STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323080 Wayne Circuit Court
MARIELLE DEMARIO MARTIN, Defendant-Appellant.	LC No. 14-003752-FC

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, felonious assault, MCL 750.82, and third-degree fleeing and eluding, MCL 257.602a(3)(a).[1] Defendant was sentenced to 7 to 10 ½ years' imprisonment for the carjacking conviction, one to four years' imprisonment for the felonious assault conviction, and one to five years' imprisonment for the third-degree fleeing and eluding conviction. We affirm defendant's convictions, but remand for further proceedings pursuant to *People v Lockridge*, 498 Mich 358; ___ NW2d ___ (2015).

On April 3, 2014, at approximately 7:20 a.m., Earnestina Saucedo arrived at her sister's home located in Detroit, Michigan in order to pick up her nieces for school. Saucedo parked her 2003 Chevrolet Suburban in the driveway of the home. Saucedo then opened the back door of the vehicle because her nieces were too young to open the door themselves. Saucedo's daughter, who rode with Saucedo to the house, got out of the car and went into the house. Saucedo stood outside the front door of her vehicle and waited for the children to come outside.

A few moments later, Saucedo saw a brown Pontiac Grand Am, which was traveling at a high rate of speed, suddenly stop directly in front of the home. Saucedo observed two men exit the vehicle with the hoods of their sweatshirts covering their eyes. Saucedo recognized one of the men as defendant from seeing him around her sister's neighborhood. The men were initially 25 feet away from Saucedo, but began to run at her after they exited the Grand Am. Saucedo

[1] Defendant was also convicted of receiving or concealing stolen property, MCL 750.535(7). However, this conviction was vacated.

fled into her sister's home in order to evade the men. She explained at trial that she was scared and that the two men "weren't going to tell me good morning with they're [sic] hoodies covering their face[s]." From inside the home, Saucedo was able to observe the men drive off.

At approximately 8:00 a.m. that same day, Officer Ian Reinhold of the Detroit Police Department observed the Suburban. Officer Reinhold began to follow the vehicle as it entered westbound I-96, at which point he called for backup because he was in an unmarked vehicle. Officer Jason Tonti, another member of the Detroit Police Department, followed defendant as he drove onto the Southfield Freeway. Officer Tonti was able to pull alongside defendant and was able to identify defendant as the driver despite defendant's attempts to cover his face with his hat. Defendant then attempted to swerve into Officer Tonti's vehicle in order to cause Officer Tonti to crash into a wall. Officer Tonti was able to avoid being struck and continued pursuing defendant. Another officer, Jerry Kuza of the Michigan State Police, joined in the pursuit and was ultimately able to apprehend defendant when the Suburban came to a stop on I-696.

Defendant first argues that there was insufficient evidence to support his carjacking conviction. We disagree.

When reviewing a claim of insufficient evidence, we review the record de novo. *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). We review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

The carjacking statute, MCL 750.529a, provides, in relevant part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

There was sufficient evidence to convict defendant of carjacking. Saucedo testified that she was standing next to the front door of her vehicle waiting for her nieces and daughter to come out of the house so that she could take them to school. She heard a car come to a screeching halt approximately 25 feet from her and observed two men with hoods covering part of their faces begin to run at her. She then ran into the house. When asked why she ran into the house, Saucedo testified that she was scared of the men because they "weren't going to tell me good morning with they're [sic] hoodies covering their face[s]." Defendant then drove off in Saucedo's vehicle. Based on this testimony, defendant's conduct comes within the carjacking statute. See *id*.

Defendant next argues that he is entitled to resentencing because offense variables (OVs) 1, 9, and 16 were improperly scored by the trial court, causing defendant's sentence to fall outside of the appropriate sentencing guidelines range. We agree that the court erred in scoring OV 16, but conclude that the error did not prejudice defendant, we disagree that the court erred in scoring OV 1 and OV 9, and we remand to the trial court for reconsideration of defendant's sentence in light of our Supreme Court's decision in *Lockridge*.

"A challenge to a sentence that is within the guidelines sentence range is preserved when it is raised at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals." *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013). When a challenge to the trial court's scoring of the OVs is unpreserved, it is reviewed for plain error affecting a defendant's substantial rights. *Id*. at 457. With regard to OV 1, defense counsel argued at sentencing that it should be assessed at zero points. He argued that Saucedo's testimony did not establish the presence of a weapon and that defendant's attempts to run Officer Tonti off the road occurred after the carjacking had ended. Therefore, this issue is preserved for appellate review. See *id*. at 456. However, defendant now also raises an issue under *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013), for the first time on appeal with regard to the scoring of OV 1. In order to preserve an *Alleyne* challenge, a defendant must object at sentencing to the scoring of the OVs on that basis. *Lockridge*, 498 Mich at 392. Defendant did not preserve the issue since he failed to raise an *Alleyne* challenge to the scoring of OV 1 at sentencing. See *id*. Because defendant failed to preserve this issue, it will be reviewed for plain error affecting defendant's substantial rights. See *id*.

With regard to OV 9, defense counsel stated at sentencing that both Saucedo and her daughter were considered victims and agreed to the assessment of 10 points for OV 9. On appeal, defendant now argues for the first time that Saucedo's daughter was in the home at the time of the carjacking and, therefore, cannot be counted as a victim for purposes of OV 9. Defendant's challenge to the assessment of 10 points for OV 9 is unpreserved since defendant did not challenge the assessment of 10 points for OV 9 at sentencing. See *Loper*, 299 Mich App at 456.[2] Defendant also failed to challenge the assessment of one point for OV 16. At sentencing, defense counsel argued that five points was an inappropriate assessment for OV 16, but did not challenge the assessment of one point for OV 16. Therefore, defendant's challenge to the assessment of one point for OV 16 is also unpreserved. See *id*.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). However, whether the facts as found by the court are sufficient to meet the scoring conditions prescribed by statute is a legal question to be reviewed de novo. *Id*. A Sixth Amendment challenge presents a question of constitutional law that we review de novo. *Lockridge*, 498 Mich at 373.

---

[2] It should be noted that the trial court's scoring of OV 9 raises the same *Lockridge* issue that is present with the scoring of OV 1. However, defendant does not raise a *Lockridge* issue with regard to the scoring of OV 9. Therefore we do not address it here.

This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to avoid forfeiture of the issue, (1) error must have occurred (2) the error must have been plain, meaning that it was clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id*. (citation omitted). This third requirement is satisfied if the defendant can demonstrate prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. If the defendant satisfies these three requirements, reversal is proper when the plain error resulted in the conviction of an innocent defendant or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763 (citation and quotation marks omitted; alteration in *Carines*).

OV 1 directs the trial court to consider whether there was an aggravated use of a weapon during the commission of the crime. *People v Chelmicki*, 305 Mich App 58, 71; 850 NW2d 612 (2014). MCL 777.31(1)(e) provides that OV 1 is to be assessed at five points if "[a] weapon was displayed or implied." Defendant argues that his attempt to use the vehicle as a weapon to run Officer Tonti off the road should not have been considered when scoring the offense variables for carjacking because the carjacking had ended by the time defendant encountered Officer Tonti. A reading of the carjacking statute, MCL 750.529a, shows that defendant is mistaken. MCL 750.529a(1) states that a carjacking occurs when "A person who in *the course of committing a larceny of a motor vehicle* uses force or violence or the threat of force or violence, or who puts in fear . . . any person lawfully attempting to recover the motor vehicle." (Emphasis added.) MCL 750.529a(2) defines the phrase "in the course of committing a larceny of a motor vehicle" to include "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle." While defendant claims that his flight from the police was a "separate and distinct event" from the commission of the carjacking, the plain language of the statute is clear that they are one and the same. Defendant's attempted escape from the police was a continuation of the carjacking and thus his use of the vehicle as a weapon against Officer Tonti was properly considered in scoring OV 1. See MCL 750.529a(2). Officer Tonti's testimony clearly established that defendant attempted to run him off the road using the stolen vehicle. Therefore, a preponderance of the evidence supported the trial court's finding that a weapon was displayed or implied during the carjacking. See MCL 777.31(1)(e); *Hardy*, 494 Mich at 438.

However, defendant now raises an *Alleyne* issue with regard to the scoring of OV 1. While the trial court scored OV 1 correctly according to the law at the time of sentencing, the Michigan Supreme Court's subsequent decision in *Lockridge* mandates a remand for reconsideration of defendant's sentence. In *Lockridge*, the Court held that Michigan's sentencing guidelines scheme violated the Sixth Amendment of the United States Constitution. *Lockridge*, 498 Mich at 364. The Court was guided by the United States Supreme Court's decision in *Alleyne*, which held that judicial fact-finding that increases the mandatory minimum sentence violates a defendant's Sixth Amendment rights. *Id*. at 372-373. The Court held that Michigan's sentencing guidelines scheme violates the Sixth Amendment because it allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives. *Id*. at 399. In order to correct this constitutional deficiency, the Court held that Michigan's sentencing guidelines are now advisory. *Id*.

In order for a defendant sentenced before July 29, 2015, to be eligible for a remand for reconsideration of his sentence, the Court held that the defendant must first demonstrate that his OV level was calculated using facts not found by a jury beyond a reasonable doubt or admitted by the defendant. *Lockridge*, 498 Mich at 394-395. If the facts admitted by the defendant or found by the jury "were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," then there is no plain error. *Id*. If the defendant can show that his OV level was calculated using facts not found beyond a reasonable doubt by the jury or admitted by the defendant, and if the defendant was not subject to an upward departure sentence, then the defendant is entitled to a remand to the trial court to determine whether the court would have imposed a materially different sentence but for the unconstitutional constraint on the trial court's sentencing discretion. *Id*. at 395.

As stated above, defendant must satisfy the plain error standard regarding this scoring issue. Defendant is able to satisfy the first two elements, namely that an error occurred and that the error was clear or obvious. Because the crime of carjacking does not contain an element of displaying or implying a weapon, this fact was not found beyond a reasonable doubt by the jury. Defendant also never admitted that he displayed or implied a weapon during the crime. Therefore, it is plain that defendant's sentence was erroneously calculated using facts not found beyond a reasonable doubt or admitted by defendant. See *Lockridge*, 498 Mich at 394-395. It is also clear that a reduction of the assessment of points for OV 1 from five points to zero points would alter the minimum sentencing guidelines range. Defendant was assessed a total of 41 OV points and 24 prior record variable (PRV) points. The minimum sentencing guidelines range for the class A felony was 81 to 135 months' imprisonment. See MCL 777.62. A reduction of five OV points would reduce the sentencing guidelines range to 51 to 85 months' imprisonment. See *id*.

A remand for reconsideration of defendant's sentence is necessary to determine whether this impermissible judicial fact-finding prejudiced defendant. See *Lockridge*, 498 Mich at 395. The Court in *Lockridge* held that this requires the trial court to determine "whether the court would have imposed a materially different sentence but for the unconstitutional constraint" on its sentencing discretion. *Id*. at 398. If the court would have imposed a materially different sentence, then the court shall order resentencing. *Id*. at 397. Because defendant's OV level was calculated using facts beyond those found by the jury or admitted by defendant, and a corresponding reduction in defendant's OV score would change the guidelines range, defendant is entitled to a remand to determine whether resentencing is required. *Id*. at 394-395.

The trial court properly assessed 10 points for OV 9. MCL 777.39(1)(c) provides that 10 points are assessed for OV 9 when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(2)(a) provides, "Count each person who was placed in danger of physical injury or loss of life or property as a victim." Officer Tonti was placed in danger of physical injury or loss of life when defendant swerved the Suburban toward Officer Tonti's police car on the freeway. See MCL 777.39(2)(a). As explained above, the carjacking was not complete at the time that defendant swerved the Suburban toward Officer Tonti's vehicle. See *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009) (noting that the offense variables must be scored with regard to conduct that occurred during the commission of the sentencing offense, unless the

offense variable provides otherwise). Therefore, Officer Tonti was a victim under OV 9, and the trial court properly assessed 10 points for OV 9. See MCL 777.39(1)(c).

The trial court erred when it assessed one point for OV 16, but the error was not outcome determinative. OV 16 relates to property that was obtained, damaged, lost, or destroyed during the crime. See MCL 777.46(1). A trial court assesses one point for OV 16 if the property had a value of $200 or more, but less than $1,000. MCL 777.46(1)(d). If the property was damaged during the crime, then the trial court considers the amount needed to restore the property to its preoffense condition. MCL 777.46(2)(b). The Michigan Supreme Court in *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), held that "[w]hen the sentencing offense is a 'crime against a person,' . . . OV 16 is to be scored only where the sentencing offense is home invasion or attempted home invasion." MCL 777.16y specifically classifies carjacking as a crime against a person. Therefore, since carjacking is not home invasion or attempted home invasion, the trial court should have assessed OV 16 at zero points. See *id*. at 309. However, defendant cannot show that the error affected the outcome of the lower court proceedings. The sentencing guidelines range was 81 to 135 months' imprisonment for the class A felony. See MCL 777.62. Even if the trial court correctly assessed OV 16 at zero points, defendant would have been assessed a total of 40 OV points, still leaving him in the 81 to 135 months' imprisonment sentencing guidelines range. See *id*. Therefore, defendant cannot satisfy the plain error standard with regard to OV 16. See *Carines*, 460 Mich at 763.

We affirm defendant's convictions, but remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher