

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 21, 2013

v

JASON JAMAL HUBBERT,  
  
Defendant-Appellant.

No. 316085  
Saginaw Circuit Court  
LC No. 10-034243-FH

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Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unlawfully driving away an automobile (UDAA), MCL 750.413, and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 76 months to 15 years for each conviction.

In a previous appeal, this Court affirmed defendant's convictions but remanded for resentencing. In the instant appeal, defendant again challenges the sentences imposed on remand. We affirm.

**I. FACTUAL BACKGROUND**

As this Court recognized in a previous appeal, the factual circumstances of this case are as follows:

Around 4:15 a.m. on April 24, 2010, Saginaw police initiated a traffic stop on a 2002 Chevrolet Trailblazer after seeing it traveling at a high rate of speed. As the officer approached the vehicle on foot, it sped away, leading police on a chase. Eventually, the vehicle occupants fled on foot. Defendant was arrested while attempting to hide from pursuing officers. Two stolen firearms were recovered in or near the vehicle. The vehicle was reported stolen. Laboratory analysis showed that glass fragments found on defendant's clothing were similar to glass from the broken windows of the vehicle. Defendant denied being in the vehicle and claimed that he did not know the other two individuals arrested at the scene. However, recorded telephone calls made by defendant from jail indicated that he did know these individuals. [*People v Hubbert*, unpublished opinion per

curiam of the Court of Appeals, issued November 29, 2012 (Docket No. 302655) (unpub at 1).]

While a panel of this Court affirmed defendant’s convictions, it remanded for resentencing. *Id.* at 7. The panel recognized that defendant was found not guilty of several offenses and remanded for the trial court to make a factual record regarding whether any such conduct justified a score of 10 points under Offense Variable (OV) 12. *Id.* at 6.

On remand, the trial court found that a score of 10 points was justified under OV 12 based on a preponderance of the evidence that defendant committed the following: carrying concealed weapon, MCL 750.227, felon in possession of a firearm (felon in possession), MCL 750.224f, receiving and concealing a stolen firearm, MCL 750.535b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant now appeals.

## II. SENTENCING

### A. Standard of Review

As the Michigan Supreme Court recently clarified in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), a trial court’s factual determinations at sentencing must be supported by a preponderance of the evidence and will be reviewed for clear error. “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). Further, whether the facts “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.” *Hardy*, 494 Mich at 438.

### B. OV 12

Defendant first argues that the trial court erred in scoring OV 12. The trial court found that defendant committed three contemporaneous felonious acts and under OV 12, so a score of 10 points was therefore justified. Pursuant to MCL 777.42(1), the scoring of OV 12 is as follows:

(c) Three or more contemporaneous felonious criminal acts involving other crimes were committed.....10 points

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(e) Two contemporaneous felonious criminal acts involving other crimes were committed.....5 points

(f) One contemporaneous felonious criminal act involving any other crime was committed.....1 point

(g) No contemporaneous felonious criminal acts were committed.....0 points

A felonious criminal act is contemporaneous if it “occurred within 24 hours of the sentencing offense” and “[t]he act has not and will not result in a separate conviction.” MCL 777.42(2)(a).

While defendant was convicted of UDAA and resisting and obstructing, he was found not guilty of carrying a concealed weapon, MCL 750.227, felon in possession, MCL 750.224f, receiving and concealing a stolen firearm, MCL 750.535b, and felony-firearm, MCL 750.227b. On remand, the trial court found that there was a preponderance of the evidence that defendant was a felon in possession, he received and concealed a stolen firearm, and he committed felony-firearm.

Of initial importance is that OV 12, MCL 777.42(2)(b), specifically states that “[a] violation of section 227b of the Michigan penal code, 1931 PA 328, MCL 750.227b [felony-firearm], should not be considered for scoring this variable.” Thus, the trial court erred in considering felony-firearm, MCL 750.227b, under OV 12. However, the trial court correctly found that there was a preponderance of the evidence that defendant received and concealed a stolen firearm and was a felon in possession.

Possession of a firearm may be actual or constructive. *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010). Constructive possession occurs when “there is proximity to the article together with indicia of control.” *Id.* (quotation marks and citation omitted). In other words, the test for constructive possession is whether “the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992).

Here, there was evidence linking defendant to the Trailblazer, as he was seen running and attempting to hide, and glass fragments found on his clothing were consistent with the glass found in the vehicle. Moreover, this was a stolen vehicle, and evidence indicates that the occupants knew it. Instead of complying when the police attempted to pull them over, they fled from the police in the vehicle and on foot. Defendant even tried to hide himself next to a shed after running away on foot. Defendant also wore dark clothing, including black gloves. Two stolen weapons were recovered from the area, one of which was in the car.<sup>1</sup>

Based on this evidence, we agree that there was a preponderance of the evidence that defendant at least constructively possessed the weapons, as possession of a firearm may be joint, with more than one person in constructive possession. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011); see also *Wolfe*, 440 Mich at 520. The evidence also shows that the occupants of the car, including defendant, were engaged in the joint venture of stealing the vehicle and that the accompanying weapons were part of that endeavor. See e.g., *Wolfe*, 440 Mich at 521 (quotation marks and citation omitted) (“[c]onstructive possession may also be proven by the defendant’s participation in a ‘joint venture’ to possess a controlled substance.”). Further, just like there is a well-known relationship between drug dealing and the use of firearms, *People v Rapley*, 483 Mich 1131, 1131; 767 NW2d 444 (2009), there is a similar link

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<sup>1</sup> Two individuals testified at trial that the firearms belonged to them, respectively, and had been taken without permission.

between firearms and car thefts. Therefore, we agree with the trial court that there was a preponderance of the evidence that the car's occupants were jointly involved in the theft of the vehicle and the accompanying possession of the firearms.<sup>2</sup>

While the trial court erred in considering felony-firearm under OV 12, it did not err in considering felon in possession or receiving and concealing a stolen firearm. Because a reduction of five points does not alter defendant's OV level, resentencing is not required. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) (“[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required.”).<sup>3</sup>

### C. Sentencing Departure

Defendant also contends that he is entitled to resentencing for his resisting and obstructing conviction because the imposed minimum sentence exceeds the maximum range permitted under the sentencing guidelines.

This sentencing issue has been addressed in *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005). This Court held that when a defendant is convicted of multiple offenses and receives concurrent sentences, the trial court only is required to score the offense in the highest crime class. *Id.* at 125-129. Because the conviction in the lower class is not required to be scored under the guidelines, the trial court is not obligated to score it within the range delineated. *Id.*

In the instant case, defendant argues that resentencing is required because his conviction for resisting and obstructing did not fall within the guideline range, and the trial court did not articulate substantial and compelling reasons for the departure. Yet, pursuant to *Mack*, the trial court was not required to score this offense, which is in a lesser class than UDAA, under the sentencing guidelines.<sup>4</sup> Therefore, pursuant to *Mack*, defendant's argument lacks merit.

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<sup>2</sup> While defendant cites an overruled case to argue that the trial court erred in making “inferences” only relevant to the UDAA conviction, the trial court was permitted to use factual circumstances relevant to separate crimes. Moreover, defendant does not contest that he was a felon, and the fact that the occupants discarded the weapons suggests knowledge of their stolen nature. Furthermore, defendant fails to offer any arguments specific to the elements of the contemporaneous felonious acts. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

<sup>3</sup> Unlike *Alleyne v United States*, \_\_US\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013), the issue on appeal in this case does not involve a mandatory minimum sentence.

<sup>4</sup> UDAA is a class E felony, MCL 777.16u, and resisting or obstructing is a class G felony, MCL 777.16d.

### III. CONCLUSION

Because any change in the scoring of OV 12 does not affect defendant's sentencing guidelines range, resentencing is not required. Further, the trial court's scoring of defendant's resisting and obstructing conviction was not a sentencing departure. We affirm.

/s/ Patrick M. Meter  
/s/ Deborah A. Servitto  
/s/ Michael J. Riordan