STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
March 4, 2021

No. 352521
Washtenaw Circuit Court
LC No. 18-000818-FH

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his sentence for his conviction of domestic violence–third offense, MCL 750.81(2) and (5). Defendant was sentenced to 14 months to 5 years' imprisonment for the conviction. On appeal, defendant argues that the trial court improperly assessed 10 points each for Offense Variable (OV) 4 and OV 19. For the reasons stated in this opinion, we vacate defendant's sentence and remand to the trial court for resentencing.

I. UNDERLYING FACTS

On September 4, 2018, defendant approached his ex-girlfriend, the victim, in a party store and hugged and kissed her without her consent. At that time, the victim had a no-contact order against defendant because of two prior domestic violence incidents. The victim was shaken up by the encounter and called the police; defendant eventually pleaded *nolo contendre* to domestic violence based on his conduct in the party store. Defendant was sentenced as described earlier, but he challenged the scoring of OVs 4 and 19 in a motion for resentencing. The trial court denied defendant's motion and this appeal followed.

[1] *People v Williams*, unpublished per curiam opinion of the Court of Appeals, entered April 1, 2020 (Docket No. 352521).

II. STANDARD OF REVIEW

When reviewing a trial court's scoring decision, the trial 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). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (citation and quotation marks omitted). "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." *Hardy*, 494 Mich at 438. Finally, "[t]he trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012), aff'd 495 Mich 33 (2014).

III. ANALYSIS

A. OV 4

Defendant argues that the trial court erred by assessing 10 points for OV 4. We agree.

OV 4 relates to "psychological injury to a victim." MCL 777.34. A defendant is assessed 10 points under OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim" and zero points when "[n]o serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a) and (c). Additionally, OV 4 calls for assessing 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(2).

"[P]oints for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a 'serious psychological injury' would normally occur as a result of the crime perpetrated against the victim . . . ." *People v White*, 501 Mich 160, 162; 905 NW2d 228 (2017). Furthermore, "evidence of fear while a crime is being committed, by itself, is insufficient to assess points for OV 4." *Id.* "[A] trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury *occurred* to a victim, not that a reasonable person in that situation would have suffered a serious psychological injury." *Id*. at 163 (citation and quotation marks omitted). Additionally, a victim's fear, "by itself and without any other showing of psychological harm" does not meet the serious psychological injury threshold required in OV 4. *Id*. at 164 (emphasis omitted).

The trial court clearly erred by assessing 10 points for OV 4. According to the Presentence Investigation Report (PSIR), the victim called 911 when defendant approached her in a store in violation of the no-contact order. The victim told officers that defendant's actions toward her, including a forced hug and kiss, were unwanted and that she was afraid that defendant might victimize her again. This, however, is the only evidence in the record that the trial court had to rely on when assigning points for OV 4. The police report served as the factual basis for the plea,

see MCR 6.302(D)(2), but the report was never entered into the record.[2] The prosecution stated that the victim asked two strangers to escort her home after the incident, but there is no evidence of this in the record nor specific information to establish how this demonstrated significant psychological injury. The prosecution further stated that the victim expressed fear of defendant to a victim's advocate, but the prosecution simply referred to this occurrence without testimony from the victim or the victim advocate as part of the record. The prosecution referred to a video of the incident, which also is not part of the record. Neither defendant nor the victim testified; nor did the victim provide an impact statement or provide information for the PSIR. Consequently, there was no record evidence of the victim's psychological state after the incident occurred; only unsupported statements by the prosecution support any claim that OV 4 is applicable, and unsupported arguments are insufficient to support an assessment of points for OV 4, even if such purported facts, if proven, would support application of the guideline. See *White*, 501 Mich at 161-163. Thus, on the present record, the trial court clearly erred by assessing 10 points for OV 4.

Domestic violence–third offense is a class E felony. MCL 777.16d. Defendant's prior record variable (PRV) score was 110 points, placing him in PRV level F. MCL 777.66. At sentencing, the trial court calculated defendant's total OV score at 30 points, placing him in OV level III. *Id*. This resulted in a recommended sentencing guidelines range of 14 to 43 months' imprisonment. *Id*. After removing the 10 points for OV 4, defendant's OV score is reduced to 20 points, which places him in OV level II and leads to a recommended sentencing guidelines range of 12 to 36 months' imprisonment. See *id*. Consequently, "[b]ecause OV [4] was improperly scored, which resulted in an improperly calculated guidelines range, defendant is entitled to be resentenced." *Sours*, 315 Mich App at 350.

In light of our conclusion regarding OV 4, any error in scoring OV 19 would not affect defendant's corrected sentencing guidelines range. See MCL 777.66. Nevertheless, we choose to address the OV 19 issue because the trial court applied the wrong legal standard in this case and we hope that by addressing that issue here it can be avoided in the future. In addition, as we are remanding the case for resentencing in any event, the trial court's misapplication of OV 19 could nevertheless affect the ultimate sentence which the trial court imposes, if not the calculation of the proper guideline range itself.

B. OV 19

Defendant argues that the trial court erred by assessing 10 points instead of zero points for OV 19 because defendant did not interfere or attempt to interfere with the administration of justice. We hold that the trial court erred by applying the incorrect legal standard for OV 19 in this case, but we decline to determine whether OV 19 was nevertheless properly scored at 10 points because doing so would require us to make factual findings in the first instance.

[2] Defendant's trial attorney stated at the plea hearing that he could provide the trial court with the police report, but there is no record of defendant's trial attorney actually doing so.

A sentencing court is to assess 10 points under OV 19 if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c), as amended by 2002 PA 137.[3] "[T]he 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). "Our Supreme Court has determined that the phrase 'interfered with or attempted to interfere with the administration of justice' is broader than the concept of obstruction of justice and that conduct subject to scoring under OV 19 'does not have to necessarily rise to the level of a chargeable offense . . . .' " *People v Passage*, 277 Mich App 175, 179-180; 743 NW2d 746 (2007) (alteration in original), quoting *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004). "While 'interfered with or attempted to interfere with the administration of justice' is a broad phrase that *can* include acts that constitute 'obstruction of justice,' it is not limited to *only* those acts that constitute 'obstruction of justice.' " *Barbee*, 470 Mich at 286. Thus, the term "interference with the administration of justice," as used in OV 19 "encompasses more than just the actual judicial process." *Id*. at 287-288. "Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Id*. at 288. Furthermore, "OV 19 may also be properly scored when the sentencing offense itself necessarily involves interfering with the administration of justice." *People v Sours*, 315 Mich App 346, 349, n 1; 890 NW2d 401 (2016). While "[o]ffense 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), the language of OV 19 does not provide for sentencing factors to be scored other than by reference to the sentencing offense. See former MCL 777.49; *McGraw*, 484 Mich at 135; *People v Carpenter*, 322 Mich App 523, 530; 912 NW2d 579 (2018) (holding that OV 19 must be scored based on conduct related to the sentencing offense).

The trial court's entire explanation for assessing 10 points for OV 19 was that "[d]efendant violated a personal protective order directly and/or indirectly." But that language was not added to MCL 777.49 until after defendant committed the sentencing offense. See 2018 PA 652. Consequently, as explained earlier in note 2, the former version of MCL 777.49 that does not include the language regarding personal protective orders is the applicable version of MCL 777.49 in this case. Thus, the trial court committed an error of law by scoring OV 19 based on the incorrect version of the statute.

On appeal, the prosecution makes several arguments relating to why, as a factual matter, OV 19 could properly be assessed, and defendant makes factual arguments in opposition. Pursuant

[3] MCL 777.49 was amended effective March 28, 2019 and subsection (c) was amended to include the phrase "or directly or indirectly violated a personal protection order." 2018 PA 652. The sentencing offense was committed before March 28, 2019. Thus, former MCL 777.49(c), as amended by 2002 PA 137, is the applicable version of the statute in this case. See MCL 769.34(2) ([T]he minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.").

to our role as an error-correcting court, however, we decline to make factual findings in the first instance by scoring OV 19 ourselves. See *In re Martin*, 200 Mich App 703, 717; 504 NW2d 917 (1993) (citation omitted; alteration in original) ("It is not the function of an appellate court to decide disputed questions of fact in the first instance and then choose between affirmance or reversal by testing its factual conclusion against that which the trial court *might* have . . . reached."). We are not in a position to rule on the merits of those arguments in the first instance, as they turn on factual determinations, but of course on remand, a party is free to make any factual argument it wishes in support of or opposition to a guideline provision. Moreover, if rescoring OV 19 could have affected defendant's applicable sentencing guidelines range, we would have remanded to the trial court for additional findings relating to OV 19. As addressed earlier, however, no change to the scoring of OV 19 could affect defendant's corrected sentencing guidelines range. That we would not vacate a sentence if an error in calculating the guidelines would not have affected the guideline range, however, is a function of the fact that, on appeal, we engage in harmless error analysis. Thus, "[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MCL 769.23 (same). The guidelines, however, operate under different rules. By statute, a sentencing court must properly compute all guideline calculations; a court is not permitted to decline to calculate a particular OV simply because it might not or will not affect a guideline range. See MCL 777.21(1)(b) (directing a sentencing court to "[s]core all prior record variables for the offender as provided in part 5 of this chapter."). Thus, on remand, the trial court shall consider OV 19 under the proper legal standard.

IV. CONCLUSION

For the reasons stated in this opinion, the trial court's scoring of OVs 4 and 19 was erroneous, and prejudiced defendant by yielding an incorrect guideline range. Consequently, we vacate defendant's sentence and remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Jonathan Tukel