STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 328481 St. Joseph Circuit Court
BENJAMIN J. DODSON, Defendant-Appellant.	LC No. 14-019041-FC

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted by pleading no contest to unarmed robbery, MCL 750.530. Defendant was sentenced to 53 months to 15 years' imprisonment with credit for 106 days served. Defendant now appeals by leave granted. We affirm.

Defendant first claims that the trial court improperly scored offense variable (OV) 1, OV 4, and OV 19. We disagree.

Defendant preserved his OV challenges by objecting at sentencing to the points assessed for these three OVs, based on the same grounds he now argues on appeal. *People v Sours*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 326291, issued May 10, 2016); slip op at 1. Issues that involve "the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq*. . . . are legal questions that this Court reviews de novo." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). "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. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citation omitted). When calculating a defendant's guidelines range, the sentencing court "may consider all record evidence before it," which "include[es], but [is] not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (quotation marks and citation omitted).

With respect to OV 1, defendant argues that the trial court improperly assessed 15 points. The instructions for scoring OV 1 are located in MCL 777.31, which provides in relevant part:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon..... 15 points
>
> * * *
>
> (e) A weapon was displayed or implied..... 5 points
>
> (f) No aggravated use of a weapon occurred..... 0 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 1:
>
> * * *
>
> (b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.

In *People v Harverson*, 291 Mich App 171, 174, 182; 804 NW2d 757 (2010), this Court found that the trial court did not err by assessing 15 points for OV 1, although there was conflicting testimony about whether any of the robbers pointed a gun at the robbery victim. In *Harverson*, the defendant and two other individuals attacked the victim in his driveway and took the victim's sunglasses. *Id*. at 174. The defendant was charged with armed robbery, but was only convicted of unarmed robbery. *Id*. at 173, 175. On appeal, the defendant challenged his 15-point score for OV 1, arguing "that he was not convicted of possessing or pointing a firearm toward the victim and because there was no evidence that any other offender was assigned points for the use of weapons in this case." *Id*. at 181-182. In upholding the trial court's scoring decision, this Court reasoned that there was evidence in the PSIR that the defendant pointed a gun at the victim's face during the robbery, and two eyewitnesses testified that the defendant pointed a gun at the victim during the robbery. *Id*. at 174, 179, 181, 182. The *Harverson* Court did not address the existence of conflicting testimony, mentioned elsewhere in the opinion, that a gun was not pointed at the victim. See *id*. at 182. Another witness, who apparently was one of the participants in the robbery, testified that a gun was "passed" to the defendant by the third individual and that neither that individual nor the defendant pointed a gun at the victim. *Id*. at 174. The defendant testified that he never possessed the gun and that somebody else pulled out the gun during the incident. *Id*. at 174. The *Harverson* Court found that assessing 15 points for OV 1 was not erroneous. *Id*. at 182.

Here, the presentence investigation report (PSIR) indicated that Kristen Borst told police that the two men were pulling guns from their waistbands as they came into the pharmacy during the attempted robbery, although Borst testified at the preliminary examination that she only saw one handgun. Borst also testified that the individual holding the gun was not pointing it at her or Pami Thaxton. Borst testified again at a hearing on December 23, 2014, that she only saw one of the defendants holding a handgun and that it was not pointed at her. The PSIR also indicated that Thaxton told police that the individuals' hands were up "like they had guns," but she never saw a gun. However, Thaxton testified at the preliminary examination that one individual was close to her and Borst and that the individual was pointing a gun at them. Thaxton also saw a second individual by the door, pointing a gun. She testified that she was certain that she saw the guns and that her recollection was better at the preliminary examination than when she initially spoke to police because she was "in a more stable presence of mind" at the time of the preliminary examination. The police found an AK-47 and two handguns inside the van that defendant was driving when he and David Brandys were apprehended. The fact that Borst did not see the individual point a gun at anyone does not mean that Thaxton could not have seen one of the individuals point a gun at her and Borst. Thus, the trial court's finding that a gun was pointed at a victim was supported by a preponderance of the evidence and was not clearly erroneous, despite the existence of some conflicting evidence. *Hardy*, 494 Mich at 438; see also *Harverson*, 291 Mich App at 182. Based on its finding that a "firearm was pointed at or toward a victim," the trial court did not err by assessing 15 points for OV 1. MCL 777.31(1)(c); *Hardy*, 494 Mich at 438.

Moreover, while Thaxton testified that both robbers were pointing guns, it is not necessary to establish whether defendant or Brandys was actually pointing the gun. Like defendant, Brandys pleaded guilty to unarmed robbery as part of a plea agreement. Multiple offenders convicted of the same crime must be assessed the same number of points under OV 1. MCL 777.31(2)(b); see also *Morson*, 471 Mich at 260 (holding that "the plain language" of MCL 777.31(2)(b) "requires the sentencing court to assess the same number of points to multiple offenders").

Defendant next asserts that the trial court improperly assessed 10 points rather than zero points for OV 4, psychological injury to a victim. MCL 777.34 provides the instructions for scoring OV 4. The statute states:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim ……. 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim ……... 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

A sentencing court "properly assesses 10 points when a victim suffers a serious psychological injury that might require professional treatment." *People v Lockett*, 295 Mich App 165, 182-183; 814 NW2d 295 (2012), citing MCL 777.34(2). The court "need not find that the victim actually sought professional treatment," *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009), and "[t]here must be some evidence of psychological injury on the record to justify a 10-point score," *Lockett*, 295 Mich App at 183. "[T]he victim's expression of fearfulness is enough to satisfy the statute." *Davenport*, 286 Mich App at 200. "The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). This Court has previously upheld the assessment of 10 points for OV 4 where there was evidence that the bank teller who was confronted during a bank robbery "was nervous and scared during the robbery," was concerned that the defendant would harm her during the robbery because there were no protective barriers and she did not know if the defendant had a gun, suffered from sleepless nights, and constantly feared being robbed by her customers. *People v Earl*, 297 Mich App 104, 109-110; 822 NW2d 271 (2012). In contrast, this Court has found that the assessment of 10 points for OV 4 was erroneous where the PSIR indicated that "the police observed that the cashier was 'visibly shaken' when they arrived at the scene" of the robbery, but this Court's "review of the entire record, including the preliminary examination, sentencing, plea transcripts, and PSIR, fail[ed] to disclose *any other information or evidence* regarding or touching on the cashier's psychological state as a result of the robbery." *People v McChester*, 310 Mich App 354, 356; 873 NW2d 646 (2015) (emphasis added).

The rules of evidence do not apply during sentencing proceedings. MRE 1101(b)(3). Due process does not require that the rules of evidence be applied to sentencing proceedings. See *People v Uphaus*, 278 Mich App 174, 184; 748 NW2d 899 (2008). "Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence." *Id*. However, "the defendant must be afforded an adequate opportunity to rebut any matter that he believes to be inaccurate." *Id*. (quotation marks and citation omitted).

Here, Borst testified during the proceedings on December 23, 2014, that she "experience[s] anxiety" and has "had some sleepless nights" as a direct result of the robbery. Borst had not experienced anxiety or been treated for anxiety before the robbery occurred. Additionally, the PSIR indicated that Chief Mark Brinkert observed Borst to be "very upset and visibly shaken" by the incident when he arrived at the pharmacy shortly after the robbery. This evidence was sufficient to show that Borst incurred a serious psychological injury requiring professional treatment as a result of the robbery. See *Earl*, 297 Mich App at 109-110; *Davenport*, 286 Mich App at 200; *Armstrong*, 305 Mich App at 247.

There was also evidence that Thaxton suffered a serious psychological injury. Borst also testified during the December 23, 2014 proceedings that Thaxton went to the emergency room, sought counseling, was on medication, and was unable to return to work at the pharmacy as a result of the robbery. During the preliminary examination, Borst testified that Thaxton "was a wreck" and "very, very scared" when she went to press the panic button during the robbery, and Chief Brinkert testified that he was not able to speak with Thaxton until five days after the robbery because she was having a hard time coping with the incident. Finally, although the

prosecution is not required to show that professional treatment was actually sought, the prosecution submitted a request for restitution showing payments made by Grange Insurance for psychological services on behalf of Thaxton as the claimant. Because the rules of evidence do not apply during sentencing, the trial court was not prevented from considering evidence that might have been inadmissible at trial. *Uphaus*, 278 Mich App at 184. Moreover, defendant cross examined Borst at the December 23 hearing and had "an adequate opportunity to rebut" this evidence. *Id*. This evidence is sufficient to show that Thaxton suffered a serious psychological injury as a result of the robbery for which she actually sought professional treatment. *Earl*, 297 Mich App at 109-110; *Davenport*, 286 Mich App at 200; *Armstrong*, 305 Mich App at 247.

Thus, a preponderance of the evidence supported a finding that both Borst and Thaxton suffered serious psychological injury requiring professional treatment, and the trial court did not clearly err by assessing 10 points for OV 4. MCL 777.34; *Hardy*, 494 Mich at 438.

Defendant next challenges the trial court's assessment of 10 points for OV 19, interference with the administration of justice. MCL 777.49 provides the instructions for scoring OV 19 and states in relevant part:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice ..... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force ..... 0 points

"Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). This Court has held that "the plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). "[T]he phrase 'interfered with or attempted to interfere with the administration of justice' encompasses more than just the actual judicial process," and a defendant's conduct "does not have to necessarily rise to the level of a chargeable offense" to satisfy the OV 19 statute. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). "The investigation of crime is critical to the administration of justice," and giving a false name to a police officer during a traffic stop has been held to constitute interference with the administration of justice. *Id*. at 284-285, 288. This Court has also stated that "fleeing from

police contrary to an order to freeze" has been held to be an interference or attempted interference with the administration of justice. *Hershey*, 303 Mich App at 343-344.

In *People v Ratcliff*, 299 Mich App 625, 626-627, 633; 831 NW2d 474 (2013), vacated in part on other grounds, app dis in part 495 Mich 876 (2013), this Court held that 10 points were properly assessed for OV 19 where the defendant fled from the police both by car and on foot. In *Ratcliff*, the defendant and his accomplice robbed a store and stole a car. *Id*. at 626-627. The police later saw a car that fit the description of the stolen car, went up to the car, and said, "Freeze." *Id*. at 627, 633. The defendant was in the passenger seat, and his accomplice was driving. *Id*. at 627. The accomplice drove away. *Id*. at 633. The police tried to pull the car over, turning on their lights and sirens. *Id*. at 627, 633. The accomplice accelerated in response. *Id*. at 627. Eventually, the car stopped, and both the defendant and his accomplice got out of the car and tried to run away from the police. *Id*. at 627, 633. The police quickly apprehended both individuals. *Id*. at 627.

In upholding the trial court's scoring decision, the *Ratcliff* Court noted that 10 points are properly assessed for OV 19 if a defendant "refused to pull his car over when a police officer activated his vehicle's lights and sirens and instead attempted to escape, first by car and then on foot." *Id*. at 632. The Court reasoned that "[f]leeing from the police can easily become 'interference with the administration of justice' particularly where . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens. *Id*. at 633. The Court also emphasized that the defendant ignored a police order to freeze. *Id*. The Court noted that the defendant could not be held responsible for his accomplice's decisions, but the defendant knew that he had been ordered to stop and nonetheless tried to escape on foot once the car stopped. *Id*.

