STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2016
v	No. 325307 Livingston Circuit Court
JAMES ROBERT HAZELMAN, Defendant-Appellant.	LC No. 14-021962-FH

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Defendant, James Robert Hazelman, pleaded guilty to reckless driving causing serious impairment of a body function, MCL 257.626(3), operating a motor vehicle while intoxicated causing injury (OWI-Injury), MCL 257.625(5), and third-offense operating while intoxicated (OWI), MCL 257.625(9). At sentencing, the prosecution requested that defendant's reckless driving conviction be dismissed because it was charged as an alternative offense, and the trial court granted that request. The trial court sentenced defendant to concurrent prison terms of six to 15 years for each remaining offense. We eventually granted defendant's application for leave to appeal. *People v Hazelman*, unpublished order of the Court of Appeals, entered May 18, 2014 (Docket No. 325307). We now affirm in part, vacate in part, and remand this matter for resentencing.

This case arises out of a motor vehicle collision that occurred on April 20, 2014. As part of his plea, defendant admitted that on that date, while under the influence of Alprazolam and Adderall, he operated a motor vehicle in a manner that was in willful and wanton disregard for the safety of others. Specifically, he admitted that while driving, he allowed his vehicle to cross the center line and strike the victim, who was driving a motorcycle. The victim survived but sustained serious leg injuries. Defendant also admitted having two prior OWI convictions and at least three prior felony convictions. As part of his plea agreement, defendant was to be sentenced to 45 months to 15 years in prison. During the sentencing hearing, however, after it had an opportunity to review the presentence investigation report, the trial court declined to sentence defendant according to the terms of the plea agreement in light of the facts and circumstances of this case, defendant's criminal history, and several other factors. Defendant declined the trial court's invitation to withdraw his plea and agreed to be sentenced. The trial court then sentenced defendant as described above. This appeal followed.

On appeal, defendant raises a variety of arguments relating to double jeopardy, offense variable (OV) scoring, cruel and unusual punishment, and restitution. Because each argument was not raised before the trial court, each is unpreserved for appellate review. *People v Cameron*, 291 Mich App 599, 617; 807 NW2d 371 (2011). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. Even if a defendant satisfies these requirements, however, reversal is discretionary. *Id*. Reversal should be granted only when the plain error resulted in the conviction of an actually innocent defendant or when it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

Defendant first argues that his third-offense OWI and OWI-injury convictions violate the constitutional protections against double jeopardy. This Court, as well as the prosecution, agrees in light of our Supreme Court's decision in *People v Miller*, 498 Mich 13, 20-26; 869 NW2d 204 (2015). Thus, in this circumstance, the appropriate remedy is to vacate the third-offense OWI conviction. See *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). While this will impact defendant's prior record variable (PRV) score, it will not impact his PRV level. Thus, he is not entitled to resentencing. See *People v Fransisco*, 474 Mich 82, 89, n 8; 711 NW2d 44 (2006). However, for the reasons set forth below, resentencing is nevertheless required.

Next, defendant argues that he is entitled to resentencing because the trial court erroneously scored several OVs and did so using judicially found facts. We partially agree. First, as it relates to judicial factfinding, defendant is not entitled to relief. In *People v Lockridge*, 498 Mich 358, 394-395; 870 NW2d 502 (2015), our Supreme Court explained that "there is no plain error and no further inquiry is required" in "cases in which (1) facts admitted by the defendant and (2) facts 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." Here, the trial court explicitly asked defendant if the information included in the presentence investigation report was factually accurate and if it could rely on that information. Defendant answered affirmatively: "Yes your Honor." Thus, defendant is precluded from contesting the factual accuracy of and the trial court's reliance on the presentence investigation report on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992).

Second, as it relates to OV scoring, defendant specifically challenges the scoring of OVs 1, 2, 13, and 19. As it relates to OVs 1 and 2, the trial court's scoring of these offense variables, ten points and one point respectively, was based on the premise that defendant's vehicle constituted a weapon. MCL 777.31(1)(e); MCL 777.32(1)(e). We conclude that this premise is erroneous. In *People v Ball*, 297 Mich App 121, 125; 823 NW2d 150 (2012), recognizing that the OV-scoring statutes do not define "weapon," we turned to the dictionary definition, which, in pertinent part, defines a "weapon" as "any instrument or device used for attack or defense in a fight or combat." Thus, we concluded that because the heroin in *Ball* was not used to "attack the victim," it was not a weapon for OV scoring. *Id*. at 126. The same is true here. While defendant admittedly operated his motor vehicle with a willful and wanton disregard for others, the record is void of any evidence that he used his vehicle "for attack or defense in a fight or combat" or in any other related matter. Instead, it was used in "an ordinary, albeit illegal," manner. *Id*. Thus,

the trial court erroneously scored OV 1 at ten points and OV 2 at one point. Furthermore, defendant and the prosecution agree that OV 13 should have been scored at ten, not 25, points. See MCL 777.43(1)(c)-(d). Finally, OV 19 was erroneously scored at ten points. The record reflects that it was scored at 19 points because defendant sat on the "sidelines" smoking after the incident. It does not reflect, however, any attempt to interfere or actual interference by defendant with the administration of justice. MCL 777.49; see also *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013) (defining the phrase "interfere with the administration of justice" as "to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process."). In light of these scoring errors, defendant's OV level would be reduced, and his guideline range would change. Thus, resentencing is required. *Fransisco*, 474 Mich at 88-91.

Defendant also argues that his sentence constitutes cruel and unusual punishment. While addressing this argument is largely unnecessary in light of the need for resentencing, we will briefly note our disagreement. Defendant claims that his sentence constitutes cruel "and/or" unusual punishment because the trial court failed to adequately consider his "rehabilitative potential." The record plainly indicates otherwise. The trial court, in choosing not to abide by the terms of the plea agreement, expressly and thoroughly considered a variety of factors, but it paid especially close attention to the facts and circumstances of the incident and defendant's prior record. While defendant complains that the trial court "gave no consideration as to how the sentence(s) imposed would rehabilitate the defendant," he conveniently overlooks his status as a fourth-offense habitual offender with, according to the presentence investigation report that he agreed was factually accurate, nine prior misdemeanors and six prior felonies (including two OWI convictions). Additionally, his claim that the four factors discussed in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), "must all be considered" under *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990), is false. In *Schultz*, 435 Mich at 531, our Supreme Court stated that there are "[f]our factors [that] *may* be taken into consideration[.]" (Emphasis added.) "Must" and "may" have different meanings. Finally, even if we ignore all of the above, defendant's sentence is within the applicable guidelines range (subject to the scoring errors discussed above) and, therefore, presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant does nothing to overcome this presumption. Thus, for several reasons, defendant's sentence does not constitute cruel and unusual punishment.

Finally, defendant argues that the trial court erred in ordering $6,000 in restitution as well as that trial counsel was ineffective in failing to object to the same.[1] Again, we disagree. "In determining the amount of restitution to order . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). "A judge is entitled to rely

[1] It is important to note that the only amount challenged by defendant on appeal is the $6,000 included in the judgment of sentence. At sentencing, it was clear that this amount was "the minimum," and the parties agreed to determine the total amount of restitution at a later date. They did so, eventually stipulating to an order providing for an amount of restitution substantially greater than $6,000 for the victim's lost compensation. That amount is not challenged.

on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Here, defendant did not effectively challenge the information included in the presentence investigation report. Conversely, he expressly agreed that it was factually correct and that the trial court could rely on it. Defense counsel further stated as follows: "My client assures me that he has no objection to restitution in this matter that are in any way reasonable." The presentence report, which defendant expressly agreed was factually accurate and could be relied upon, unambiguously provided that the victim incurred $6,000 in damages to his motorcycle. Thus, any objection to the amount of restitution was waived. *Carter*, 462 Mich at 214.

Relatedly, we also reject defendant's argument that trial counsel was ineffective in failing to object to this amount. To establish ineffective assistance of counsel, a defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (citations and internal quotation marks omitted). Because this issue was not properly raised before the trial court, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). We find none warranting relief. While defendant claims that challenging the amount would have been risk free, that argument relies entirely on hindsight. *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008), quoting *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001) (" 'This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.' "). Further, defendant's explicit agreement that the presentence investigation report was factually accurate and could be relied upon undermines his argument. *Carter*, 462 Mich at 214; see also *People v Serr*, 73 Mich App 19, 30; 250 NW2d 535 (1976). Finally, defendant does not deny the fact that, as counsel indicated, he "assure[d] [counsel] that he has no objection to the restitution amounts," and it is unclear why counsel would nevertheless object in light of defendant's assurances. In fact, defendant does not give any indication as to why the $6,000 amount was inappropriate. In short, the record does not reflect that trial counsel's performance fell below an objective standard of reasonableness or that, but for counsel's performance, a different result would have been reasonably probable. *Douglas*, 496 Mich at 592. Thus, defendant has not established ineffective assistance of counsel.

We affirm in part, vacate in part, and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien