RECEIVED by MSC 11/14/2024 8:26:31 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

EVAN TAYLOR ARMOGEDA,
Defendant-Appellant.
_____/

Supreme Court no. 167760

Court of Appeals no. 365184

Circuit Court no. 21-260-FC

JOHN DEWANE (P56247)
Ingham County Prosecuting Attorney
ELIZABETH L. ALLEN (P75179)
Appellate Division Chief
JERROLD SCHROTENBOER (P33223)
Assistant Appellate Attorney
303 W. Kalamazoo Street, 4th Floor
Lansing, MI 48933
(517) 483-6228

CHRISTOPHER B. WICKMAN (P75395)
Attorney for Defendant-Appellant
3452 E. Lake Lansing Road
E. Lansing, MI 48823
(517) 432-9000

ANSWER TO APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 11/14/2024 8:26:31 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED iv

COUNTERSTATEMENT OF FACTS 1

ARGUMENT

I. Because the judge said that the sentence would have been the same anyway, defendant is not entitled to a resentencing merely because a guideline error changed the range. 4

II. Because (1) the trial court did not restrict his testimony, (2) nothing in the record shows what else defendant had wanted to present, and (3) his driving to the scene to stab the victim is not immediate enough to allow for the lesser offense, he is not entitled to a new trial merely because he now claims that the judge would not let in more evidence about his relationship with his father. 6

III. Because the SCAO has the power to approve a formerly elected circuit judge to be a visiting judge handling the county's backlog, defendant is not entitled to a new trial especially because he did not object until after he was convicted. 11

RELIEF 15

RECEIVED by MSC 11/14/2024 8:26:31 AM

INDEX OF AUTHORITIES

Cases

In re Huff, 352 Mich 402; 91 NW2d 613 (1958) 13
People v Cain, 498 Mich 108; 869 NW2d 829 (2015) 11, 12
People v Epplett, unpublished opinion per curiam of the Court of Appeals, issued 10/28/21 (Docket no. 353093) 5
People v Everett, 318 Mich App 511; 899 NW2d 94 (2017) 7
People v Fleming, 185 Mich App 270; 460 NW2d 602 (1990) 12, 13
People v Francisco, 474 Mich 82; 711 NW2d 44 (2006) 5
People v Latham, 334 Mich App 501; 965 NW2d 248 (2020) 4, 5
People v Sardy, 216 Mich App 111; 549 NW2d 23 (1996) 12, 13
People v Thomas, 399 Mich 826; 349 NW2d 867 (1977) 9
People v Watroba, 89 Mich App 718; 282 NW2d 196 (1979) 4
People v Webb, 458 Mich 265; 580 NW2d 884 (1998) 9
United States v Al-Maliki, 787 F3d 784 (CA 6, 2015) 12
United States v Alvarado, 95 F4th 1047 (CA 6, 2024) 12
United States v Burrell, 114 F4th 537 (CA 6, 2024) 12
United States v Chávez, 951 F3d 349 (CA 6, 2020) 8
United States v Johnson, 95 F4th 404 (CA 6, 2024) 12

Statutes

MCL 257.602a(3) 9
MCL 750.226 9

Rules

MRE 103(a)(2) 6, 7, 8

RECEIVED by MSC 11/14/2024 8:26:31 AM

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Where the judge said that the sentence would have been the same anyway, is defendant entitled to a resentencing anyway merely because a guideline error changed the range?

Defendant-Appellant answers: Yes
Plaintiff-Appellee answers: No

II. Where (1) the trial court did not restrict his testimony, (2) nothing in the record shows what else defendant had wanted to present, and (3) his driving to the scene to stab the victim is not immediate enough to allow for the lesser offense, is he entitled to a new trial anyway merely because he now claims that the judge would not let in more evidence about his relationship with his father?

Defendant-Appellant answers: Yes
Plaintiff-Appellee answers: No

III. Where defendant did not object until after he was convicted, is he entitled to a new trial merely because the SCAO approved a formerly elected circuit judge to be a visiting judge handling the county's backlog?

Defendant-Appellant answers: Yes
Plaintiff-Appellee answers: No

RECEIVED by MSC 11/14/2024 8:26:31 AM

COUNTERSTATEMENT OF FACTS

Plaintiff accepts defendant's Statement of Facts with the following additions and changes.

Plaintiff does not accept defendant's claim in the first paragraph on page 12 that the stabbing victim, Zachary Wickizer, had "texted [defendant] in an antagonizing manner that led [defendant] to believe that he would not be able to be a father to his child, but that Mr. Wickizer would instead." The admitted texts, ##100, 104, and 105, say no such thing. After defendant had said that he would come over "fists only," the victim texted back some laughing emojis and a picture of Abby O'Connor (defendant's former girlfriend) kissing him. Afterwards, defendant said, "Have fun raising my baby. Catch u outside . . . run." As it is, Wickizer denied having ever told defendant that he would raise his baby. (December 9, 2022, Trial Transcript [TrIII], p 139). Further, although defendant said that that statement had been conveyed to him, he never said from whom. (December 12, 2022, Trial Transcript [TrIV], p 49).

Plaintiff also does not accept defendant's statement in the second paragraph on page 12 that Ingham County Circuit Court Judge David Jordan "severely limited" his attempt to explain that his own relationship with his father had affected him. When asked about the matter, the judge overruled plaintiff's objection and let defendant testify that what happened still affects him. (TrIV, p 44). Defendant did not go any further.[1]

[1] Defendant's later claim that counsel did not go further "due to the Trial Court's rulings" finds no support in the record.

RECEIVED by MSC 11/14/2024 8:26:31 AM

The second paragraph on page 13 states that defendant "felt bombarded by messages and phones calls" from Abby O'Connor and Wickizer. As it is, exhibits ##95 through 98 show defendant trying to maintain a relationship with O'Connor despite her refusals.

The video (in the court file) does not show that Wickizer first struck defendant. Instead, it shows defendant (with his knife hidden behind his back) walking up to him, pushing him, and then stabbing him and then walking back to his car. At most, Wickizer stuck out his right hand against defendant. Although defendant denied it (TrIV, p 61), Ronald Holbrook III testified that defendant smiled as he walked away (December 8, 2022, Trial Transcript [TrII], p 192) and O'Connor testified that he was almost laughing as he drove away (TrIII, p 50).

The first full paragraph's statement on page 17 that the entry wound's length was about one inch long is misleading. The *width* was four centimeters (1 ½ inches). (TrIII, pp 112-114). The depth may have been more than one inch but less than five inches. (TrIII, p 117). Defendant stabbed Wickizer in the abdomen's upper left quadrant. (TrIII, p 92).

The first full paragraph on page 18 mentions defendant's not stopping for the police. He went up to 90 mph. (TrII, p 204).

The last paragraph on page 18 mentions the objections to Kathleen Boss's testimony. Although plaintiff called defendant's aunt's testimony irrelevant, it also objected (and the trial court agreed) on hearsay grounds. (TrIV, p 22)

RECEIVED by MSC 11/14/2024 8:26:31 AM

The first full paragraph on page 20 mentions that the trial court would not let Boss testify to defendant's "mental-health disorders." The trial court did so on hearsay grounds. (TrIV, p 10).

The same paragraph inaccurately states that the trial court would not let defendant testify "to his mental-health disorders." Instead, the question was whether he was ever diagnosed with any mental-health disorder. (TrIV, p 54). The trial court did not rule on the objection. Instead, the parties had an off-the-record conference after which defendant did not proceed with that question. Just what was said at side bar is not part of the record.

Nothing in the record shows what defendant would have brought out had he "been allowed" to bring out more about his relationship with his father.

RECEIVED by MSC 11/14/2024 8:26:31 AM

ARGUMENT

I. Because the judge said that the sentence would have been the same anyway, defendant is not entitled to a resentencing merely because a guideline error changed the range.

Starting as long ago as *People v Watroba*, 89 Mich App 718; 282 NW2d 196 (1979), long before any sentencing guidelines existed, courts have consistently held that a defendant is not entitled to a resentencing where the court says that the sentence would have been the same even without the error. Defendant is not entitled to a resentencing.

In *Watroba*, the sentencing court relied on a more substantial mistake than occurred in the present case. Rather than a numerical miscalculation, the court relied on an unconstitutionally obtained prior conviction. Even so, because the sentencing court (when the error was brought to its attention) denied resentencing saying that the sentence would have been the same anyway, the Court of Appeals affirmed, saying:

> As factfinder, it was [the sentencing court's] province to consider all the factors and elements which culminated in the original sentence imposed, determine what emphasis was to be given each, and to resolve whether that sentence should be altered. [*Watroba,* 89 Mich App at 724-725.]

In the present case, the sentencing court did just that, specifically saying that the sentence would have been the same. Hence, *People v Latham*, 334 Mich App 501, 506; 965 NW2d 248 (2020), also said that no resentencing is required where the judge says that the sentence would have been the same anyway.

Even more recently, another opinion said it more directly:

RECEIVED by MSC 11/14/2024 8:26:31 AM

> A trial court's sentencing decision will be upheld despite any underlying errors in scoring the guidelines if it is clear that the trial court would have imposed the same sentence irrespective of the errors and that the sentence is not otherwise improper. [*People v Epplett*, unpublished opinion per curiam of the Court of Appeals, issued 10/28/21 (Docket no. 353093), p 3.]

As it is, the very case that defendant cites, *People v Francisco*, 474 Mich 82, 91; 711 NW2d 44 (2006), allows this approach. This Court ordered resentencing there simply because "we simply do not know" whether the guideline correction that affected the range would have resulted in a different sentence. Here, everyone knows. The judge could not have been clearer.[2]

Therefore, the Court of Appeals' unpublished opinion is correct. It specifically pointed out what this Court had said in *Francisco* and then correctly followed *Latham*. (P 8). No need exists to grant leave to appeal on this issue.

[2] The last part of the statement, "[r]esentencing is . . . not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range," *Francisco*, 474 Mich at 89 n 8, no longer applies. The guidelines were mandatory when *Francisco* was decided. They are not now. Back then, a court had to have substantial and compelling reasons to depart. Now, it must merely articulate the departure reason (which was done here) and the appellate court reviews for only proportionality.

RECEIVED by MSC 11/14/2024 8:26:31 AM

II. Because (1) the trial court did not restrict his testimony, (2) nothing in the record shows what else defendant had wanted to present, and (3) his driving to the scene to stab the victim is not immediate enough to allow for the lesser offense, he is not entitled to a new trial merely because he now claims that the judge would not let in more evidence about his relationship with his father.

Defendant has three very large problems here. First, he mischaracterizes the record in saying that the judge would not allow in this evidence. At no time did the court say that he could go no further. Second, he failed to follow MRE 103(a)(2)'s offer of proof requirement. He got a lot in as it was. He does not even hint at what more would have come in. Third, the evidence would not have mattered anyway. Not only did defendant deny intending to kill, but the mitigation allowance does not apply where the defendant has had time to cool down (as happened here).

First, despite what defendant says, this issue is not preserved for appeal. Earlier, the judge had sustained a hearsay objection to defendant's aunt testifying about the relationship between defendant and his father. (TrIV, p 22). Then, the very last time that the issue came up, the trial court overruled plaintiff's objection—allowing defendant himself to testify to his relationship with his father. (TrIV, p 44). For whatever reason, he chose not to go further than just this one answer to this one question. He now just makes up that counsel went no further because of the judge's earlier rulings.

A party cannot legitimately claim error based on the judge allowing him to do what he wants to do and then speculating that the judge would not have allowed him to go further if he had bothered to try. Allowing such a procedure to preserve an issue

RECEIVED by MSC 11/14/2024 8:26:31 AM

on appeal would effectively eliminate the issue-preservation rule. Anyone could afterwards say something like "I didn't ask the question that I was entitled to ask because I know this judge would not have allowed me to. I'm therefore entitled to a new trial even though the judge did not rule against me."

A party needs to put the matter on the record for this Court (or any appellate court) to properly review the record. The record shows nothing more than the judge allowing the question and wanting to see where things led. The record does not show why defendant did not bother going further.

Therefore, this Court reviews for nothing more than plain error. Without an error, defendant is not entitled to relief. *People v Everett*, 318 Mich App 511, 527; 899 NW2d 94 (2017).

Second, defendant has failed to preserve this issue in another way as well. Even assuming that the trial court kept out the information (despite what the record shows), defendant did not present at the trial level the required offer of proof. MRE 103(a)(2) says:

> Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right is affected, and
>
> * * *
>
> (2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

At no time did defendant ever say just what it was that he wanted to say that was being excluded. As it was, defendant brought out a lot. He testified that his relationship with his father continued to impact him as an adult. (TrIV, p 44). He

RECEIVED by MSC 11/14/2024 8:26:31 AM

said that he wanted to be a better father. (TrIV, p 46). Because he had failed as a father with his son and did his best with his daughter, he did not want to lose another opportunity. (TrIV, p 98). Accordingly, the messages that he had been receiving caused him to feel jealousy, anger, betrayal, hurt, and devastation. (TrIV, pp 58, 100). His own brief then outlines his testimony about his past emotional problems:

> Mr. Armogeda was allowed to testify that he had a lot of emotions, struggled to process, and felt panicked, frenzied, and scared at times during his entire life. . . . He also testified that because of his lifelong struggles with his feelings, thoughts, and emotions, there were days he could not get any work done and where he couldn't attend class due to anxiety, depression, and suicidal thoughts. . . . He testified his anxiety was debilitating and caused racing thoughts, made him feel insecure, and made him feel crazy. . . . Mr. Armogeda described his depression as causing days when he just shut the blinds, stayed in bed, put the phone on silent, and the best thing that he could do was eat and go the bathroom. . . . Mr. Armogeda also testified that this has been going on in his entire life including when he was dating Mr. O'Connor. (P 17).

What more was there? Merely saying that there was more does not mean that there was any or, more importantly, just what it was. The record does not say. Defendant did not comply with MRE 103(a)(2).

Once again, defendant must show plain error, which requires that he show, among other things, that the error is "plain."[3] Of course, finding plain error is impossible where the supposed missing evidence is unknown (or at least unspecified). This Court just cannot assess the matter. Because nothing shows that defendant was prejudiced, on this ground alone, he is not entitled to a new trial.

[3] The word "plain" has teeth. *United States v Chávez*, 951 F3d 349, 357 (CA 6, 2020).

RECEIVED by MSC 11/14/2024 8:26:31 AM

In the alternative his Court could look at the issue another way, without looking at evidence preservation. In *People v Webb*, 458 Mich 265, 279; 580 NW2d 884 (1998), the trial court improperly ordered an expert to limit his testimony to what was in his report. This Court, however, affirmed the conviction simply because "we have located no point in [the doctor's] testimony where he was effectively precluded from making his point." Despite the ruling, the doctor was able to say everything that he had wanted to say. In the present case, defendant points to nothing in the record that effectively kept him from making his point. *Webb* applies.

Third, in the end, whatever evidence defendant had wanted to present but could not (assuming any exists) is essentially legally irrelevant. Such evidence has nothing to do with his defense, that he had not intended to kill, just to injure.[4]

As it is, two very strong problems exist as to any claim that the turmoil that he was going through mitigated the crime. First, he denied an intent to kill. (TrIV, p 62). The mitigation evidence would merely explain why he attacked the victim. It would not show that he intended merely to injure and not to kill. (At least defendant makes no such claim.) Second, plenty of time occurred between defendant picking up the knife and driving to where the victim was and then stabbing him. Even after he

[4] In essence, defendant's relief request is quite limited. This issue has nothing to do with either the carrying with unlawful intent, MCL 750.226, or the fleeing and eluding, MCL 257.602a(3). In addition, since he admitted that he intended to injure the victim, defendant is at most entitled to having the AWIM reduced to AGBH (with plaintiff's option whether or not to try on the higher charge). *People v Thomas*, 399 Mich 826, 826-827; 349 NW2d 867 (1977).

went there, he waited a few moments in his car, then got out, calmly walked toward the victim, pushed him, stabbed him, and then calmly walked back. (Video.)

In other words, defendant was not even entitled to the mitigation instruction. In other words, whatever evidence defendant claims should have come out was legally irrelevant. Nothing that he could present on this front would show that he did not intend to kill but instead merely to injure. He is not entitled to relief no matter how this issue is analyzed.

Therefore, the Court of Appeals correctly denied relief. It first found no error. (P 6). Then, it pointed out that, because plenty of evidence had come out already for defendant to make his point, any error here was harmless. (Pp 6-7). No need exists to grant leave to appeal on this issue either.

RECEIVED by MSC 11/14/2024 8:26:31 AM

RECEIVED by MSC 11/14/2024 8:26:31 AM

III. Because the SCAO has the power to approve a formerly elected circuit judge to be a visiting judge handling the county's backlog, defendant is not entitled to a new trial especially because he did not object until after he was convicted.

By itself, defendant not objecting means that he is not entitled to a new trial. He cannot meet three of the four *sine qua non* requirements for plain error. He cannot show error at all, any error that is plain, or even error that undermines the system's fairness. After all, the SCAO properly set up a system having two retired formerly elected circuit court judges help with the county's backlog in cases. For any of these three defects in his argument, defendant is not entitled to a new trial.

Although defendant correctly points out that this issue is unpreserved, he fails to deal with that admission's ramifications. In *People v Cain*, 498 Mich 108; 869 NW2d 829 (2015), the jury had not been properly sworn in—a structural error. Even for a structural error, however, where the issue is not preserved, "a defendant is still not entitled to relief unless he or she can satisfy the four requirements set forth in [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)]." *Cain*, 498 Mich at 116.

The three missed requirements in reverse order. As in *Cain*, defendant not only cannot meet the fourth step, "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings," *Cain*, 498 Mich at 120, but he does not even try to. Where the defendant fails to object, reversal is reserved for only "the most serious cases, those in which the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance that error." *Cain*, 498 Mich at 119. To repeat, defendant does not even try to meet that standard.

RECEIVED by MSC 11/14/2024 8:26:31 AM

No one questions that defendant is guilty (at least he makes no such claim on appeal—and he admitted at trial that he is guilty of two counts and a lesser of the more serious). Further, no one claims that the US Constitution is in any way implicated. And except for Argument II, defendant does not claim that the trial was anything but fair. Instead, defendant claims nothing but the state Constitution was somehow violated even though Judge David Jordan (a former Michigan Court of Appeals commissioner) was duly appointed by the SCAO and himself was once elected as an Ingham County District Court judge. Assuming a violation, this is not the type that somehow seriously affects the system's integrity and fairness. If it does, then failing to properly swear in the jury (a more serious concern) does too despite what this Court said in *Cain*.

Next, defendant cannot meet the second step, that any error was "plain." No case has yet accepted defendant's position. As pointed out in *United States v Al-Maliki*, 787 F3d 784, 794 (CA 6, 2015), "[a] lack of binding case law that answers the question will . . . preclude our finding of plain error." As it is, the only cases go against him. *People v Sardy*, 216 Mich App 111, 117; 549 NW2d 23 (1996); *People v Fleming*, 185 Mich App 270, 274-276; 460 NW2d 602 (1990). By itself with the only two cases going against defendant, he cannot show that the error is still somehow "plain."[5]

[5] In *United States v Johnson*, 95 F4th 404, 416 (CA 6, 2024), *United States v Alvarado*, 95 F4th 1047, 1052-1053 (CA 6, 2024), and *United States v Burrell*, 114 F4th 537, 549-550 (CA 6, 2024), the defendants claimed that their felon-possessing-a-firearm convictions violated their Second Amendment rights. In each case, the Sixth Circuit rejected the argument by pointing out that the circuit split on the issue prevented the court from declaring the issue plain error. It was not "plain."

RECEIVED by MSC 11/14/2024 8:26:31 AM

And, defendant cannot even meet the first step, that any error even occurred. As both Judge Jordan ruled and the prosecutor pointed out in her answer to the new-trial motion, the SCAO has the authority to allow visiting judges to be appointed for however long where the regular judges have a backlog.[6]

That the state constitution allows for visiting judges even though not elected to the county goes further back than either *Sardy* or *Fleming*. This Court in *In re Huff*, 352 Mich 402; 91 NW2d 613 (1958), rejected many of defendant's claims. In *Huff*, because the Saginaw dockets were in such bad shape, the SCAO ordered the presiding Saginaw Circuit Court Judge to temporarily sit on the Wayne County Circuit Court and then appointed someone else to handle the Saginaw docket in the meantime. Not only did the Saginaw judge refuse to go to Wayne County but he prevented the Saginaw visiting judge from presiding over anything. He said that he could preside only where he has been elected to serve, in Saginaw and not in Wayne.

This Court unanimously rejected this judge's constitutional claims by pointing to the provisions that both Judge Jordan and the prosecutor cited below. The state constitution allows the SCAO to appoint visiting judges. It then found the judge in contempt of court and fined him.

In fact, *Huff* even points out that previous visiting judges had been appointed in Saginaw to help out this particular judge. In other words, exactly the same situation as in the present case. *Huff*, 352 Mich at 411.

---

[6] Plaintiff will not repeat those arguments as defendant is not claiming that the rules were not properly followed but instead merely that the rules violate the state Constitution.

Judges Jordan and Clinton Canady, both retired Ingham County judges, were appointed by the SCAO to clean up an Ingham County Circuit Court backlog. Nothing that defendant says what they are doing, sanctioned by the SCAO, is unconstitutional—especially since he did not object beforehand. He is not entitled to a new trial.

Hence, the Court of Appeals correctly rejected this claim too. (Pp 3-4). No need exists to grant leave to appeal on this issue either.

RECEIVED by MSC 11/14/2024 8:26:31 AM

RECEIVED by MSC 11/14/2024 8:26:31 AM

RELIEF

ACCORDINGLY, plaintiff asks this Court to deny this application.

November 14, 2024

Respectfully submitted,

/s/ Jerrold Schrotenboer

Jerrold Schrotenboer (P33223)
Assistant Appellate Attorney

STATEMENT OF WORD COUNT

There are 2,961 countable words in this answer.

/s/ Jerrold Schrotenboer

Jerrold Schrotenboer (P33223)
Assistant Prosecuting Attorney

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 11/14/2024 8:26:31 AM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY AUSTIN EPPLETT,

Defendant-Appellant.

UNPUBLISHED
October 28, 2021

No. 353093
Ottawa Circuit Court
LC No. 19-042918-FH

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM.

Defendant, Gary Austin Epplett, appeals as on leave granted[1] his sentence following his jury trial conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 30 to 360 months' incarceration.[2] This case arises from defendant's involvement in taking property from a home in which three victims were either living or kept property. On appeal, defendant argues that because the trial court erred when it assessed Offense Variable (OV) 9 (number of victims), he is entitled to resentencing. We affirm.

I. BACKGROUND

As noted, defendant was involved in entering the victims' home and taking a number of valuable items from that home. Defendant was convicted by a jury of second-degree home invasion, and that conviction is not challenged on appeal. At defendant's sentencing, the trial court

[1] *People v Epplett*, 506 Mich 964; 950 NW2d 747 (Mich, 2020).

[2] Defendant was sentenced on July 29, 2019, and he was given credit for 155 days served. As of August 23, 2021, he had therefore already served his minimum sentence. However, defendant apparently remains incarcerated at this time, and his minimum sentence may affect decisions made by the Department of Corrections. Therefore, it is not obvious that defendant's minimum sentence is moot even if that minimum sentence has already been served.

RECEIVED by MSC 11/14/2024 8:26:31 AM

assessed 10 points for OV 9, indicating that four or more victims had been placed at risk of property loss, MCL 777.39(1)(c). However, only three victims kept property at the home from which defendant took property. Therefore, it is undisputed that OV 9 should have been assessed zero points,[3] MCL 777.39(1)(d). Defendant moved for resentencing. As both parties agreed, the trial court corrected OV 9 and ordered it rescored at zero points. Defendant's original guidelines minimum sentence range had been 29 to 85 months; correcting the scoring error lowered his minimum sentence range to 19 to 57 months. However, the trial court denied defendant's motion for resentencing, determining that it was unnecessary. The trial court made clear that it was well-acquainted with this case and would, if resentencing were to occur, impose an identical 30-month minimum sentence, notwithstanding the recalculation of the defendant's minimum sentencing guidelines range.

II. STANDARD OF REVIEW

"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." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "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." *Id*. "[T]he proper interpretation and application of the statutory sentencing guidelines . . . are both legal questions that this Court reviews de novo." *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). Although trial courts are required to correctly score and must consider the sentencing guidelines when imposing a sentence, the guidelines are only advisory. *People v Lockridge*, 498 Mich 358, 365, 391; 870 NW2d 502 (2015); *People v Steanhouse*, 500 Mich 453, 459-460, 474-475; 902 NW2d 327 (2017).

III. ANALYSIS

In general, "this Court is required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines." *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). If a defendant's minimum sentence is within the correctly-scored sentencing guidelines range, the sentence is presumptively proportionate, absent proof of unusual circumstances. *People v Posey*, 334 Mich App 338, 358; ___ NW2d ___ (2020). It is not disputed that defendant's minimum sentence of 30 months was within his original miscalculated guidelines range, and it remains within his correct recalculated guidelines range. Defendant has not seriously urged us to consider any unusual circumstances that would make a 30-month minimum sentence disproportionate. Therefore, defendant's sentence was, and remains, proportionate.

Defendant argues that he is nevertheless entitled to resentencing. We disagree. Defendant speculates that his original sentence was intended to be at the bottom of his original guidelines range, so he is entitled to a new sentence at the bottom of his revised guidelines range. This argument places undue weight on the guidelines. Although the guidelines are a highly relevant

[3] Insofar as we can determine, OV 9 was scored at 10 points in defendant's PSIR, and the error simply passed unnoticed by everyone.

consideration, the proper analysis is proportionality. *Steanhouse*, 500 Mich at 474. At the hearing on defendant's motion, the trial court appropriately and unequivocally stated its familiarity with the case, and it explained that a 30-month minimum sentence is what it would have imposed originally even if defendant's sentencing guidelines had been properly scored. A trial court's sentencing decision will be upheld despite any underlying errors in scoring the guidelines if it is clear that the trial court would have imposed the same sentence irrespective of the errors and that sentence is otherwise not improper. See *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003); *People v Latham (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 338891), slip op at pp 2-3.

Because defendant's sentence is proportionate, and the trial court clearly explained that it would have imposed the same sentence had the guidelines been correctly scored at the outset, resentencing is not required. We therefore need not consider defendant's request to order resentencing before a different judge.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick

RECEIVED by MSC 11/14/2024 8:26:31 AM