

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 22, 2011

v

JAMES HENRY TAYLOR,
Defendant-Appellant.

No. 298957
Tuscola Circuit Court
LC No. 07-010401-FH

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence of 11 to 25 years in prison imposed on remand on his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We vacate defendant's sentence and remand for resentencing.

Defendant struck Abrien Swires in the head following a dispute between Swires and defendant's girlfriend. The prosecution alleged that defendant hit Swires with a tire iron, but defendant claimed he merely had a ring on his finger. The trial court instructed the jury on the charges of felonious assault, MCL 750.82, which requires the use of a weapon, and assault with intent to do great bodily harm less than murder, which does not require the use of a weapon. The jury acquitted defendant of felonious assault and convicted him of assault with intent to do great bodily harm less than murder. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 11 to 25 years in prison.

Defendant appealed, objecting to the scoring of two sentencing guidelines variables. In *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2009 (Docket No. 284983), this Court affirmed defendant's conviction and sentence. In *People v Taylor*, 486 Mich 904; 780 NW2d 833 (2010), our Supreme Court vacated this Court's sentence and remanded for resentencing, holding that the trial court erred in scoring Offense Variable ("OV") 10.

At the hearing on resentencing, the prosecution argued that defendant's sentence should remain unchanged, as an offsetting scoring error was made with respect to OV 12. The prosecution argued that the court should find by a preponderance that defendant committed both charged offenses and because defendant could have been convicted of both charged offenses without violating double jeopardy, OV 12 should have been scored for two contemporaneous

criminal acts.¹ The trial court adopted the prosecution’s argument and imposed the same sentence of 11 to 25 years in prison.

We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The proper interpretation and application of statutory sentencing guidelines are legal questions that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). “[T]he primary goal of statutory interpretation is to give effect to the Legislature’s intent.” *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). If the language of the statute is unambiguous, judicial construction is not permitted “because the Legislature is presumed to have intended the meaning it plainly expressed.” *Id.*

MCL 777.42, OV 12, reads in relevant part:

(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 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:

...

(d) one contemporaneous criminal act involving a crime against a person was committed.....5 points

...

(g) no contemporaneous criminal act was committed.....0 points

When scoring OV 12, the trial court may consider charges for which the defendant was acquitted. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). However, the trial court must also “look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.” *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010).

At the resentencing hearing, the prosecution argued that OV 12 should be scored at five points because defendant could have been found guilty of both charged offenses without violating double jeopardy principles. The trial court adopted this argument, but it is not justified under MCL 777.42. The mere commission of two contemporaneous criminal offenses is insufficient to support a score of five points for OV 12 if those crimes were committed in a single act. *Light*, 290 Mich App at 726. Therefore, the trial court’s reasoning was insufficient to support a score of five points for OV 12.

¹ Although the jury acquitted defendant of felonious assault, because of the lower burden of proof involved in sentencing the trial court was free to find that defendant used a tire iron for sentencing purposes. *People v Ratkov*, 201 Mich App 123, 126; 505 NW2d 886 (1993).

On appeal, however, the prosecution makes two alternative arguments in support of upholding the trial court's scoring at resentencing. First, the prosecution argues that defendant committed two distinct criminal acts—that raising the tire iron was one criminal act and swinging the tire iron forward and striking Swires was a second criminal act. Alternatively, the prosecution argues that defendant committed felonious assault against Swires's girlfriend by raising the tire iron to her prior to striking Swires with the tire iron. These arguments were not presented at the resentencing hearing, and are not properly before this Court. See *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

Even if these theories were properly before this Court, neither withstands scrutiny. First, defendant's raising of the tire iron, if defendant had a tire iron, was not "separate" from the acts constituting assault with intent to do great bodily harm less than murder under *Light*. Both the raising of the arm and the blow delivered to the head of Swires constituted one continuous criminal act. Defendant could not have struck Swires in the head without first raising his arm, and the testimony makes clear that defendant only raised his arm in order to immediately strike Swires—there was no independent purpose for raising the arm. Thus, the raising of the tire iron cannot be viewed as a contemporaneous criminal act for purposes of OV 12. Second, the argument that defendant committed felonious assault against Swires's girlfriend is not supported by the record. Only one of the seven witnesses at trial testified that defendant raised a hand towards Swires's girlfriend, and that witness denied seeing any object in defendant's hand at that time. Because there was absolutely no evidence of a weapon in defendant's hand at that time, the trial court could not properly find that defendant feloniously assaulted Swires's girlfriend.²

The trial court erred by scoring OV 12 at five points. The guidelines recommended a minimum term range of 34 to 134 months with OV 12 scored at five points. Had OV 12 been correctly scored at zero points, the guidelines would have recommended a minimum term range of 29 to 114 months. Defendant's minimum term of 11 years (132 months) is outside the properly scored guidelines range. Defendant is entitled to be resentenced. See *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Sentence vacated; remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

² Proof of simple assault would not be sufficient to support five points under OV 12, because the statute refers to "contemporaneous felonious criminal acts."