

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
December 13, 2011

v

ERRICK GENE VANCE,  
Defendant-Appellant.

No. 300200  
Kent Circuit Court  
LC No. 10-003076-FC

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Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, MCL 750.227b; and assault with intent to do great bodily harm, MCL 750.84. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to prison terms of 20 to 40 years for armed robbery; two to five years for felon in possession, five to ten years for assault with intent to do great bodily harm, and two years for felony-firearm. Defendant appeals his sentence as of right. We affirm.

Defendant challenges the scoring of offense variables (OVs) 8, 9, and 12. “This Court reviews a trial court’s scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted). We will uphold a scoring decision for which there is any evidence in support. *Id.* However, defendant failed to preserve his challenges to the scoring of Ovs 9 and 12. We review unpreserved challenges to the scoring of offense variables for plain error affecting substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

Defendant asserts that the trial court erred in scoring 15 points for OV 8. Fifteen points may be scored for OV 8 when “[a] victim was . . . held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). OV 8 applies where a victim was imprisoned, enslaved, dominated, confined, or restrained beyond the time necessary to commit the offense. The offense in this case was armed robbery.

There are three elements of armed robbery: (1) an assault, (2) a felonious taking of property from the victim’s presence or person, (3) while the defendant is armed with a weapon. MCL 750.529; *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). Here, defendant

confronted the victim with a gun and said “this is a robbery.” The victim handed defendant a bottle of gin and attempted to also hand over his watch. The elements of armed robbery were complete once defendant had taken property from the victim. *Id.* The victim was subsequently shot during a struggle with defendant, but succeeded in closing a door between himself and defendant. The victim was in an upstairs room while the only doorway was blocked by defendant. The victim was forced to break open a second-story window to escape. There was evidence that the victim was confined to the upstairs room by defendant after the robbery was completed. The trial court did not abuse its discretion when it scored OV 8 at 15 points because there was evidence that the victim was held captive beyond the time necessary to commit the offense.

Defendant also asserts that the trial court erred in scoring ten points for OV 9. Defendant waived this issue by agreeing at his sentencing hearing that OV 9 was properly scored at ten points. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Waiver of an issue generally extinguishes all error for appellate review. *Id.* Defendant also argues, however, that defense counsel was ineffective for agreeing that OV 9 was properly scored at ten points because the testimony established that two victims were placed in danger of physical injury or death. MCL 777.39(2)(a). However, defendant’s claim of ineffective assistance of counsel is not properly presented to this Court because it was not raised in defendant’s statement of the questions presented. MCR 7.212(C)(5); *People v Miller*, Mich App 168, 172; 604 NW2d 781 (1999). Thus, we need not address it any further. Nonetheless, we note that there was evidence to support the decision, specifically the presence of another person in the house when defendant shot his weapon. Thus, counsel was not ineffective for bringing a meritless objection to the scoring of OV 9. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Finally, defendant asserts that the trial court erred in scoring one point for OV 12, and the people concede as much. However, a defendant is only entitled to resentencing on the basis of a scoring error if the error alters the recommended minimum sentence range under the legislative sentencing guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). If OV 12 was rescored from one point to zero points, defendant’s total OV score would be 65 and would remain within OV Level IV for class A offenses. MCL 777.62. Consequently, the scoring error did not alter the recommended minimum sentence range under the legislative sentencing guidelines and defendant is not entitled to resentencing.<sup>1</sup>

Affirmed.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Stephen L. Borrello

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<sup>1</sup> Defendant’s unpreserved argument that defense counsel was ineffective for failing to object to the scoring of OV 12 is likewise without merit.