Here, the evidence showed that Chief Brinkert was following a van, and he suspected that the individuals who had attempted to rob the pharmacy were inside because he saw them enter the van after running from the direction of the pharmacy. Once backup arrived, Chief Brinkert turned on his emergency lights and siren in his marked police car, and the van sped up instead of pulling over. Chief Brinkert also shined his spotlight in the back windows and driver's window of the van, and there was no reaction. Officer Chauncey was following behind Chief Brinkert and activated the emergency lights on his marked police car as well. Other vehicles on the road clearly understood the meaning of the signals because they pulled over to the side of the road. Defendant only stopped the van after another officer approached the van from the opposite direction. There was testimony that defendant did not stop the van until he drove for a quarter mile to 1¼ miles or approximately 2½ minutes after the police turned on their lights and sirens. This evidence supports a finding that there was "an effective command for the vehicle to stop, in the form of the police activating their lights and sirens" and that defendant disregarded this command by accelerating and refusing to stop for a significant time. *Ratcliff*, 299 Mich App at 633. Regardless of the precise distance defendant travelled while fleeing the police, it is undisputed that he failed to stop immediately. Defendant's conduct hampered the ability of law enforcement to investigate crime. *Hershey*, 303 Mich App at 343; *Barbee*, 470 Mich at 288. Thus, a preponderance of the evidence supported the conclusion that defendant interfered or attempted to interfere with the administration of justice, and the trial court did not clearly err by assessing 10 points for OV 19. MCL 777.49(c); *Hardy*, 494 Mich at 438.

While defendant appears to argue that this conduct should not be used as a basis for assessing points under OV 19 because it relates to the separate offense of fleeing and eluding, defendant is simply incorrect. Nothing in MCL 777.49 absolutely prevents a trial court from considering conduct that could also form the basis of a separate criminal offense, whether or not the defendant is actually charged or convicted for that separate offense. See *People v Smith*, 488 Mich 193, 196-197, 202; 793 NW2d 666 (2010) (upholding the scoring of OV 19 where the defendant threatened a witness to prevent her from speaking with the police and this conduct resulted both in the defendant's being convicted of witness intimidation and being assessed points under OV 19 on his manslaughter conviction).

Because the trial court did not clearly err by scoring OV 1, OV 4, and OV 19 as it did, defendant was not sentenced on the basis of inaccurate information and is not entitled to resentencing. "[I]f a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). Here, defendant's 53-month minimum sentence was within the guidelines range of 36 to 71 months, and as previously noted, defendant's sentence was not based on inaccurate information. Therefore, defendant's sentence must be affirmed. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10)[1] ("If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence.").

Next, defendant has affirmatively waived any potential *Lockridge*[2] issue on appeal because defendant specifically requested "resentencing rather than a *Crosby*[3]*/Lockridge* remand." "Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id*. (quotation marks and citation omitted). Here, defendant was clearly aware of the holding in *Lockridge* and the relief available under *Lockridge*, and defendant chose to decline that relief. Thus, the issue is waived. *Carter*, 462 Mich at 215.

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[1] MCL 769.34(10) provides in relevant part:

> If a minimum sentence is *within the appropriate guidelines sentence range*, the court of appeals *shall affirm that sentence and shall not remand for resentencing* absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. [Emphasis added.]

[2] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

[3] *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

Moreover, in *People v Biddles*, ___ Mich App ___, ___; ___ NW2d___ (Docket No. 326140, issued June 30, 2016); slip op at 4, a panel of this Court recently clarified the distinction between (1) "a challenge regarding the adequacy of the evidence supporting the court's scoring of the offense variables," which the Court termed an "evidentiary challenge," and (2) "a constitutional argument under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), . . . contending that the trial court engaged in impermissible judicial fact-finding in regard to the OVs," which the Court termed a "constitutional challenge." The *Biddles* Court stated that each type of challenge "has its own distinct remedy" and explained that "a *Crosby* remand [i.e., the remedy for a successful constitutional challenge under *Lockridge*] results in *the possibility* of resentencing, whereas, in the context of a successful evidentiary challenge, resentencing is actually ordered by the appellate court [i.e., the *Francisco* remedy]." *Id*. at ___; slip op at 4, 5. Most relevant to the instant case, the Court noted:

> The issuance of *Lockridge* did not result in depriving a defendant from presenting a traditional evidentiary challenge to a trial court's scoring of the guidelines, even if the scoring was also constitutionally problematic under *Lockridge*; a defendant would be free to forgo the constitutional challenge or embrace it in conjunction with the evidentiary challenge. [*Id*. at ___; slip op at 7.]

Here, defendant clearly chose to make an evidentiary challenge to the scoring of his OVs, did not make any argument for relief under *Lockridge*, and affirmatively waived any potential *Lockridge* issue. Thus, defendant unmistakably chose to forgo pursuing a constitutional challenge to his sentence under *Lockridge*. See *Biddles*, ___ Mich App at ___; slip op at 7.

Next, although defendant does not state his argument very clearly or precisely, it appears that defendant argues that all sentences should be automatically reviewed for reasonableness using the proportionality standard of review from *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and that his within-guidelines sentence is unreasonable. In *Lockridge*, 498 Mich at 391-392, 399, the Michigan Supreme Court held that Michigan's sentencing guidelines are advisory and that a sentencing court is no longer required to articulate substantial and compelling reasons for departing from the guidelines range. Sentencing courts are still required to "consult the applicable guidelines range and take it into account when imposing a sentence," and "[a] sentence *that departs* from the applicable guidelines range *will be reviewed by an appellate court for reasonableness*." *Id*. at 392 (emphasis added). The Court only referenced departure sentences and did not declare a rule that all sentences are subject to review for reasonableness. Thus, defendant is not entitled to have his within-guidelines sentence reviewed for reasonableness. Rather, it must be affirmed pursuant to MCL 769.34(10), as noted earlier. See *Babcock*, 469 Mich at 261. "*Lockridge* did not alter or diminish MCL 769.34(10)." *People v Schrauben*, ___ Mich App ___ n 1, ___; ___NW2d___ (Docket No. 323170, issued January 26, 2016); slip op at 6 n 1.

Next, defendant asserts in a footnote that this Court should find the first sentence of MCL 769.34(10) to be invalid. This issue was not raised in defendant's statement of questions presented and therefore need not be addressed because it was not properly presented for review. MCR 7.212(C)(5); *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008) (in declining to address an issue, this Court stated, "This issue is not properly presented for review because it has not been raised in defendant's statement of the questions presented.").

Next, defendant argues that the restitution ordered by the trial court was erroneous because the amount was not proven with reasonable certainty and because it was not established that Thaxton's inability to work and need for psychological treatment were directly caused by defendant's offense. We disagree.

Defendant did not object in the lower court to the restitution order, and this issue is therefore unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This Court ordinarily "review[s] a court's calculation of a restitution amount for an abuse of discretion and its factual findings for clear error." *People v Corbin*, 312 Mich App 352, 361; 880 NW2d 2 (2015) (citation omitted). "But when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo as a question of law." *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009). "A trial court may abuse its discretion by blurring the distinction between a civil remedy for damages and the criminal penalty of restitution." *Corbin*, 312 Mich App at 361. However, unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). On plain-error review, the defendant has the burden to show (1) "error"; (2) that was "plain," meaning "clear or obvious"; (3) and that affected substantial rights or caused prejudice, meaning "that the error affected the outcome of the lower court proceedings." *Id*. at 763. "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse," but "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 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; last alteration in original).

Both the Michigan Constitution and statutory authority provide crime victims with a right to restitution. *People v Bell*, 276 Mich App 342, 346; 741 NW2d 57 (2007). As stated in the Michigan Constitution, "Crime victims, as defined by law, shall have . . . [t]he right to restitution." Const 1963, art 1, § 24. MCL 780.766, which is part of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., provides in relevant part:

> (1) As used in this section only, "victim" means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. As used in subsections (2), (3), (6), (8), (9), and (13) only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime.
>
> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. For an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, the court shall order the restitution required under this section.

* * *

(4) If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

* * *

(c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime.

* * *

(8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action. [MCL 780.766.]

Michigan also has a general restitution statute, found in MCL 769.1a, which is virtually identical to the above provision of the CVRA in all material respects relevant to this appeal. See MCL 769.1a(1)(b), (2), (4), (8).

With respect to determining the amount of restitution, MCL 780.767 states:

(1) In determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense.

(2) The court may order the probation officer to obtain information pertaining to the amounts of loss described in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs.

> (3) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in subsection (1).
>
> (4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

A court may order that restitution be paid to "any individual, government entity, or business or legal entity that compensates the victim for losses arising out of a defendant's criminal conduct," such as an insurance company that paid medical expenses and lost wages for the victim. *People v Byard*, 265 Mich App 510, 512; 696 NW2d 783 (2005), citing MCL 780.766(8); see also MCL 769.1a(8). Under the CRVA, "the standard to be applied when calculating a restitution amount is simply one of reasonableness." *Corbin*, 312 Mich App at 365. The statute does not permit restitution for "speculative or conjectural losses," but "[w]here the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met." *Id*. "A restitution amount, if contested, must be proven by a preponderance of the evidence." *Byard*, 265 Mich App at 513, citing MCL 780.767(4).

In addition, "MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." *People v McKinley*, 496 Mich 410, 421; 852 NW2d 770 (2014) (holding that "[b]ecause MCL 780.766(2) does not authorize the assessment of restitution based on uncharged conduct, the trial court erred by ordering the defendant to pay $94,431 in restitution to the victims of air conditioner thefts attributed to the defendant by his accomplice but not charged by the prosecution"). "The CVRA . . . permits an award only for losses factually and proximately caused by the defendant's offense . . . ." *Corbin*, 312 Mich App at 369. " 'In determining whether a defendant's conduct is a factual cause of the result, one must ask, "but for" the defendant's conduct, would the result have occurred?' " *Id*. (citation omitted). " 'For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions.' " *Id*. (citation omitted).

In *Corbin*, this Court found that the trial court's order of restitution in an amount equal to the " 'actual' professional services rendered" to a victim in the form of psychological therapy was proper. *Corbin*, 312 Mich App at 356, 358, 366; see also MCL 780.766(4)(a); MCL 769.1a(4)(a). The actual cost of the victim's psychological treatment was shown by evidence of the amount that had already been paid to the therapist. *Id*. at 358. However, the *Corbin* Court vacated the trial court's award of restitution for "future therapy costs, future medication expenses, future psychiatric services, and lost wages" because "[t]he sums awarded for these categories of loss were not 'reasonably determined,' and do not correspond to amounts 'reasonably expected to be incurred' by [the victim]." *Id*. at 371. The trial court's restitution award for future treatment costs was based on the therapist's testimony in which he estimated the type, length, and costs of the future treatment that the victim would require to recover from the defendant's abuse. *Id*. at 357-358. The *Corbin* Court noted that the therapist conceded that these numbers "were conjectural." *Id*. at 366. The Court concluded that "[a]n informed guess as to a

victim's future psychological therapy costs does not equate with an amount 'reasonably expected to be incurred.' " *Id*. at 368.

Additionally, the Court found that the therapist's testimony did not establish causation for the future costs because his estimates were insufficient to establish that the restitution awarded for those costs was based on the direct harm that the victim suffered as a result of the defendant's crime. *Id*. at 368-370. The Court also found that the restitution awarded for lost wages was similarly based on estimates and assumptions rather than calculations of "after-tax income loss, as required by the statute." *Id*. at 371. This Court remanded "for correction of the order to reflect the amount paid for psychological therapy, $1,785." *Id*.

Here, the court ordered restitution in the amount of $6,322.67. The prosecution submitted a Request for Restitution document showing payments made by Grange Insurance totaling $6,322.67 for Thaxton's unemployment compensation that was incurred beginning on December 12, 2013, the day after the incident, and medical payments for services that were received by Thaxton between December 11, 2013 and July 2, 2014 (Request for Restitution, cover page, request for payment-case statement for workers' compensation, LCF). A court may order that restitution be paid to an insurance company that paid medical expenses and lost wages on behalf of the victim where they were the result of the defendant's criminal conduct. *Byard*, 265 Mich App at 512; MCL 780.766(8); MCL 769.1a(8). The amount of restitution in the instant case was proven with reasonable certainty because it reflected the actual amount paid by the insurance company, which represented actual wage losses and medical costs incurred by Thaxton. *Corbin*, 312 Mich App at 356, 358, 366; see also MCL 780.766(4)(a); MCL 769.1a(4)(a). The restitution ordered by the trial court was not based on speculation, conjecture, or estimates. *Corbin*, 312 Mich App at 366, 368, 371.

The evidence on the record was also sufficient to establish causation. The restitution request does not include payments for any service rendered or loss incurred before the date of the incident. There was testimony that Thaxton was at work at the pharmacy when the attempted robbery occurred, that she was one of the victims, and that she was unable to return to work after the incident. There was also testimony that Thaxton went to the emergency room, sought counseling, and was on medication as a result of the robbery. Thus, a preponderance of the evidence supports the conclusion that Thaxton would not have incurred these medical expenses and would not have been unable to work "but for" the attempted robbery committed by defendant. See *Byard*, 265 Mich App at 513; *Corbin*, 312 Mich App at 369. Furthermore, it is a "direct and natural result" of an attempted robbery involving guns for the victim to feel unable to return to the scene of such a traumatic incident and to require medical treatment and counseling. Therefore, a preponderance of the evidence supported the conclusion that there was "a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded." See *McKinley*, 496 Mich at 421; see also MCL 780.766(2).

Additionally, defendant claims that he did not have notice of the restitution request because it was not included in the PSIR. However, "[b]ecause restitution is now mandatory, it is no longer open to negotiation during the plea-bargaining or sentence-bargaining process, and defendants are on notice that restitution will be part of their sentences." *Bell*, 276 Mich App at 347 (quotation marks and citation omitted; alteration in original). In other words, defendant was

automatically on notice that he would be required to pay restitution because the CVRA requires that "restitution must be ordered in addition to any other penalty." *Id*.

In sum, defendant has failed to show that the trial court plainly erred in imposing the restitution award in this case. *Carines*, 460 Mich at 763.

Finally, defendant argues that defense counsel provided ineffective assistance because counsel failed to object to the restitution imposed or to request an evidentiary hearing to determine the correct amount of restitution. We disagree.

This issue is unpreserved because defendant did not move the trial court for a new trial or an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *Lockett*, 295 Mich App at 186; 814 NW2d 295 (2012). "A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

There are "two components" to establishing an ineffective-assistance-of-counsel claim requiring reversal: the defendant must show first, "that counsel's performance was deficient," and second, that "the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In other words, the defendant must establish (1) "that counsel's performance was below an objective standard of reasonableness under prevailing professional norms," and (2) "that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). "Effective assistance of counsel is presumed," and "[t]he defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, as discussed above, the amount of restitution ordered by the trial court was supported by a preponderance of the evidence. There is no evidence that the record of payments made by Grange Insurance is inaccurate or that anything other than the attempted robbery committed by defendant caused Thaxton to be unable to work or to require medical and psychological treatment. Therefore, even if defense counsel had objected to the restitution imposed, the objection would have been unsuccessful. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 US at 700. Defendant has not demonstrated that he received ineffective assistance of counsel on this ground. See *id*.

Furthermore, defendant has not demonstrated that an evidentiary hearing on the restitution issue is necessary. Defendant has not provided any evidence that the restitution amount is inaccurate, but instead relies on positing hypothetical theories. The appellant bears "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000); see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stating that a

"defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel").

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien