

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals

ERIN LEIGH BIRKAM (71217)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5787

TABLE OF CONTENTS

	<u>Page</u>
Index of authorities	ii-iv
Counterstatement of jurisdiction	1
Counterstatement of questions presented	2
Counterstatement of facts	3
Argument	8
I. Scoring decisions for which there is any evidence in support will be upheld. Defendant made self-serving attempts to hinder the investigation and prosecution, including disposing of evidence, fleeing and remaining on the run for 15 days, and influencing witness testimony. The trial court properly scored OV 19 for defendant's interference or attempt to interfere with the administration of justice	8
Standard of review	8
Discussion	8
A. Rules of interpretation	9
B. Disposing of evidence, fleeing and remaining on the run for 15 days, and influencing witness testimony constituted an interference or attempt to interfere with the administration of justice	11
C. Defendant's flight, alone, constituted an interference or attempt to interfere with the administration of justice	15
Relief	20

INDEX OF AUTHORITIES

Federal cases

United States v Alpert, 28 F3d 1104 (CA 11, 1994)	17
United States v Bliss, 430 F3d 640 (CA 2, 2005)	17
United States v Jackson-Randolph, 282 F3d 369 (CA 6, 2002)	17
United States v Sanchez, 928 F2d 1450 (CA 6, 1991)	17

State cases

Bush v Shabahang, 484 Mich 156 (2009)	10, 18
Driver v Naini, 490 Mich 239 (2011)	10
People v Anderson, 391 Mich 419 (1974)	13
People v Barbee, 470 Mich 283 (2004)	6, 11, 16
People v Earegood, 383 Mich 82 (1970)	13
People v Earl, 297 Mich App 104 (2012)	8
People v Elliott, 215 Mich App 259 (1996)	8, 9, 15, 19
People v Erickson, 288 Mich App 192 (2010)	11, 12
People v Gajos, (Docket No. 281344)	18, Attachment F

People v Hicks, 259 Mich App 518 (2003)	8
People v Hill, 486 Mich 658 (2010)	10
People v Holm, (Docket No. 256985)	15, Attachment D
People v Kloosterman, 296 Mich App 636 (2012)	12
People v Magee, (Docket No. 280534)	12, Attachment A
People v McGraw, 484 Mich 120 (2009)	8, 13
People v Olsen, (Docket No. 271267)	15, Attachment B
People v Ratkov, 201 Mich App 123 (1993)	14
People v Smith, 488 Mich 193 (2010)	7, 13
People v Spangler, 480 Mich 947 (2007)	18
People v Steele, 283 Mich App 472 (2009)	14
People v Underwood, 278 Mich App 334 (2008)	16
People v Waller, (Docket No. 297639)	15, Attachment C
People v Williams, (Docket No. 299484)	6
People v Williams, 493 Mich 876 (2012)	7

Potter v McLeary,
484 Mich 397 (2009) 10

Statutes, rules, and publications

Black’s Law Dictionary (2009) 11

MCL 8.3a 10

MCL 750.82 17

MCL 750.227b 5

MCL 750.316 3, 5

MCL 750.317 5

MCL 750.529 17

MCL 769.32, repealed by 31 PA 2002 18

MCL 777.22 18

MCL 777.31(2) 17

MCL 777.33(2)(d) 17

MCL 777.41(2)(c) 17

MCL 777.42(2)(a) 18

MCL 777.49 6, 9, 10, 16, 18

MCL 777.49(c) 8, 12, 15, 19

MCR 7.215(C)(1) 12

Random House Webster’s College Dictionary (1997) 10

Report of the Michigan Sentencing Guidelines Commission (1997) 18

USSG § 3C1.1 16, 17, Attachment E

Webster’s New Collegiate Dictionary (1973) 11

COUNTERSTATEMENT OF JURISDICTION

The People accept and adopt defendant's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Scoring decisions for which there is any evidence in support will be upheld. Defendant made self-serving attempts to hinder the investigation and prosecution, including disposing of evidence, fleeing and remaining on the run for 15 days, and influencing witness testimony. Did the trial court properly score OV 19 for defendant's interference or attempt to interfere with the administration of justice?

The trial court answered: **"YES"**

The Court of Appeals answered: **"YES"**

The People answer: **"YES"**

Defendant answers: **"NO"**

COUNTERSTATEMENT OF FACTS

This action arises out of the shooting death of Henry Morgan, also known as “Red,” during the early morning hours of November 28, 2009, at the Satan’s Side Kick motorcycle club in Detroit. Members had gathered at the club the night before for a friends and family event.¹

Defendant and codefendant Tiffany Pritchett,² who were in a romantic relationship and cohabiting, arrived at the club between 10:00 p.m. and 11:00 p.m.³ Defendant is a member of the club, and as a female who was in a relationship with defendant, codefendant was considered defendant’s “personal property” under the club’s rules.⁴

At approximately 11:00 p.m., club member Kenief Lynch, club member Morgan, and codefendant were in the club’s office.⁵ Morgan closed the office door, joking that his action would raise defendant’s suspicion. Codefendant’s phone then rang, and defendant unlocked the office door and entered.⁶ Defendant was agitated and argued with Morgan.⁷ Then, defendant punched Morgan.⁸ Lynch and codefendant pushed defendant out of the office.⁹

¹1b, 32a-33a, 2b-4b.

²Codefendant was tried by the same jury as defendant for first-degree murder, MCL 750.316. She was acquitted. 72b.

³38b-39b, 43b.

⁴10b-12b, 60a, 13b-14b.

⁵15b-16b.

⁶17b, 62a.

⁷18b-19b.

⁸64a, 84a.

⁹20b.

While codefendant monitored the door, Morgan gave Lynch his gun and stated, "here, take my gun; I don't want to kill this nigger."¹⁰ Meanwhile, defendant yelled to Morgan, "pull your gun, nigger."¹¹ Clothilda Jones, who was nearby, yelled to defendant that Morgan did not have a gun.¹²

When Morgan had calmed down, he went to the bar area where defendant glared at him.¹³ Morgan lifted his shirt and told defendant that he was unarmed.¹⁴

An hour or two later, Morgan and defendant began arguing again. Defendant ran toward Morgan. Defendant reached for his gun, but Lynch grabbed defendant's arm. Codefendant moved in between Morgan and defendant to try to calm defendant down. Defendant nevertheless freed his arm from Lynch. Then, defendant grabbed his gun from his waistband and pointed it over codefendant's shoulder to shoot Morgan.¹⁵ Jones and another member, Francisco Calderin, were in the kitchen and heard a shot. When they ran to the bar area, Morgan fell at Jones's feet. Morgan told Calderin that defendant shot him.¹⁶

Club members restrained defendant, but he refused to release his gun to anyone but codefendant.¹⁷ Before the police arrived, defendant exited the club and jumped into codefendant's

¹⁰65a-66a.

¹¹34a.

¹²5b.

¹³66a, 21b-22b.

¹⁴6b, 51a, 23b.

¹⁵7b-8b, 51a-52a, 69a-70a, 24b-25b, 71a-72a, 26b, 40b.

¹⁶7b-8b, 51a-52a.

¹⁷27b-32b.

van as she was leaving.¹⁸ When codefendant pulled over to allow a police car to pass, defendant jumped out of the van.¹⁹ Defendant walked away and called a cousin for a ride.²⁰ Fifteen days later, defendant turned himself in to police.²¹

The People charged defendant with first-degree murder²² and felony-firearm.²³ At the jury trial, defendant testified that he acted in self-defense because, just before the shooting, Morgan pursued him and reached for a gun.²⁴ Codefendant also claimed that she saw Morgan reaching toward his back or waist-area.²⁵ Defendant testified that he wanted to stay at the club after the shooting to wait for police, but another club member named “Narco” threatened him so he escaped to codefendant’s van.²⁶ The jury convicted defendant of the lesser offense of second-degree murder²⁷ and felony-firearm.²⁸

At sentencing on April 27, 2010, defendant challenged, among other things, the scoring of ten points for offense variable (OV) 19. The prosecutor argued that defendant left the scene of the

¹⁸58b-59b.

¹⁹60b.

²⁰107a.

²¹66b.

²²MCL 750.316.

²³MCL 750.227b.

²⁴102a-103a.

²⁵51b-57b.

²⁶66b, 68b.

²⁷MCL 750.317.

²⁸3a-4a.

shooting and failed to turn himself in to police for 15 days.²⁹ She also noted that codefendant's statement to police differed from her testimony at trial and the record demonstrated that defendant spoke to codefendant in between.³⁰ Defense counsel argued that defendant left the scene under duress and only waited 15 days to turn himself in so that he could retain an attorney.³¹ The trial court scored ten points for OV 19 based on the fact that defendant was on the run for 15 days.³²

Defendant was scored a total of five points for the prior record variables (PRVs) and a total of 105 points for the OVs, placing him in the B-III offender range (180 to 300 months).³³ The trial court sentenced defendant within the guidelines to 23 to 40 years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction.³⁴

Defendant filed an appeal as of right in the Court of Appeals arguing: 1) prosecutor error, 2) scoring errors as to PRV 2 and OV 19, and 3) ineffective assistance of counsel. On January 19, 2012, the Court of Appeals affirmed defendant's convictions and sentences.³⁵ Regarding OV 19, the Court of Appeals concluded:

OV 19 requires a trial court to assess ten points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. OV 19 has a broad application. *People v Barbee*, 470 Mich 283,

²⁹16a.

³⁰17a, 19a-20a.

³¹17a.

³²20a-21a.

³³5a.

³⁴3a-5a.

³⁵*People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2012 (Docket No. 299484); see 6a-11a.

286-287; 681 NW2d 348 (2004). Any acts by a defendant that interfere or attempt to interfere with the judicial process or law enforcement officers and their investigation of a crime may support a score for OV 19. *Id.* In scoring OV 19, the trial court may consider “conduct that occurred after the sentencing offense was completed.” *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

Here, there was trial testimony that defendant left the scene by jumping in Pritchett’s van and driving away with her. When the police arrived soon after the shooting, there was no gun on the premises and both defendant and Pritchett had left. Although defendant did not directly flee from police at the scene, he admittedly left the scene and did not contact the police for 15 days, even though he was aware that he was wanted in connection with the shooting. Thus, defendant hindered law enforcement efforts by leaving the scene and by remaining at large for more than two weeks. Because there is some support in the record for the trial court’s scoring of OV 19, we uphold the trial court’s scoring decision.

Defendant filed an application for leave to appeal the January 19, 2012 opinion of the Court of Appeals. On October 24, 2012, this Court granted defendant’s application, “limited to the issue whether OV 19 (interference with the administration of justice) was correctly scored.”³⁶

³⁶*People v Williams*, 493 Mich 876 (2012).

ARGUMENT

I.

Scoring decisions for which there is any evidence in support will be upheld. Defendant made self-serving attempts to hinder the investigation and prosecution, including disposing of evidence, fleeing and remaining on the run for 15 days, and influencing witness testimony. The trial court properly scored OV 19 for defendant's interference or attempt to interfere with the administration of justice.

Standard of Review

“A trial court’s scoring of the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score.”³⁷ The trial court’s factual findings are reviewed for clear error.³⁸ “Scoring decisions for which there is any evidence in support will be upheld.”³⁹ “The interpretation and application of the legislative sentencing guidelines . . . involve legal questions that this Court reviews de novo.”⁴⁰

Discussion

The trial court properly scored ten points for OV 19 pursuant to MCL 777.49(c).⁴¹ The unambiguously broad language of subsection (c) requires a score of ten points for OV 19 if an offender makes an effort to, or succeeds in hampering, hindering, or obstructing the administration

³⁷*People v Earl*, 297 Mich App 104, 109 (2012).

³⁸*People v Hicks*, 259 Mich App 518, 522 (2003).

³⁹*People v Elliott*, 215 Mich App 259-260 (1996).

⁴⁰*People v McGraw*, 484 Mich 120, 123 (2009).

⁴¹18a-21a.

of justice, which includes the investigation and prosecution of crime. Here, mere flight in the aftermath of the shooting falls within the language of subsection (c). But the additional facts that defendant disposed of the murder weapon, remained on the run for 15 days after fleeing from the scene, and influenced the testimony of a witness more than establish the minimal requirement that “any evidence” support the trial court’s decision to survive appellate review.⁴²

A. Rules of interpretation

MCL 777.49 provides:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) The offender by his or her conduct threatened the security of a penal institution or court 25 points
- (b) The 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 15 points
- (c) The offender otherwise interfered with or attempted to interfere with the administration of justice 10 points
- (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force 0 points

Here, the question is how “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice” should be interpreted in subsection (c).

⁴²*Elliott*, 215 Mich App at 260.

Statutory construction discerns and gives effect to the Legislature’s intent.⁴³ In determining that intent, this Court first looks to the language of the statute.⁴⁴ “When the language is clear and unambiguous, [this Court] will apply the statute as written and judicial construction is not permitted.”⁴⁵ As far as possible, this Court gives effect to every phrase, clause, and word in the statute.⁴⁶ Undefined statutory terms are given “their plain and ordinary meaning unless the undefined word or phrase is a term of art.”⁴⁷ “The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.”⁴⁸

The predicate of subsection (c)—“interfered with or attempted to interfere”—and its object—“administration of justice” must be given effect to determine the Legislature’s intent. MCL 777.49 does not define “interfere.” But the plain and ordinary meaning of “interfere” is “to come into opposition or collision so as to hamper, hinder, or obstruct someone or something.”⁴⁹ The ordinary meaning of “attempt” is “to make an effort at; try; undertake.”⁵⁰

The statute also does not define “administration of justice” in MCL 777.49. The definition of administration is, “the act or process of administering.” Administer, in turn, is “to manage or

⁴³*Potter v McLeary*, 484 Mich 397, 410 (2009).

⁴⁴*Id.*

⁴⁵*Driver v Naini*, 490 Mich 239, 247 (2011).

⁴⁶*Bush v Shabahang*, 484 Mich 156, 167 (2009).

⁴⁷*People v Hill*, 486 Mich 658, 668 (2010), citing MCL 8.3a.

⁴⁸*Shabahang*, 484 Mich at 167.

⁴⁹Random House Webster’s College Dictionary (1997).

⁵⁰*Id.*

supervise the execution, use, or conduct of.”⁵¹ Justice is “[t]he fair and proper administration of laws.”⁵² Black’s Law Dictionary defines the phrase “administration of justice:” “The maintenance of right within a political community by means of the physical force of the state; the state’s application of the sanction of force to the rule of right.”

This Court has already held that the investigation of crime is one facet of the administration of justice.⁵³

[T]he phrase “interfered with or attempted to interfere with the administration of justice” encompasses more than just the actual judicial process. Law enforcement officers are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order.⁵⁴

The unambiguously broad language of subsection (c) requires a score of ten points for OV 19 if an offender makes an effort to, or succeeds in hampering, hindering, or obstructing the administration of laws or the maintenance of right.

B. Disposing of evidence, fleeing and remaining on the run for 15 days, and influencing witness testimony constituted an interference or attempt to interfere with the administration of justice

In *People v Erickson*,⁵⁵ the defendant wiped a knife down that he used to stab the victim, asked a companion to dispose of it, asked others to lie about his whereabouts during the crime, left the scene of the crime, and later left the state. The Court of Appeals held that the trial court did not

⁵¹Webster’s New Collegiate Dictionary (1973).

⁵²Black’s Law Dictionary (2009).

⁵³*People v Barbee*, 470 Mich 283, 288 (2004).

⁵⁴*Id.* at 287-288.

⁵⁵*People v Erickson*, 288 Mich App 192, 204 (2010), lv den 488 Mich 1045 (2011).

abuse its discretion by scoring ten points for OV 19. The defendant's disposal of evidence and manipulation of witness testimony constituted an attempt to "mislead the police."

[The defendant's] actions ultimately constituted fabrications that were self-serving attempts at deception obviously aimed at leading police investigators astray or even diverting suspicion onto others and away from him. Unmistakably, defendant's actions were attempts to interfere with the administration of justice as contemplated by the plain language of MCL 777.49(c)

The trial court did not abuse its discretion when it scored ten points for OV 19 in *Erickson*.

In *People v Magee*,⁵⁶ the ten-point score for OV 19 was similarly within the trial court's discretion. In that case, the defendant told witnesses at the scene of an accident that he did not want to call the police. Then, the defendant left the scene before the authorities arrived. In addition, the defendant allowed or encouraged a false confession by a witness. All of these facts culminated to interfere with the investigation.⁵⁷

Like the defendants in *Erickson* and *Magee*, defendant made self-serving attempts to hinder the investigation and prosecution. Immediately after the shooting, two members of the club tried to convince defendant to give them his gun. Defendant struggled with the men and refused to give the gun to anyone but codefendant.⁵⁸ Of course, when the police arrived, the gun was gone.⁵⁹ By

⁵⁶*People v Magee*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2009 (Docket No. 280534). Unpublished opinions are not binding authority, but they may be persuasive. See Attachment A. MCR 7.215(C)(1); *People v Kloosterman*, 296 Mich App 636, 641 n 2 (2012).

⁵⁷Instead, he called his father, who later orchestrated calling the authorities. *Id.* at slip op 6.

⁵⁸30b-31b.

⁵⁹40b-41b.

disposing of physical evidence—here the gun used to shoot Morgan—defendant hindered the investigation and prosecution of the homicide.⁶⁰

After shooting Morgan, defendant did not wait for police to arrive, but rather fled from the club by jumping into codefendant’s van and ordering her to drive away. Defendant made self-serving claims at trial that he was threatened by another club member so he could not wait for police, but even when codefendant pulled her van over for a police car, defendant avoided the police by jumping out of the van.⁶¹ Then, defendant was on the run for 15 days. He knew the police were after him so he avoided his home⁶² and he kept his whereabouts from codefendant, who was in contact with the police.⁶³ Defendant’s flight hindered the investigation and delayed prosecution.

Although defendant argues that a broad interpretation of OV 19 could cause future offenders to be scored ten points for exercising their constitutional rights (i.e., remaining silent or requesting counsel during an interrogation), a court may not consider factors that violate a defendant’s constitutional rights when sentencing the defendant.⁶⁴ Defendant claimed at trial that he was on the run for 15 days because he was trying to earn money to hire an attorney.⁶⁵ Even if the trial court

⁶⁰In *People v Smith*, 488 Mich 193, 195 (2010), this Court held that “under the exception to the general rule set forth in [*McGraw*, 484 Mich at 133], the offense variable [19] may be scored for conduct that occurred after the sentencing offense was completed.”

⁶¹44b, 58b-61b, 66b, 68b.

⁶²61b-63b, 108a, 67b.

⁶³34b-35b, 36b-39b.

⁶⁴See *People v Anderson*, 391 Mich 419, 422-423 (1974) and *People v Earegood*, 383 Mich 82, 85 (1970).

⁶⁵71b-72b.

credited defendant's self-serving claim, the ten-point score for OV 19 did not penalize defendant for exercising a constitutional right to counsel. At the time that defendant was on the run, he had neither a Fifth Amendment, nor a Sixth Amendment right to counsel.

And, quite apart from defendant's efforts to dispose of physical evidence and avoid arrest, defendant attempted to hinder the prosecution by influencing the trial testimony of codefendant. When interviewed by the police after the shooting, codefendant told the officer in charge⁶⁶ of the case that she did not see Morgan with a gun. Her trial testimony was dramatically different on this critical point. Codefendant claimed Morgan pulled a gun from his waist.⁶⁷ Defendant's influence was responsible for this change. After defendant was jailed, he was tape-recorded telling codefendant on the phone, "I've got faith in you that you're going to do what you got to do to get me home," and "how are you supposed to know what to do if I don't tell you[?]" Codefendant responded, "[W]e've already discussed it."⁶⁸ Codefendant was vulnerable to defendant's persuasion because they were in a romantic relationship and she was considered his "personal property."⁶⁹ Defendant had codefendant change her account about Morgan to support his own claim of self-defense and "get defendant home."

⁶⁶33b.

⁶⁷45b-46b, 47b-48b. See *People v Steele*, 283 Mich App 472, 492-493 (2009) (by telling his victims not to disclose his acts or he would go to jail, the defendant attempted to diminish the victims' willingness and ability to obtain justice).

⁶⁸64b-65b. *People v Ratkov*, 201 Mich App 123, 125 (1993) ("A sentencing court may consider all record evidence before it when calculating the guidelines . . .").

⁶⁹10b-12b, 60a, 13b-14b.

That defendant disposed of the gun, fled after the shooting and remained on the run for 15 days, and influenced witness testimony to support his defense, more than established the minimal requirement that “any evidence” support a decision.⁷⁰ The trial court properly scored ten points for OV 19.

C. Defendant's flight, alone, constituted an interference or attempt to interfere with the administration of justice

Even if the only evidence that existed in the record to support the trial court's decision to score ten points for OV 19 was that defendant fled after the shooting and remained on the run for 15 days, the decision was not an abuse of discretion because the disappearance hindered the investigation and delayed prosecution. Again, the broad language of MCL 777.49(c) requires a score of ten points if an offender makes an effort to, or succeeds in hampering, hindering, or obstructing the administration of laws or the maintenance of right.⁷¹

Defendant relies on two straw man arguments, claiming that he did not have a duty to wait for police after the shooting and his disappearance may not have amounted to misprision of felony.

⁷⁰*Elliott*, 215 Mich App at 260.

⁷¹In *People v Olsen*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 271267), lv den 480 Mich 1137 (2008), the defendant fled from police the scene of the crime and left the country for 13 weeks to avoid contact with police. The Court of Appeals held in *Olsen* that the trial court did not abuse its discretion by scoring ten points for OV 19, noting, “The fact that he was unavailable for questioning prevented the timely investigation and prosecution of the crime.” See Attachment B. See also *People v Waller*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2011 (Docket No. 297639), lv den 490 Mich 969 (2011) (the “[d]efendant’s flight and name change interfered with his capture . . . justice is not fully administered until the accused is brought to trial.”) (see Attachment C); *People v Holm*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 256985), lv den 476 Mich 855 (2006) (within a week of coming in contact with stolen money, the defendant left town knowing the police were looking for him, told his accomplice a “bogus” destination, and stayed in hotel rooms under a different name) (see Attachment D).

But OV 19 speaks to hindering the administration of justice—including the investigation and prosecution of crime—and, therefore, it could be scored according to the plain language of subsection (c). Those who do not hinder are scored differently than those who hinder. Similarly situated defendants are treated similarly.

As this Court noted in *Barbee*, the Legislature could have written MCL 777.49 to only be scored when the offender's conduct amounted to an obstruction of justice.⁷² But it did not. Similarly, the Legislature could have excluded flight from consideration.⁷³ But it did not.

The Federal Sentencing Guidelines, which were in effect when OV 19 was enacted, considered an offender's obstruction or impediment, or attempted obstruction or impediment, to the administration of justice.⁷⁴

USSG § 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.⁷⁵

⁷²*Barbee*, 470 Mich at 286-287.

⁷³See similarly, *People v Underwood*, 278 Mich App 334, 337-340 (2008) (if the Legislature had intended to preclude scoring for OV 19 when the sentencing offense inherently involves interference with the administration of justice, the Legislature would have written the statute in that manner).

⁷⁴USSG § 3C1.1.

⁷⁵Version of USSG § 3C1.1 in effect when MCL 777.49 was enacted on December 15, 1998. See Attachment E for the full text of this version.

The application notes of USSG § 3C1.1 then listed certain included and excluded conduct. Application Note 5(d) excluded “avoiding or fleeing from arrest.”⁷⁶ As a result of the plain language of USSG § 3C1.1 and Application Note 5, federal courts might not enhance an offender’s offense level under that section for mere flight.⁷⁷

Our Legislature has also chosen to expressly exclude the scoring of offense variables under certain circumstances. For example, OV 1 (aggravated use of a weapon) is not scored five points⁷⁸ when the sentencing offense is felonious assault⁷⁹ or armed robbery.⁸⁰ OV 3 (physical injury to victim) is not scored five points if bodily injury is an element of the sentencing offense.⁸¹ OV 11 (criminal sexual penetration) excludes scoring for the “penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.”⁸² An act is only a contemporaneous felonious criminal act in OV 12 if it occurred within 24 hours of the sentencing offense and it has not and will

⁷⁶Application Note 5 when MCL 777.49 was enacted. See USSG § 1B1.1(i) (referred courts to policy statements or commentary, such as Application Note 5, in the guidelines that might warrant consideration in imposing a sentence).

⁷⁷See *United States v Bliss*, 430 F3d 640, 648 (CA 2, 2005); *United States v Sanchez*, 928 F2d 1450, 1459 (CA 6, 1991), abrogated on other grounds by *United States v Jackson-Randolph*, 282 F3d 369 (CA 6, 2002); *United States v Alpert*, 28 F3d 1104, 1107 (CA 11, 1994).

⁷⁸MCL 777.31(2)(e).

⁷⁹MCL 750.82.

⁸⁰MCL 750.529.

⁸¹MCL 777.33(2)(d).

⁸²MCL 777.41(2)(c).

not result in a separate conviction.⁸³ Because the Legislature failed to include similar limiting language in MCL 777.49, it follows that the broad language of subsection (c) was intentional.

Defendant complains that a broad interpretation of subsection (c) will result in scoring for “almost all offenders.”⁸⁴ But a “statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.”⁸⁵ The guidelines’ purpose is uniformity in sentencing for offenders with similar criminal histories who commit crimes with similar, relevant factors. An offender who did not hinder the administration of justice should not be treated the same as an offender who did. The Legislature has deemed this factor relevant, regardless of whether it applies to most offenders, or just some of them. Moreover, even if OV 19 applies to most offenders, it is only one variable among many—seven PRVs and 20 OVs—that could be considered by the trial court in obtaining a sentencing guidelines range that is proportionate to the seriousness of the offense and the offender’s criminal history.⁸⁶ By requiring courts to consider OV 19 for all crime classes,⁸⁷ the Legislature indicated its intent to make OV 19 an important component of the overall range.

⁸³MCL 777.42(2)(a).

⁸⁴Defendant’s Brief on Appeal, 12. See *People v Gajos*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281344) (“If merely attempting to evade discovery or capture constituted interference with the administration of justice, OV 19 would have to be scored for virtually every criminal conviction.”) (see Attachment F); *People v Spangler*, 480 Mich 947 (2007) (Markman, J., dissenting) (“Given that it would be extraordinary for a criminal perpetrator *not* to attempt to hide evidence of his or her crime or to make such crime less detectable, it would seem that OV 19 would almost always be scored under the trial court’s interpretation.”).

⁸⁵*Shabahang*, 484 Mich at 167.

⁸⁶MCL 769.32, repealed by 31 PA 2002; Report of the Michigan Sentencing Guidelines Commission (1997).

⁸⁷MCL 777.22.

In sum, mere flight in the aftermath of a crime falls within the plain language of MCL 777.49(c). That defendant here also disposed of the murder weapon, fled after the shooting and remained on the run for 15 days, **and** influenced the testimony of a witness, more than established the minimal requirement that “any evidence” support the trial court’s decision.⁸⁸

⁸⁸*Elliott*, 215 Mich App at 260.

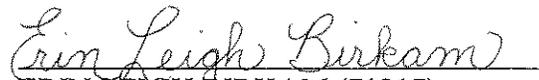
RELIEF

WHEREFORE, this Court should affirm defendant's convictions and sentences.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals



ERIN LEIGH BIRKAM (71217)

Assistant Prosecuting Attorney

11th Floor, 1441 St. Antoine

Detroit, Michigan 48226

Phone: (313) 224-5787

Dated: March 1, 2013

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE WAYNE MAGEE,

Defendant-Appellant.

