

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 19, 2013

v

JAMES DANA WARE, JR.,
Defendant-Appellant.

No. 312019
Wayne Circuit Court
LC No. 11-012555-FH

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right his sentences for unarmed robbery, MCL 750.530; resisting, assaulting, or obstructing a police officer, MCL 750.81d(1); second-degree retail fraud, MCL 750.356d; and contributing to the delinquency of a minor, MCL 750.145. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 120 to 540 months' imprisonment for the unarmed robbery conviction, 12 to 48 months' imprisonment for the resisting a police officer conviction, 6 to 12 months for the second-degree retail fraud conviction, and 93 days for the contributing to the delinquency of a minor conviction. We affirm.

Defendant's convictions arose from his theft of several videogames from a Target store, while accompanied by his 11-year-old son, and the subsequent fracas with police. On appeal, defendant challenges the assessment of 15 points against him under offense variable (OV) 19, MCL 777.49(1)(b). OV 19 allows the assessment of 15 points when "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." *Id.* Defendant contends that a conviction of resisting or obstructing a police officer cannot provide the basis for scoring OV 19. Defendant further contends that failing to remain at a crime scene and attempting to evade charges does not constitute interference with the administration of justice for purposes of scoring OV 19. We disagree.

Our Supreme Court recently explained the standard of review applicable to sentencing guidelines scoring:

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the

evidence. 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. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

In this case, we review for clear error the trial court's factual determination that defendant used force against a police officer to interfere with, or attempt to interfere with, the administration of justice. We review de novo the trial court's decision that points could be assessed against defendant under OV 19.

The trial court correctly determined that defendant used force against a police officer. At trial, the arresting officer testified that after defendant came out of the store, she and another officer instructed him to stop. Defendant ran, and when the officers caught him, he pushed and tried to fight the officers as they attempted to handcuff him. The arresting officer further testified that defendant elbowed her underneath her eye. At sentencing, defendant's counsel acknowledged that the officer sustained an injury to her eye area during the fracas with defendant. Accordingly, the record is sufficient to support by a preponderance of the evidence the trial court's factual finding that defendant used force against the police.

The trial court also correctly determined that the assessment of points under OV 19 is appropriate for a conviction of resisting or obstructing under MCL 750.81d(1). Defendant appears to argue that scoring OV 19 is inappropriate for a resisting or obstructing conviction, on the ground that the conduct that supports the OV 19 score is the same as the conduct that supports the conviction. This argument misperceives both the sentencing guidelines and the controlling case law. Our Legislature has directed that points be assessed under OV 19 for *every* offense category. MCL 777.22; see also *People v Smith*, 488 Mich 193, 199-200; 793 NW2d 666 (2010). In addition, our Supreme Court has determined that "[t]he circumstances inherent in an offense may be considered when scoring offense variables, absent an express prohibition." *Hardy*, 494 Mich at 441-442. OV 19 contains no express prohibition against assessing points on a resisting or obstructing conviction. Moreover, the term "interference with the administration of justice" in OV 19 includes conduct that constitutes interference with police. *Smith*, 488 Mich at 201-202; *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

This Court recently recognized that OV 19 points should be assessed against a defendant for conduct that includes "fleeing from police contrary to an order to freeze, [or] attempting to deceive the police." *People v Hershey*, ___ Mich App ___, ___; ___ NW2d ___ (No. 309183, December 5, 2013), slip op pp 7-8 (holding that interference with administration of justice does *not* include failure to pay child support or violation of probation terms). In this case, the evidence at trial indicated that defendant ran from police and used force to interfere with police officers' efforts to handcuff him. Consequently, defendant's conduct warranted the assessment of points under OV 19.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly