *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005).

We vacate defendant's sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ Deborah A. Servitto  
/s/ Douglas B. Shapiro