

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIOUS WOODY,

Defendant-Appellant.

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UNPUBLISHED  
November 17, 2016

No. 328718  
Jackson Circuit Court  
LC No. 14-004943-FC

Before: BECKERING, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of assault with intent to rob while armed (AWIRA), MCL 750.89. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 81 months' to 20 years' imprisonment. We affirm defendant's conviction, but remand to the trial court for *Crosby*<sup>1</sup> proceedings pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

Defendant's conviction arises from the September 2014 assault of a bartender at Veach's Office Bar in Jackson, Michigan. After being asked to leave several times, defendant went behind the bar to where the bartender had moved her tips, he pulled out a knife, and he then charged at the bartender. Defendant also placed his hands on the sides of the cash register like he was trying to pick it up, but he did not open it. He then fled the premises, and the bartender noticed that \$20 or \$30 in tip money was missing after defendant left. A jury convicted defendant of AWIRA, but found defendant not guilty of armed robbery, MCL 750.529. Defendant now appeals as of right.

On appeal, defendant argues, and the prosecution concedes, that defendant is entitled to a *Crosby* remand because his mandatory minimum sentencing guidelines' range was increased based on judicial fact-finding, resulting in a violation of the Sixth Amendment. Because defendant did not object to his offense variable (OV) scoring on these grounds at trial, defendant's claim is unpreserved. *Lockridge*, 498 Mich at 392. We review this unpreserved claim for plain error affecting substantial rights. *Id.*

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<sup>1</sup> *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

In *Lockridge*, our Supreme Court found that Michigan’s sentencing guidelines violated the Sixth Amendment to the extent that “the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . .” *Id.* at 364. To remedy this constitutional deficiency, the Court held that, while trial courts must continue to consult the guidelines at sentencing, the guidelines are now “advisory only,” rather than mandatory. *Id.* at 391, 399. Under *Lockridge*, a defendant bringing an unpreserved claim on appeal is required to make a “threshold showing of potential plain error.” *Id.* at 395, 398. If a defendant makes a threshold showing of potential plain error, he or she is entitled to a *Crosby* remand for further inquiry to determine whether the trial court would have imposed a materially different sentence knowing that the guidelines were merely advisory. *Id.* at 395-397. See also *People v Stokes*, 312 Mich App 181, 201; 877 NW2d 752 (2015).

In particular, to merit a *Crosby* remand, a defendant alleging a claim of unpreserved error must demonstrate that (1) he or she was not subject to upward departure and (2) that the “guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment.” *Lockridge*, 498 Mich at 395, 399. This second requirement is satisfied when the “OV level was calculated using facts beyond those found by the jury or admitted by the defendant and . . . a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range.” *Id.* at 399. In other words, we consider “whether defendant's OV scores can be upheld *strictly* by facts necessarily found by the jury or admitted by defendant.” *People v Garnes*, \_\_ Mich App \_\_, \_\_; \_\_ NW2d \_\_ (2016) (Docket No. 324035); slip op at 2.

In this case, the trial court assessed 20 total OV points under the sentencing guidelines, placing defendant at OV level II. Specifically, the trial court assessed defendant 15 points under OV 1, which requires that 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.” MCL 777.31(1)(c). The trial court also scored 5 points under OV 2, which requires that a defendant “possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). The trial court’s scoring of these variables was amply supported by evidence that defendant possessed a knife, which defendant used to threaten the bartender by charging at her and placing her in a reasonable apprehension of an immediate battery. See *People v Brooks*, 304 Mich App 318, 322-323; 848 NW2d 161 (2014).

However, while there was considerable support for the scoring of OV 1 and OV 2, the jury did not necessarily determine that defendant had a knife or any other weapon specifically identified in OV 1 and OV 2. Rather, in convicting defendant of AWIRA, the jury determined that defendant committed an assault with intent to steal while armed with a “dangerous weapon,” which could involve a weapon other than the types of firearms and cutting devices itemized in OVs 1 and 2. See MCL 750.89. See also *People v Walls*, 265 Mich App 642, 646; 697 NW2d

535 (2005); M Crim JI 18.3.<sup>2</sup> Because the jury did not necessarily find, and defendant did not admit, that he possessed or used a knife (or other weapon identified in OV 1 and OV 2), the trial court engaged in judicial fact-finding with regard to the assessment of 15 points for OV 1 and 5 points for OV 2. Cf. *Stokes*, 312 Mich App at 194.

Without the scoring of OVs 1 and 2, defendant's OV score drops from 20 to 0, i.e., from level II to level I on the Class A grid. MCL 777.62. As a result, defendant's minimum sentence range under the guidelines would decrease from 81-168 months to 51-106 months. MCL 777.62; MCL 777.21(3)(a). The trial court sentenced defendant within the 81 to 168 month range, meaning that defendant was not subject to an upward departure. See *Lockridge*, 498 Mich at 395. On these facts, defendant has made a threshold showing of plain error entitling him to a *Crosby* remand for further inquiry to determine whether the trial court would have imposed a materially different sentence knowing that the calculated guidelines were only advisory. *Id.* at 395-398. See also *Stokes*, 312 Mich App at 201. Consequently, we remand for *Crosby* proceedings pursuant to *Lockridge*, 498 Mich at 395-398.

We affirm defendant's conviction, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

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<sup>2</sup> The jury was not instructed that defendant could also be found guilty of AWIRA if he was armed with "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. See also *Walls*, 265 Mich App at 646.