If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH JONES II,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 353359
Monroe Circuit Court
LC No. 19-245517-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and maintaining a drug house, MCL 333.7405(1)(d). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 44 months to 180 months for each conviction. Defendant's possession convictions were of lesser offenses in connection with charges of two counts of manufacturing and delivering cocaine, of which the jury found defendant not guilty. We affirm.

I. BACKGROUND

Defendant was prosecuted for having chunks of crack cocaine at the home of his friend, Jamie Allen, which was searched after defendant was seen frequenting the home and participating in a drug transaction.

On appeal, defendant argues that the trial court erred in scoring Offense Variable (OV) 14, that his trial counsel provided ineffective assistance by failing to object to that assessment, and that the trial court impermissibly relied on acquitted conduct when sentencing him. We disagree.

II OV 14

This Court reviews the trial court's factual determinations at sentencing for clear error. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), superseded by statute on other grounds as stated in *People v Rodriguez*, 327 Mich App 573, 579 n 3; 935 NW2d 51 (2019).

"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." *Id*. See also *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). The constitutional question whether an attorney's ineffective assistance deprived a defendant of his Sixth Amendment right to counsel is reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

"A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). The court must score and consider the advisory sentencing guidelines. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). A court relies on inaccurate information when it sentences a defendant by consulting an inaccurate advisory guidelines range. *Francisco*, 474 Mich at 89 n 7.

Defendant argues that the trial court erred in assessing 10 points for OV 14, as MCL 777.44(1)(a) prescribes when "[t]he offender was a leader in a multiple offender situation." A "multiple offender situation" is when more than one person participates in a violation of the law. *People v Ackah-Essien*, 311 Mich App 13, 38-39; 874 NW2d 172 (2015). In this case, defendant does not argue that the activity for which he was convicted did not involve a multiple-offender situation. Indeed, his friend, Allen, testified pursuant to an agreement for reduced charges stemming from her involvement in the events underlying this case. But defendant does argue that there was no evidence that he was a leader of the crimes committed by the two of them.

This Court has stated that " '[t]o "lead" is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting.' " *People v Dickinson*, 321 Mich App 1, 22; 909 NW2d 24 (2017), quoting *People v Rhodes (On Remand)*, 305 Mich App 85, 90; 849 NW2d 417 (2014). Defendant notes that there was no evidence that either party directed, led, supervised, or guided the other. Allen testified that she never spoke with defendant about drug sales, and defendant testified that Allen regularly provided him with drugs from her apartment for sales. Defendant suggests that, because the drugs were found in Allen's apartment, they were presumably under her control, and he emphasizes that she admitted that marijuana and a smaller amount of cocaine found on a dresser were hers.

However, "[t]he entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). See also *Ackah-Essien*, 311 Mich App at 38. Both defendant and Allen testified that defendant routinely visited Allen's apartment. Allen stated that defendant had been visiting her unlocked home at least three times a week, regularly coming and going at will, including when she was not home. She further stated that defendant had been to the apartment three times the day that the police discovered the drugs. She elaborated that defendant was the only person who used a spare bedroom with an air mattress, when he would sleep there for short periods of time with his girlfriend.

Allen testified that defendant could access her bedroom at any time, that no one else used her bedroom in any way, and defendant used it to store his belongings away from the children in the home. She continued that there was a trash bag on her bedroom door, and she had seen plastic baggies in it that she did not place there. Allen further testified that defendant had clothes and boxes of shoes on one side of the bedroom closet, and on the shelf above had a black container with a clear lid. She reported that she did not own the black container, and did not know who did,

but the police discovered drugs and drug paraphernalia in it. Allen testified that she knew defendant was selling crack cocaine from her home because she had observed baggies with severed corners of a sort used to sell that substance.

" '[F]or purposes of an OV 14 analysis, a trial court should consider whether the defendant acted first or gave directions or was otherwise a primary causal or coordinating agent.' " *People v Baskerville*, 333 Mich App 276, 300; 963 NW2d 620 (2020), quoting *Dickinson*, 321 Mich App at 22. "The 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). In this case, it was reasonable for the trial court to infer from the evidence that defendant and Allen were engaged in selling drugs from her apartment, and that defendant was the primary perpetrator. The evidence suggested, consistent with the jury verdict, that a significant amount of defendant's crack cocaine was in Allen's bedroom. Also, Allen was aware that defendant was selling the cocaine that was in her apartment. Further, defendant maintained an exclusive area in the apartment where he stored the drugs, and Allen disavowed knowledge of the specific location of the drugs but knew that they were sold with her apartment as the base of operations. The evidence thus indicated that defendant was the main actor, or the "primary causal or coordinating agent," in possessing the cocaine with Allen and using her apartment as a drug house, thus supporting the trial court's determination.

Defendant additionally points out that the trial court, while discussing its assessment of OV 14 at the hearing on his motion for resentencing, stated that it was "going with the standard normal people interpretation," and argues that the court thus indicated that it used an incorrect evidentiary standard. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (a trial court's factual determinations regarding offense variables must be supported by a preponderance of the evidence). It is apparent, however, that the trial court was referring to the dictionary definition of the word "leader." At the hearing on the motion for resentencing, defense counsel stated that caselaw indicated that a dictionary definition of "leader" should guide the inquiry because of the statute's silence on the issue. See *Rhodes*, 305 Mich App at 90. The court then stated that, "based on the case law, and yeah, going with the standard normal people interpretation on leader, no question in the Court's mind that [defendant] was in a leadership position in this case." The court thus clearly indicated that it was the word "leader" for which it was using the "normal people interpretation," rather than using the latter to find the facts underlying its scoring decision. Confirming this view is that the trial court had discussed the factual basis for its scoring of OV 14 before concluding, on the basis of the dictionary definition of "leader," that defendant "was in a leadership position in this case, and I think OV 14 was appropriately scored." Defendant's claim that the court employed the wrong evidentiary standard is without merit.

Defendant also argues that his trial counsel provided ineffective assistance by failing to object to the trial court's assessment of OV 14 at 10 points. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This "right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that counsel's deficient performance prejudiced the defense." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007) (quotation marks and citation omitted). A defense

attorney's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In this case, the trial court's denial of defendant's motion for resentencing premised on the scoring of OV 14 indicates that a timely objection from defense counsel would have been futile. Further, we agree with the trial court's decision in that regard on appeal. Accordingly, defendant's claim that defense counsel was ineffective for declining to challenge the scoring of OV 14 must fail. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

III. ACQUITTED CONDUCT

Defendant argues that the trial court impermissibly sentenced him on the basis of a belief that defendant was guilty of trafficking narcotics. A defendant is presumed innocent in connection with a charge for which a jury has specifically found the defendant not guilty, and the trial court thus may not consider acquitted conduct as an aggravating factor at sentencing. *People v Beck*, 504 Mich 605, 626-627; 939 NW2d 213 (2019). Acquitted conduct is the conduct that is "underlying charges of which [the defendant] had been acquitted." *People v Stokes*, 333 Mich App 304, 308-309; 963 NW2d 643 (2020) (alteration in original; quotation marks and citation omitted).

In this case, as noted, the jury found defendant not guilty of two counts of manufacturing and delivering cocaine, and instead found him guilty of two counts of the lesser offense of simple possession, along with maintaining a drug house. At the close of sentencing, the trial court stated the following:

> And I just can't . . . put you on probation, it's just a mere rewarding of everything that went on here. And quite frankly, I'm convinced there was enough of the material, the possession and things like that, that it is tantamount to trafficking in this town. There's no question in my mind about this.

The court's reference to trafficking hearkened to the delivery offenses that the jury determined the prosecution failed to prove beyond a reasonable doubt. However, the trial court's comment was in response to a request by defendant and his attorney that defendant's sentence include drug treatment—something defendant had not received despite a history of drug use and related entanglements with law enforcement. That context suggests that the court was explaining why it denied defendant's request for a sentence of probation with drug treatment in lieu of incarceration, rather than explaining the basis for the minimum sentence of 44 months, which was within the guidelines range of 5 to 46 months. The court's gratuitous mention of trafficking was thus not a *Beck* violation. See *People v Beesley*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 348921), slip op at 8-9.

To merit resentencing, a defendant must demonstrate that the trial court "actually relied on acquitted conduct when sentencing the defendant[.]" *Stokes*, 333 Mich App at 312. In this case, the trial court provided its rationale for imposing defendant's sentence as follows:

What is very troubling to this court . . . is that [defendant] was on parole at the time that he commits these offenses. And it's interesting that, most defendants do pitch to me that nobody ever provided me with the opportunity to take drug programming, treatment, or things like that, and my question always is, why didn't you do it on your own. All you have to do is ask and say get me in a program, or this or that, and it's never done. And then you write me the letters and say give me the chance, put me into a drug program.

Yet, what was very telling to me in this probation report is the fact that you made the very same statement back in 2017, that I wanna change my ways, I don't wanna do this anymore, I wanna get into treatment. And what have you done in the last three years; nothing but reoffend. And it's not the first time that you've been in front of me. It's not the first time that I have to sentence you to prison because I cannot see any other way to do anything here.

In *Stokes*, 333 Mich App at 309-311, this Court explained that *Beck* expressly permits trial courts to consider the contents of a defendant's presentence investigation report, uncharged conduct, and any other circumstances or context surrounding the defendant or the sentencing offense. In this case, the trial court stated that its sentence was based on defendant's inability to rehabilitate his drug use despite prior judicial intervention. The trial court highlighted that defendant had made similar pleas for treatment rather than jail time previously and had not attempted treatment despite his stated desire. The trial court referenced information from defendant's PSIR, previous judicial interactions, and his continued drug use, facts which defendant does not dispute, before stating, "It's not the first time that I have to sentence you to prison because I cannot see any other way to do anything here." The trial court did not state that delivering cocaine—defendant's acquitted conduct—was part of the justification for the sentence.

A *Beck* violation occurs when " 'the sentencing court specifically reference[s] acquitted offenses as part of its sentencing rationale[.]' " *Beesley*, ___ Mich App at___; slip op at 7, quoting *Stokes*, 333 Mich App at 312 (alteration in original). In this case, the trial court acknowledged that it could not properly sentence defendant on the basis of acquitted conduct. The court amended the assessment of OV 15 (aggravated controlled substance offenses), MCL 777.45, because defendant was acquitted of the delivery charge. The court also stated, before pronouncing its sentence, that it was "very well aware that there was no conviction on the delivery charge, and that's not taken into account here," as well as, "It's interesting, . . . even though there was direct testimony that there was in fact delivery here, but that's neither here nor there because the jury came back and found not guilty on that count." The trial court then proceeded to sentence defendant on the basis of factors other than drug delivery, in compliance with *Beck*.

In summary, defendant has not established that he is entitled to resentencing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola