STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 299906 Wayne Circuit Court
DON LAMAR TURNER, Defendant-Appellant.	LC No. 10-004866-FC

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, after a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 46 months to 20 years' imprisonment for his felon in possession of a firearm conviction and two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Marcus Rooker went to a house in Detroit to buy marijuana. Defendant answered the door and recognized Rooker as a man he thought had given him counterfeit money. Defendant called two men, and the men chased Rooker around the neighborhood. Rooker managed to get back to his car and, as he was driving away, defendant shot at the car. Rooker's two-year-old daughter, Maliyah, was in the backseat and was shot in the leg.

I. SCORING ERRORS

Defendant argues in his brief on appeal that the trial court improperly scored PRV 7, OV 3, and OV 9 at sentencing. Application and interpretation of sentencing guidelines is reviewed de novo by this Court. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011), citing *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). With respect to scoring under each variable of the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular

[1] Defendant was also charged with two counts of assault with intent to murder, MCL 750.83, but was acquitted of those counts.

score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, errors in scoring are reviewed for an abuse of discretion. *Id.* "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.* (quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996)). If a scoring error has been forfeited on appeal, review is limited to plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

A. PRIOR RECORD VARIABLE 7

Although defendant argues the trial court improperly scored PRV 7 at 20 points, defendant has waived this issue on appeal. A scoring error is preserved if it is "raised at sentencing, in a motion for resentencing, or in a motion to remand." *Kimble*, 470 Mich at 310-311; MCL 769.34(10). A scoring error that was not objected to should not be raised on appeal if the sentence fell within the appropriate guidelines sentence range. *Id.* at 309; MCL 769.34(10). A scoring error that is not objected to is forfeited on appeal, *People v Greene*, 477 Mich 1129, 1132; 730 NW2d 478 (2007), while a scoring decision to which a party agrees, even if made in error, is waived, and the error is extinguished on appeal. *Id*. at 1132-1133. With respect to PRV 7, the parties stipulated to a score of 20 points at sentencing, so this issue is waived on appeal. There is also no plain error because, as noted below, the corrected score does not affect defendant's sentence.

However, defendant claims trial counsel's stipulation to this PRV score constituted ineffective assistance of counsel. Claims of ineffective assistance of counsel must be preserved by moving for a new trial or *Ginther*[2] hearing in the trial court to make an evidentiary record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009), citing *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant did not do so here. However, unpreserved claims of ineffective assistance of counsel may still be reviewed, with review limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).[3]

Prior Record Variable 7 deals with subsequent or concurrent felony convictions. MCL 777.57. A score of 20 points is given under this variable when the offender has two or more subsequent or concurrent convictions, 10 points are given for one such conviction, and zero points are given if there are none. MCL 777.57(1)(a)-(c). Felony-firearm convictions are not counted under this variable. MCL 777.57(b).

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973) (holding that a defendant claiming ineffective assistance of counsel must move for an evidentiary hearing in order to create a record on the issue).

[3] Courts have reviewed unpreserved claims of scoring error when defendants have presented them as ineffective assistance of counsel claims. See *People v Kimble*, 252 Mich App 269, 278-279 n 7; 651 NW2d 798 (2002) aff'd 470 Mich 305 (2004). However, the propriety of "allowing defendants to secure appellate review under the ineffective assistance of counsel rubric to overcome the preservation requirement when . . . the legal error is equally apparent and equally prejudicial when raised alone" has been questioned. *Id*. at 279 n 7.

A defendant is not entitled to resentencing when his sentence is within the appropriate guidelines sentencing range, *absent an error in scoring*. MCL 769.34(10) (emphasis added). However, "[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), citing *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Here, defendant was being sentenced for felon in possession of a firearm, MCL 750.224f, and the concurrent felony convictions were two counts of felony-firearm, MCL 750.227b, and one count of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). Because, out of defendant's three concurrent convictions, two were for felony-firearm, only one conviction, possession with intent to deliver, was eligible to be counted toward PRV 7, which would have resulted in a score of 10 points. The prosecution concedes this error, and counsel was ineffective in agreeing to this score.

However, if counsel had objected and defendant had been assessed a total PRV score of 60 instead of 70, his PRV Level would not change.[4] Therefore, this error would not alter the appropriate guidelines range,[5] and the improper scoring did not affect defendant's substantial rights or cause him any prejudice. Thus, defendant is not entitled to resentencing.

B. OFFENSE VARIABLE 3

Defendant next argues in his brief on appeal that the trial court improperly scored OV 3 at 10 points. Offense variable 3 addresses physical injury to a victim. MCL 777.33. Relevant to this case, 10 points are scored under OV 3 for "[b]odily injury requiring medical treatment occur[ing] to a victim." MCL 777.33(d). Defendant argues, without citing to any authority, that it was improper for the trial court, in sentencing, to consider injuries to victims of crimes of which defendant was acquitted by a jury. In *People v Ewing (After Remand)*, 435 Mich 443, 446 (opinion by BRICKLEY, J.), 473 (opinion by BOYLE, J.); 458 NW2d 880 (1990), a majority of the Michigan Supreme Court condoned the consideration of acquitted conduct when sentencing a defendant, so long as the facts were established by a preponderance of the evidence.

Here, the evidence established that Maliyah was shot and was treated at a hospital. Rooker also testified that it was defendant who shot her. At sentencing, the trial court stated:

> [W]hether he personally shot, maybe by a preponderance of the evidence, you could give him that one, but there was a serious injury in this case.
>
> There was a serious injury in this case, and it was, in part, caused by -- under the circumstances by your client.

The court scored 10 points accordingly. Because it appears the trial court found by a preponderance of the evidence that defendant caused Maliyah's injury requiring medical

[4] See MCL 777.66.

[5] See MCL 777.66.

treatment, and that finding is supported by the record, we hold the trial court properly concluded OV 3 applied and did not abuse its discretion in scoring this variable at 10 points. Accordingly, defendant is not entitled to resentencing on this ground.

C. OFFENSE VARIABLE 9

Defendant last argues in his brief on appeal that the trial court improperly scored OV 9 at 10 points. This issue was waived for appeal when the prosecutor requested a score of 10 points for two victims and defense counsel stated he had no objection. *Greene*, 477 Mich at 1132-1133. However, we will address it.

Offense variable 9 concerns the number of victims of a crime. MCL 777.39. At issue in this case is MCL 777.39(c), which provides for a score of 10 points under OV 9 when there are between two and nine victims of a crime "who were placed in danger of physical injury or death[.]" Again, defendant argues, while citing an abundance of contrary authority and none in support of his position, that it was improper for the trial court to score 10 points under this variable because the trial court considered conduct of which defendant had been acquitted. As discussed above, consideration of acquitted conduct in sentencing is permissible as long as the facts are established by a preponderance of the evidence. *Ewing*, 435 Mich at 446, 473.

Here, Rooker testified that defendant shot at his car as he was driving away, and that his two children were in the backseat at the time. Additionally, it was established that Maliyah was actually shot. The prosecution requested 10 points for two victims, defense counsel acquiesced, and the trial court scored 10 points accordingly. The evidence indicates that there were at least two victims and, therefore, the trial court properly concluded 10 points could be scored under OV 9, and so no plain error affecting defendant's substantial rights occurred as a result of this score. Accordingly, defendant is not entitled to resentencing on this ground.

II. INCONSISTENT JURY VERDICTS

Defendant first argues in his Standard 4 Brief that the trial court erred in allowing the felony-firearm verdict to stand, when the jury acquitted defendant of assault with intent to murder, and both charges arose from the same shooting incident.

This Court reviews a trial court's denial of a motion for new trial for abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). It is questionable here whether defendant actually moved for a new trial. Defendant made a request after the jury verdict was read that the court "correct[] the jury's error." We believe this is akin to requesting the court set aside the jury's verdict and allow a new trial to go forward. The trial court's statement concluding that it would take no action on defendant's request can be seen, accordingly, as a denial of a motion for a new trial. However, even if defendant failed to preserve this issue, this Court may still review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Juries have the power to render inconsistent verdicts, so such verdicts need not be set aside. *People v Garcia*, 448 Mich 442, 461; 531 NW2d 683 (1995).

> [W]hen an accused is charged with an offense that has as an element commission of a predicate offense the jury's consideration of the charged predicate offense and its consideration of that offense again in the context of a compound offense are separate and distinct. The jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense. [*Garcia*, 448 Mich at 463, quoting *People v Goss (After Remand)*, 446 Mich 587, 599; 521 NW2d 312 (1994).]

Here, the predicate felony for the felony-firearm conviction was assault with intent to murder. The jury's acquittal of defendant for the predicate offense of assault with intent to murder did not preclude it from finding defendant guilty of felony-firearm. Therefore, no error occurred, the trial court did not abuse its discretion in refusing to correct any jury inconsistency, and defendant is not entitled to a new trial on this ground.

III. DOUBLE JEOPARDY

Defendant next argues in his Standard 4 Brief that the trial court violated his right to be free from double jeopardy when it allowed him to be prosecuted for both felony-firearm and assault with intent to murder.

Double jeopardy claims are constitutional questions this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). This Court reviews unpreserved claims that a defendant's double jeopardy rights have been violated for plain error. *Matuszak*, 263 Mich App at 47.

Generally, an objection must be made in the trial court to preserve an issue on appeal. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Even if defendant preserved this issue with a sufficiently specific objection, the legislature's choice to authorize multiple convictions for assault with intent to murder and felony-firearm, even when they both arise from the same act, does not violate defendant's constitutional right to be free from double jeopardy. *People v Rone (On Second Remand)*, 109 Mich App 702, 713; 311 NW2d 835 (1981). This is clear from the language of the statute itself: "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years." MCL 750.227b(1). There is a definite legislative intent to create an additional crime and impose cumulative punishment when a defendant commits a felony while in possession of a firearm. Because the legislature authorized prosecutions for both of these offenses even when they relate to the same incident, it was permissible for the trial court to allow defendant to be prosecuted for both crimes. Even if defendant had been convicted for both crimes, the imposition of sentences for both crimes would not violate defendant's right to be free from double jeopardy. Therefore, defendant is not entitled to a new trial on this ground.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant last argues in his Standard 4 Brief that his counsel's assertion, during closing argument, that the jury should find defendant guilty of felon in possession, constituted ineffective assistance of counsel.

As noted earlier, to preserve a claim of ineffective assistance of counsel on appeal, a defendant must move for a new trial or *Ginther* hearing below to create an evidentiary record. *Payne*, 285 Mich App at 188. Defendant did not do so here. However, unpreserved claims of ineffective assistance of counsel may still be reviewed, with review limited to errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996), citing *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

In order to prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To show prejudice, defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). There is a "strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600. Counsel's performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485.

"It is well established that arguing that defendant is guilty of an offense is not necessarily ineffective assistance of counsel . . . ." *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other grounds *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998). When evidence points clearly to a defendant's guilt, it may be a better trial strategy to admit guilt on some charges but maintain that the defendant is innocent with respect to others. *Id.* When defense counsel makes such a decision, it may make the defendant seem more credible, and a court should not second-guess these decisions. *Id.* Only a complete concession of a defendant's guilt will establish ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

Here, defense counsel stated in closing argument:

> Convict him of felon[] in possession. He admits that to you. That's fine. As the prosecutor said, that's not what we are here for. But note, ladies and gentlemen, does he strike you as a guy, the kind of guy who has got some arsenal of interchangeable weapons? He admits he has a gun. It's the same gun that Sergeant White gets from him the next day.

Defense counsel appears to be referring to defendant's admission, during the phone call he made from jail, that he was in possession of a gun. Defense counsel conceded defendant's guilt with respect to the felon in possession charge in order to gain acquittals with respect to the assault with intent to murder charges. And, in fact, defense counsel achieved the desired outcome when the jury acquitted defendant on both counts of assault with intent to murder. Therefore, defense counsel was using sound trial strategy when he conceded defendant's guilt with respect to the felon in possession charge, and defendant did not receive ineffective assistance of counsel entitling him to a new trial.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto