

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MENDEL MARK MOORE, also known as
MANDELL MARK MOORE,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

Nos. 352833; 352873
Wayne Circuit Court
LC Nos. 19-001972-01-FC;
19-002884-01-FC

Before: M. J. KELLY, P.J., and STEPHENS and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals,¹ defendant appeals by right his jury convictions of two counts of delivery of less than 50 grams of fentanyl, MCL 333.7401(2)(a)(iv), one count of tampering with evidence, MCL 750.483a(6)(b), and one count of concealing the death of an individual, MCL 333.2841(3). The jury acquitted defendant of two counts of delivery of a controlled substance causing death, MCL 750.317a. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for each count of delivery of less than 50 grams of fentanyl, 6 to 20 years' imprisonment for tampering with evidence, and 4 to 20 years' imprisonment for concealing the death of an individual. We affirm defendant's convictions but because the trial court included acquitted conduct in defendant's sentencing guidelines calculations, we reverse the trial court's sentencing decision and remand for resentencing.

I. FACTUAL BACKGROUND

At trial, the prosecution presented evidence that for many years defendant supplied heroin for others to package and sell at a duplex located at 85 Edgevale Street and 87 Edgevale Street in Detroit, Michigan (85/87 Edgevale). Another individual also supplied heroin to that drug house,

¹ *People v Moore*, unpublished order of the Court of Appeals, entered March 5, 2020 (Docket Nos. 352833 and 352873).

but users knew defendant's product as the "good stuff" for its added potency. William Coffey purchased drugs at 85/87 Edgevale and used them there with the woman who sold him the drugs. Coffey succumbed and died on site. Persons associated with the drug distribution operation were called to assist with the situation. Multiple witnesses testified that, in defendant's presence, a group of persons removed Coffey's body from the premises, placed it in a van, and drove away. Thereafter, defendant continued his drug operation as usual. After receiving a tip, police were dispatched to a garbage strewn area in the vicinity of 85/87 Edgevale where they discovered Coffey's body.

Kyle Vasicek's roommate testified that he and Vasicek purchased drugs at 85/87 Edgevale and returned to their apartment where they each used the drugs. The roommate noticed Vasicek acted differently but left the apartment. The next day, Vasicek's girlfriend found him dead in the living room. Police were called and Vasicek's girlfriend told them of Vasicek's heroin addiction. Police found drug paraphernalia in Vasicek's pocket and a plastic bag with white powder in the bathroom. Vasicek's roommate later told the police about the drug purchase at 85/87 Edgevale the night before Vasicek's death. As part of their investigation, the police conducted a controlled purchase of heroin at 85/87 Edgevale. Police later executed a search warrant under which they seized illicit drugs and related contraband including plastic bags similar to the one police had found at Vasicek's apartment containing a white powder. During interviews with persons associated with 85/87 Edgevale, detectives learned of Coffey's earlier death at 85/87 Edgevale. The person who sold Coffey the drugs at 85/87 Edgevale told police that the heroin Coffey used had been supplied by defendant. The doctor who performed both Coffey's and Vasicek's autopsies testified that each man died from an overdose of fentanyl and acetylfentanyl.

Separate criminal cases were brought by the prosecution against defendant related to each victim's death. The trial court consolidated the related cases for trial and in each case the jury acquitted defendant of counts of delivery of a controlled substance causing death, but found him guilty of the other charged offenses. At the sentencing hearing, the trial court discussed the Presentence Investigation Report (PSIR) submitted by the Department of Corrections (DOC) and the recommended assessment of points under the sentencing guidelines. The prosecution argued among other things for changing the DOC's recommended scoring of Offense Variable (OV) 3, which concerns physical injury to a victim, MCL 777.33, and requested that the trial court assess defendant 100 points for OV 3 on the ground that death resulted from the commission of a crime. Defendant opposed rescoring OV 3 because the jury had acquitted defendant of the two counts of delivery of a controlled substance causing death. The trial court decided to assess defendant 100 points for OV 3 and required the DOC to revise and resubmit the PSIR, then adjourned sentencing. When the sentencing hearing reconvened, the trial court sentenced defendant as previously stated. This appeal followed.

II. ANALYSIS

Defendant raises four claims of error in his appeals and argues that: (1) the prosecution presented insufficient evidence to support his conviction of tampering with evidence; (2) the trial court improperly relied on acquitted conduct when it assessed 100 points for OV 3 entitling him to be resentenced; (3) his sentences constituted unsupported, unreasonable upward departures from the guidelines minimum sentence range requiring resentencing; and (4) the trial court improperly

considered a victim-impact statement from Vasicek’s father concerning the crime for which the jury acquitted defendant, also requiring resentencing.

For the reasons set forth in this opinion, we hold that the prosecution presented sufficient evidence at trial from which reasonable jurors could find defendant guilty beyond a reasonable doubt of tampering with evidence under an aiding and abetting theory. Resentencing, however, is required because the trial court improperly relied on acquitted conduct when it assessed 100 points for OV 3. Because we conclude that the trial court’s error requires remand for resentencing, we decline to address defendant’s challenge to the proportionality of his sentences.

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence presented at trial was not sufficient to support defendant’s conviction of tampering with evidence under an aiding and abetting theory. We disagree.

“This Court reviews de novo a defendant’s challenge to the sufficiency of the evidence supporting his or her conviction.” *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019) (citation omitted). This Court reviews the evidence “in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime’s elements beyond a reasonable doubt.” *Id.* (citation omitted). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

MCL 750.483a in relevant part provides:

(5) A person shall not do any of the following:

(a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

* * *

(6) A person who violates subsection (5) is guilty of a crime as follows:

* * *

(b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$20,000.00, or both.

Under MCL 767.39, a person who aids and abets the commission of a crime may be “prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed

such offense.” Generally, to convict a defendant of aiding and abetting a crime, the prosecution must establish the following:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement.” [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (quotation marks, citation, and brackets omitted).]

In this case, the jury convicted defendant of tampering with evidence in violation of MCL 750.483a(5).² The record reflects that, during trial, the prosecution presented evidence that defendant performed acts or gave encouragement that assisted other individuals as they knowingly and intentionally removed, altered, concealed, destroyed, or otherwise tampered with evidence to be offered in a future official proceeding. Evidence established that Coffey died after using heroin at 85/87 Edgevale, a drug house where defendant supplied heroin for others to package and sell. Evidence obtained from both the original location of Coffey’s body and the substances in Coffey’s blood and urine constituted evidence that could have been offered in future criminal proceedings involving individuals that delivered, packaged, and sold drugs at 85/87 Edgevale. The prosecution also presented evidence that defendant had been physically present at 85/87 Edgevale when other individuals called to the scene removed Coffey’s body. Although the prosecution did not present evidence that defendant personally moved Coffey’s body, the prosecution presented evidence from which the jury could reasonably infer that defendant performed acts or gave encouragement that assisted others as they removed Coffey’s body from 85/87 Edgevale.

Evidence indicated that defendant was present on site when others at 85/87 Edgevale removed Coffey’s body, that he was also the supplier of heroin for packaging and sale at 85/87 Edgevale, and he employed or otherwise controlled those on site who carried out the sales of his heroin and other drugs at that location. One resident at 85/87 Edgevale, Geula Cole, who performed drug packaging and sales services for defendant there, admitted that she sold the drugs to Coffey before his death. Nicole McHenry, another resident at 85/87 Edgevale, who also performed packaging and sales of heroin there for defendant, testified that defendant owned the vehicle in which the other persons transported Coffey’s body. Admittedly, Cole testified defendant no longer owned the vehicle in which Coffey’s body had been transported; however, “[c]onflicting evidence and disputed facts are to be resolved by the trier of fact.” *Miller*, 326 Mich App at 735.

Whether he owned the van that transported Coffey’s body from the scene or not, based upon the evidence presented at trial, the jury could reasonably conclude from defendant’s presence during the removal of Coffey’s body, his status as supplier of heroin for packaging and sale at 85/87 Edgevale, and his status as controlling figure of the drug operation there, that defendant

² The term “official proceeding” is defined as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.” MCL 750.483a(11)(a).

intended to remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a future official proceeding, or had knowledge that the principal intended to do so at the time defendant gave aid and encouragement. Viewing the evidence presented in the light most favorable to the prosecution, the prosecution presented sufficient evidence from which a rational jury could determine that the essential elements of tampering with evidence were proved beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

B. OV 3

Defendant argues that he is entitled to resentencing because the trial court improperly relied on acquitted conduct when it assessed 100 points for OV 3.³ We agree.

We review de novo due-process challenges. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). We review for clear error the trial court's factual determinations used for sentencing under the sentencing guidelines, and such facts must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The "application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* We review de novo a trial court's interpretation and application of the statutory sentencing guidelines. *People v Jackson*, 487 Mich 783, 789; 790 NW2d 340 (2010). We review de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute[.]" *Hardy*, 494 Mich at 438. When calculating the sentencing guidelines range, a trial court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). A PSIR "is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003) (citation omitted).

"[D]ue process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019). "'Acquitted conduct' means any conduct underlying charges of which the defendant has been acquitted." *People v Stokes*, 333 Mich App 304, 308-309; 963 NW2d 643 (2020) (quotation marks, alteration, and citation omitted). "When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Beck*, 504 Mich at 626. "But when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." *Id.*

OV 3 concerns "physical injury to a victim." MCL 777.33(1). A defendant may be properly assessed 100 points under OV 3 "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). At trial, the jury acquitted defendant of two counts of delivery of a controlled substance causing death under MCL 750.317a. The jury,

³ The trial court used the offense of delivery of less than 50 grams of fentanyl to calculate defendant's guidelines minimum sentence range in both lower court Case Nos. 19-001972-01-FC and 19-002884-01-FC.

therefore, specifically determined that the prosecution had not proven beyond a reasonable doubt that defendant delivered controlled substances that ultimately caused the deaths of Vasicek and Coffey. Accordingly, the trial court was barred from finding by a preponderance of the evidence that defendant delivered controlled substances that ultimately caused the deaths of Vasicek and Coffey. The trial court improperly relied on acquitted conduct when it assessed defendant 100 points for OV 3.

If a scoring error alters the guidelines minimum sentence range, remand for resentencing is required. *People v Rodriguez*, 327 Mich App 573, 583; 935 NW2d 51 (2019). In this case, for his delivery of less than 50 grams of fentanyl, in light of defendant's status as a fourth-offense habitual offender, the trial court assessed defendant a prior record variable total score of 77 points and a total OV score of 115 points, resulting in a 43 to 152 months minimum sentence range. MCL 777.65. Had the trial court assessed 0 points for OV 3, defendant's total OV score would have been 15 points, resulting in a guidelines minimum sentence range of 19 to 76 months in light of defendant's status as a fourth-offense habitual offender. *Id.* The trial court's OV 3 scoring error affected the guidelines minimum sentence range. Accordingly, remand for resentencing is required in both cases.

Defendant argues that resentencing should occur before a different judge. We disagree.

In determining whether resentencing should occur before a different judge, this Court considers the following:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).]

After de novo review of the record, particularly the sentencing hearing transcripts, we are not persuaded that resentencing must occur before a different judge. Defendant has provided no analysis or justification for his request to be resentenced by a different judge. The record does not indicate that the sentencing judge in this case would have difficulty accepting this Court's decision or following this Court's directive not to consider during resentencing the charged offenses for which the jury acquitted defendant. We do not conclude that reassignment is necessary to preserve the appearance of justice and note that reassignment would likely entail waste and duplication out of proportion of any gain. The sentencing judge presided over both of defendant's criminal cases and trial and had opportunity to hear all witnesses' testimonies. The record does not reflect that the judge failed or neglected the duties to be fair and impartial. Accordingly, we deny defendant's request to be resentenced by a different judge.

C. VICTIM-IMPACT STATEMENT

Defendant also argues that he is entitled to resentencing because the trial court allowed Vasicek's father to make a victim-impact statement prior to sentencing. We disagree.

“To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” *People v Clark*, 315 Mich App 219, 223; 888 NW2d 309 (2016) (citations and quotation marks omitted). Defendant failed to assert that the trial court improperly considered the victim-impact statement from Vasicek’s father at sentencing, in a proper motion for resentencing, or in a proper motion to remand. Thus, this issue is unpreserved.

We review unpreserved claims of error, whether constitutional or nonconstitutional, for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Under a plain error analysis, “defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant’s substantial rights.” *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). An error affects a defendant’s substantial rights if it affects the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Reversal is warranted only when the plain 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.” *Kowalski*, 489 Mich at 506 (citation and quotation marks omitted).

In *Beck*, 504 Mich at 629, our Supreme Court held that “due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” In other words, “[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.” *Id.* at 610. In *Stokes*, 333 Mich App at 311, this Court held that “a sentencing court may review a PSIR containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant.” In doing so, this Court reasoned as follows:

In *Beck*, our Supreme Court remanded for resentencing because the sentencing court unquestionably “relied” on acquitted conduct for its sentencing decision. A sentencing court that reviews a PSIR that merely contains information about acquitted conduct, however, does not necessarily rely on such information when sentencing a defendant. There must be some evidence in the record that the sentencing court relied on such information to warrant finding a *Beck* violation. [*Stokes*, 333 Mich App at 311-312 (citation omitted).]

In this case, the trial court allowed Vasicek’s father to read a victim-impact statement on the record before sentencing defendant. Vasicek’s father included information regarding Vasicek’s life, family, and death, and suggested in part that defendant’s actions caused Vasicek’s death. The trial court noted that Vasicek’s father made a victim-impact statement on the record, but otherwise did not reference that statement or indicate in any manner that it specifically relied upon the victim-impact statement for its sentencing decisions. Indeed, the trial court’s sole reference to the victim-impact statement in its lengthy and thorough analysis consisted of Vasicek’s father’s remark that individuals were selling “poison” on behalf of defendant. The trial court did not address any portion of the victim-impact statement pertaining to the delivery of a controlled substance causing death. The record does not establish that the trial court relied on acquitted conduct referenced in the victim-impact statement when sentencing defendant. Accordingly, defendant has failed to establish plain error affecting his substantial rights and is not entitled to resentencing on this ground.

III. CONCLUSION

We affirm defendant's convictions but vacate his sentences because the trial court committed reversible error in determining his sentences. Accordingly, we remand for resentencing. Because the trial court must resentence defendant, we decline to address defendant's claim of error that his sentences were disproportionate upward departure sentences. On remand, after correction of the sentencing guidelines range and consideration of such, the trial court, in the exercise of its discretion, shall resentence defendant. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Cynthia Diane Stephens

/s/ James Robert Redford