

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 22, 2013

v

JACK MICHAEL KEY,

Defendant-Appellant.

No. 307801
Oakland Circuit Court
LC No. 2011-237792-FH

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

MEMORANDUM.

A jury convicted defendant, Jack Michael Key, of first-degree retail fraud, MCL 750.356c, and the trial court sentenced him as a fourth habitual offender, MCL 769.12, to 30 months to 20 years in prison. Defendant appeals as of right. We affirm.

Defendant was charged in the alternative with unarmed robbery, MCL 750.530, and retail fraud for stealing two tools sets priced at \$650 each from a Sears store. Store security personnel followed defendant outside of the store, apprehended him, and recovered the tool sets. The security officers testified that defendant physically resisted capture. Defendant admitted taking the property but denied struggling with the security officers.

The sole issue on appeal is whether offense variables (OV) 16 and 19, MCL 777.46 and MCL 777.49 respectively, of the sentencing guidelines were improperly scored. Because defendant did not object to the scoring of OV 16 at sentencing or in an appropriate post-sentencing motion and did not object to the scoring of OV 19 on the same ground advanced on appeal, this issue is not preserved. See MCR 6.429(C); *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Accordingly, we review the scoring of the offense variables for plain error. See *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

OV 16 addresses “property obtained, damaged, lost, or destroyed.” MCL 777.46(1). In general, points are assessed on the basis of the value of the property. Five points are to be assessed if the property had a value of \$1,000 to \$20,000. MCL 777.46(1)(c). Zero points are to be assessed if “[n]o property was obtained, damaged, lost, or destroyed or the property had a value of less than \$200.00.” MCL 777.46(1)(e). The value of the property is to be used in scoring OV 16 if “the property was obtained unlawfully, lost to the owner, or destroyed[.]” MCL 777.46(2)(b).

Defendant does not dispute that the value of the property at issue exceeded \$1,000. Rather, he contends that OV 16 should have been scored at zero points instead of five points because the store recovered its property and it was not damaged or destroyed. We disagree. Defendant unlawfully obtained, i.e., came into possession of, the store's property when he left the store with the property without paying for it. The store's recovery of the property is irrelevant. See *People v Leversee*, 243 Mich App 337, 349-350; 622 NW2d 325 (2000) (OV 16 properly scored on the basis of the value of all the stolen property, including property that was recovered and returned to the victims undamaged). Therefore, there is no plain error with respect to OV 16.

Finally, it is unnecessary to address defendant's challenge to the scoring of OV 19. Even if OV 19 is scored at zero points, defendant would not be entitled to resentencing because OV 16 was properly scored and scoring OV 19 at zero points would not affect the appropriate guidelines range. See MCL 777.66; *People v Francisco*, 474 Mich 82, 89-92 & n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering