STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2018
v	No. 336954 Macomb Circuit Court
ROBERT CLARE LOWE, Defendant-Appellant.	LC No. 2015-002285-FC

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of unarmed robbery, MCL 750.530. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 36 to 270 months' imprisonment. We affirm defendant's conviction and sentence, however we remand for the trial court to correct a clerical error in the judgement of sentence.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

This appeal arises out of the June 11, 2015 robbery of the Pretzel Peddler kiosk at Macomb Mall just before closing time. Defendant approached the counter and slid an employee a note that read, "this is not a joke, money in register, nobody gets hurt, and be calm." The employee handed over $503 from the register, and defendant fled the mall.

On his way out of the mall, defendant discarded his hat in a dumpster, his grey hooded sweatshirt in nearby bushes, and threw a "wad of something," later discovered to be money, over a brick wall that backed up to a residential area. Defendant then ran into a freestanding restaurant in front of the mall, entered the bathroom, and discarded two additional pieces of clothing as well as the note he had slipped across the Pretzel Peddler counter. Defendant, now in a new outfit, exited the restaurant and began smoking a cigarette outside. Not long after, defendant was approached by mall security, and volunteered that he did not do anything and that he was willing to be patted down. Defendant then told mall security that he was inside the restaurant with his wife and he wanted to let his wife know what was going on. Police arrived shortly thereafter and arrested defendant. Defendant admitted to his involvement in the robbery and indicated that he threw the stolen money over the wall as he was fleeing.

II. SCORING OF THE GUIDELINES

Defendant first argues that the trial court incorrectly scored offense variables (OVs) 4 and 19, and further, that the trial court engaged in impermissible judicial-fact finding when calculating defendant's minimum sentencing guidelines range in violation of *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), and *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). We disagree.

When a defendant presents an evidentiary challenge and a constitutional challenge to scoring of his or her guidelines, "the evidentiary challenge must initially be entertained, because if it has merit and requires resentencing, the constitutional or *Lockridge* challenge becomes moot" because "a defendant will receive the protections of *Lockridge* when . . . resentenced." *People v Biddles*, 316 Mich App 148, 157-158; 896 NW2d 461 (2016). On the other hand, "if an evidentiary challenge does not succeed, then and only then should [this Court] entertain the constitutional challenge." *Id*. at 158.

In reviewing a defendant's claim that the trial court incorrectly assigned a score to an offense variable, this Court reviews for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). This Court will affirm "the trial court's [factual] findings unless left with a definite and firm conviction a mistake was made." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). The trial court's interpretation and application of the sentencing guidelines is reviewed de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

With respect to defendant's constitutional challenge, we generally review constitutional questions de novo. *Lockridge*, 498 Mich at 373; *People v Stokes*, 312 Mich App 181, 192; 877 NW2d 752 (2015). However, an unpreserved Sixth Amendment claim is reviewed for plain error affecting the defendant's substantial rights. *Id*. at 392-393; *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Initially, we reject defendant's Sixth Amendment constitutional challenge. In *Lockridge*, our Supreme Court held that "the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient," because "the extent to which the guidelines *require* judicial fact-finding beyond the facts admitted by the defendant or found by the jury to score offense variables that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." To remedy this constitutional defect, the Court severed MCL 769.34(2) to the extent that it makes a sentencing guidelines range calculated using judge-found facts mandatory, and held that the sentencing guidelines were now advisory only. *Lockridge*, 498 Mich at 364-365. As this Court explained in *People v Biddles*, 316 Mich App 148, 158; 896 NW2d 461 (2016), "[t]he constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself, it was judicial fact-finding in conjunction with *required* application of those found facts for purposes of increasing a *mandatory* minimum sentence range." (Emphasis in original.) "*Lockridge* remedied this constitutional violation by making the guidelines *advisory*, not by eliminating judicial fact-finding." *Id*.

Defendant was sentenced well after *Lockridge* was decided, and we presume the trial court knows the law, unless the contrary is clearly shown. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Defendant does not suggest that the trial court was unaware of *Lockridge* at the time of his sentencing, or that the trial court did not understand that the guidelines were advisory-only. Therefore, defendant's argument that the trial court violated his Sixth Amendment rights by relying on judge-found facts to score his minimum sentencing guidelines is without merit.

Next, we turn to defendant's evidentiary challenge to his sentencing guidelines. The trial court scored the guidelines for defendant's unarmed robbery conviction, a Class C offense, MCL 777.16y, using the sentencing grid found in MCL 777.64. Defendant was assessed a total of 20 OV points, placing him in OV Level II. MCL 777.64. Defendant was assessed a prior record variable (PRV) score of 30 points, placing him in PRV Level D. MCL 777.64. In addition, defendant was determined to be a second-offense habitual offender, MCL 769.10. Accordingly, defendant's minimum sentencing guidelines range was determined to be 19 to 47 months' imprisonment.

Now turning to defendant's evidentiary challenges, defendant argues that the trial court relied on inaccurate information to score OV 4 and OV 19. We disagree.

The trial court scored OV 4 at 10 points. MCL 777.34 permits trial courts to assess 10 points for OV 4 where the victim sustained a psychological injury requiring professional treatment. MCL 777.34 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. [MCL 777.34.]

To score 10 points under OV 4, "[t]here must be some evidence of psychological injury on the record to justify" scoring the variable. *People v Lockett*, 295 Mich App 165, 182-183; 814 NW2d 295 (2012) (noting that there must be enough evidence to show the victim "might require professional treatment"). A victim need not seek professional treatment to justify scoring the variable. *Id*. Statements by a victim indicating feelings of anger, hurt, violation, fear, emotional turmoil, doubts about safety, inability to trust others, attempts to block recall of the crime, or changes in personality can properly support assessing 10 points under OV 4. *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014); *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). However, a trial court cannot assess 10 points for OV 4 solely

based on its own conclusion that "someone in the victim's position would have suffered psychological harm" or where a victim was fearful during the crime "without any other showing of psychological harm." *People v White*, 501 Mich 160, ___; 905 NW2d 228, 229-230 (2017).

At sentencing, the victim delivered the following victim's impact statement:

> I want to address on how this incident has affected me. I have been at Macomb Mall Pretzel Peddler for over 13 years, in those years reaching up to the robbery I loved my customers. Now most of the customers that approach I question their motive, I take note of their clothes, I take note of what they look like, what they say, where their hands might go. I had one man take out a note with an order on it, and I immediately backed away from the counter, I started sweating, my heart started racing, I had to walk back into the back room just to calm my breathing. I lose sleep recalling and replaying that night in my head. I have had to call into work at Pretzel Peddler as well as my teaching job. I found myself staring into space thinking of what I could have done differently, often just will sit there and cry, so to say this incident has not had an [e]ffect on me as well as my family and friends would be an understatement. [Defendant] has made me fear for my life. He took away my peace of mind and my trust in others. He deserves the maximum possible sentence. Even then that will not put my mind at ease. I also want to thank . . . [those] who gave me the confidence to testify. I didn't think that I could possibly get through it.

The victim impact statement in the presentence investigation report further indicated that the victim has had "trouble eating, sleeping, and concentrating," and that while she has not yet received counseling, she is "definitely considering it given the fact that she is still very much affected by being robbed by defendant."

Based on the foregoing, the trial court's finding that the victim sustained serious psychological injuries requiring professional treatment is supported by a preponderance of the evidence. The victim clearly stated that she is experiencing emotional turmoil, varying manifestations of stress and anxiety, changes in behavior and thought patterns while working, and general difficulty dealing with the aftermath of the incident. Consequently, the trial court did not err in assessing 10 points against defendant under OV 4.

Defendant similarly argues the trial court erroneously assessed 10 points for OV 19. MCL 777.49, the statute governing OV 19, relates to "interference with administration of justice," and provides that:

> (1) 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:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points

(b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.....15 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

The plain and ordinary meaning of "interfered with or attempted to interfere with the administration of justice" under 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). This definition has "broad application." *Id.* Interference with the administration of justice is not limited to the actual judicial process, but the definition can encompass conduct that occurs before criminal charges are filed such as acts that constitute obstruction of justice and acts that do not fully rise to the level of a chargeable offense. *Id.* Similarly, conduct that occurred after the completion of the offense may be considered when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

In this case, trial testimony established that while fleeing from the robbery, defendant discarded various items of clothing, threw money over a brick wall into a residential area, changed his clothing at a nearby restaurant, and lied to mall security by saying that he had been eating dinner inside the restaurant with his wife. We conclude that the trial court did not err by scoring 10 points for OV 19 where a preponderance of the evidence establishes that defendant attempted to interfere with the administration of justice.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel provided ineffective assistance of counsel by failing to object to the score of OV 4 during his sentencing. We disagree.

Defendant failed to move for a new trial or requesting a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), in the trial court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Accordingly, because no factual record has been created on which this Court may evaluate defendant's claims of ineffective assistance of counsel, defendant's claims are unpreserved. *People v Solloway*, 316 Mich App 174, 188; 891 NW2d 255 (2016).

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 187 (citation omitted). Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of law are reviewed de novo. *Id.* at 188. However, where no factual record has been created in regard to defendant's claim

of ineffective assistance of counsel, as is the case here, "this Court's review is limited to mistakes apparent on the lower court record." *Id.*

Effective assistance of counsel is presumed, and criminal defendants have a heavy burden of proving otherwise. *People v Schrauben*, 314 Mich App 181, 190; 886 NW2d 173 (2016). When claiming ineffective assistance of counsel, it is a defendant's burden to prove "(1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the outcome of the defendant's trial would have been different." *Solloway*, 316 Mich App at 188, citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L.Ed 2d 674 (1984). A defendant must show that "but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011), citing *Strickland*, 466 US at 694–696. "[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As discussed *supra*, the trial court correctly assessed defendant 10 points for OV 4. Therefore, it was not erroneous for defense counsel to fail to object to the scoring of OV 4. To have raised an objection would have been futile, and failure to raise a futile objection does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because defendant cannot establish that defense counsel's performance was deficient, he cannot show he was prejudiced, and therefore, his claim is without merit. *Solloway*, 316 Mich App at 188.

Although we do not find defendant's arguments to have merit, we do note that the judgment of sentence issued on January 30, 2017 contains a clerical error. Specifically, the judgment of sentence does not reflect that the jury found defendant not guilty of armed robbery. Therefore, remand is required for correction of the clerical error.

We affirm defendant's conviction and sentences, however, we remand for the trial court to correct the clerical error in defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Patrick M. Meter