UNPUBLISHED

January 13, 2009

No. 280534

Kalkaska Circuit Court

LC No. 06-002763-FH

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of failing to stop at the scene of an accident causing serious impairment or death, MCL 257.617, and felonious driving, MCL 257.626c. The trial court sentenced defendant to serve 38 to 60 months' imprisonment for failing to stop at the scene of an accident causing serious impairment or death, and 16 to 24 months' imprisonment for felonious driving. Defendant received 21 days jail credit on each sentence. Because the trial court did not err in scoring defendant under OVs 4, 14, 18, and 19, we affirm.

I

Defendant, who was approximately 19 years old, and several others celebrated Independence Day in the town of Fife Lake on July 3, 2006. Drinking was involved during the celebration. At some point that evening, a group of people decided to drive to the home of Ashley Mendor. In all, four cars traveled together to Mendor's house: Ray Thompson was in one vehicle with Jeremiah Gordon; in a second vehicle was Paul Keene, Ashlee Sims, and Mae Voss; in a third vehicle was Clinton Crandall; and defendant drove the fourth vehicle, his Jeep, with passengers Shane Kelley and Jason Robinson. Thompson testified that the cars were driving about 55 or 60 miles per hour when he saw defendant pass going extremely fast—"like a bat out of hell"—and then he saw defendant's taillights disappear.

Kelley testified that he was in the front passenger seat of the Jeep, defendant was driving, and Robinson was in the backseat when the accident occurred. Kelley opined that just before the accident, defendant was driving between 75 and 80 miles per hour. After the accident, Kelley climbed out of defendant's window, found defendant, and then went back to the Jeep to check on Robinson. When the others arrived, Kelley walked home because he was scared.

Thompson testified that he drove for roughly another minute or two after defendant sped past and then saw defendant's overturned Jeep and defendant on the side of the road. Thompson and others went to the Jeep to find Robinson. They could hear Robinson groaning in the back of the Jeep, but they could not get to him. Thompson said that he told defendant, along with the others there, that they needed to call 911 because Robinson could have internal injuries. Ashlee Sims also testified that she and others encouraged defendant to call 911 stating that, "[w]hen we saw the car, when we saw [Robinson] in the back, when we knew he couldn't move his legs, we knew that something was wrong, and we had to call the cops because someone was hurt very badly." Thompson testified that defendant did not want to call the police and that instead he was going to call his dad, Magee. At trial, the parties stipulated to the fact that defendant called Magee at 11:31 p.m. on July 3, 2006 and the call lasted one minute.

Magee arrived shortly thereafter. Thompson testified that at that point he volunteered to tell the police he was driving the Jeep, not defendant. According to Magee, he asked Thompson why he would want to do that, but Thompson did not really respond. At trial, Thompson said it was his idea, not defendant's idea because he was trying to help Robinson get the help he needed and also trying to help defendant. Magee then called Kankaska County 911 on Thompson's cell phone at 11:44 p.m. on July 3, 2006 and the call lasted 83 seconds. After the call was made, Magee told the rest of the people at the accident scene that they should leave. At trial, when asked if he told people to leave the scene, Magee stated, "I asked the girls to take [defendant] to my house, and I asked . . . Thompson to go up to the road and summon[] help." Magee also said that he asked defendant and the girls to leave so that they would not be around Robinson, making him more excited, and so they would not be tempted to move him. Sims testified that she and Voss drove defendant to Magee's house in Magee's truck and stayed there for approximately one hour.

Officer Harry Shipp arrived at the scene at approximately 12:01 a.m. on July 4, 2006. When Shipp arrived, EMS rescue vehicles and Thompson and Robinson were present. Shipp indicated that Thompson identified himself as the driver of the Jeep, but Thompson was not making eye contact and struggled to answer questions about when he borrowed the vehicle or the location of the Jeep's owner. Shipp began to question whether Thompson was being truthful about being the driver. Approximately 15 minutes into the conversation, Thompson admitted that defendant was driving the Jeep and that Kelley was also in the vehicle at the time of the crash.

Robinson testified that he and his friends, defendant, Crandall, and Kelley, were drinking on July 3, 2006. Robinson said that he does not remember leaving Fife Lake because he was "in black out" because of the drinking. Robinson testified that the next thing he remembers is waking up in the hospital and being paralyzed from the waist down.

II

Defendant raises only sentencing issues on appeal. Defendant argues that the trial court incorrectly scored offense variables (OVs) 4, 14, 18, and 19. To be properly preserved for appellate review, an issue must be raised in and decided by the trial court. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). Defendant objected to the scoring of OV 14, but did not object to the scoring of OVs 4, 18, and 19. Therefore, defendant has only properly preserved his challenge to the scoring of OV 14. MCL 769.34(10).

“A sentencing court has discretion in determining the number of points to be scored [under the relevant offense variables], provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, this Court reviews a trial court’s sentencing decision for an abuse of discretion, and to determine whether the record adequately supports a given OV score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). This Court reviews unpreserved scoring decisions for plain error affecting defendant’s substantial rights. *People v Kimble*, 470 Mich 305, 309-312; 684 NW2d 669 (2004); see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

III

Defendant’s main argument on appeal concerns OV 14. During sentencing, defense counsel raised an objection to the scoring of ten points under OV 14. MCL 777.44(1)(a) provides that the sentencing court should score ten points if the defendant was the leader in a multiple offender situation. The trial court must consider the entire criminal episode when scoring. MCL 777.44(2)(a). Defendant argued that the others present at the accident scene were not offenders and thus OV 14 was improperly scored. The prosecutor asserted that Thompson, Sims, and Voss were offenders in the situation, and could have been charged on an aiding and abetting theory. The prosecutor specifically argued that defendant was leading the group present at the accident scene not to call 911 in order to cover up the situation. The trial court indicated that it “could see that maybe as to Thompson,” but wondered how Sims and Voss would be considered to have aided and abetted the crime. The prosecutor responded that, “[t]he girls drove the defendant away from the scene, knowing that there had been a serious crash, that somebody was injured, that 911 needed to be called.” The trial court ruled, “[w]ell, there is some evidence that more than one person may have been involved in . . . assisting in the non-reporting and leaving the scene, I should say, so I’ll keep the scoring that way.”

MCL 257.617(1) provides as follows:

(1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619(a) and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.

MCL 257.619 provides as follows:

The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident with an individual or with another vehicle that is operated or attended by another individual shall do all of the following:

(a) Give his or her name and address, and the registration number of the vehicle he or she is operating, including the name and address of the owner, to a

police officer, the individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(b) Exhibit his or her operator's or chauffeur's license to a police officer, individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(c) Render to any individual injured in the accident reasonable assistance in securing medical aid or arrange for or provide transportation to any injured individual.

MCL 767.39 provides as follows:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The evidence adduced at trial supports the conclusion that the group who stopped at the accident knew the severity of Robinson's injuries. Thompson testified that he told others that Robinson might have internal injuries, and Sims testified that "we knew [Robinson] couldn't move his legs." The evidence also showed that defendant encouraged others present not to call for help despite the severity of the injuries. Both Thompson and Sims testified that instead of calling the authorities, defendant wanted to call his father. Sims and Voss drove defendant away from the scene prior to the arrival of the police. Under these facts, Thompson, Sims, and Voss can reasonably be characterized as aiding and abetting defendant's commission of the felony. MCL 257.617. Accordingly, they can be considered offenders for purposes of OV 14.

The next question concerns whether defendant can properly be characterized as the "leader" of this group of offenders. To "lead" is defined, in part, as "to influence or induce" and "to guide in direction, course, action." *Random House Webster's College Dictionary* (1997). It is true that Thompson testified that it was his idea, not defendant's, to claim that he had been driving. And, Magee testified that he asked Sims and Voss to leave the scene, not defendant. But it was defendant who initially did not want the authorities called, and according to Sims told the group assembled that "nobody is calling anybody." As portrayed by Sims, defendant was not requesting, but was directing that no one call the authorities. Defendant also chose to call his father to come to the scene rather than authorities when he knew Robinson was severely injured. Again, "[s]coring decisions for which there is any evidence in support will be upheld." *Hornsby, supra* at 468 (internal quotations and citations omitted). Therefore, this evidence supports the trial court's decision to score OV 14 as ten points. Because the evidence supports a score of ten points for OV 14, the trial court did not abuse its discretion in scoring OV 14.

Defendant's remaining arguments regarding his OV scoring are unpreserved. Yet, we will review them for plain error affecting defendant's substantial rights. *Kimble, supra* at 309-311; see *Carines, supra* at 763-764. Under OV 4, the trial court should score ten points if defendant caused a serious psychological injury that may require professional treatment. MCL

777.34(2). Defendant argues that he did not cause his victim to suffer serious psychological injury that may require professional treatment. However, the PSIR indicates that Robinson's mother has "advised that [Robinson] has been extremely depressed since the accident." Further, Robinson's sister stated that Robinson was not at the sentencing hearing because he could not "handle it. It's hard enough on him as it is, let alone to be here." Under these circumstances, it was not error for the trial court to score ten points for OV 4.

Defendant also argues that he should not have been scored five points under OV 18. According to MCL 777.48(1)(d), five points may be scored under the following circumstances:

The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content.

The phrase "any bodily alcohol content" is defined as follows:

(a) An alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

(b) Any presence of alcohol within an individual's body resulting from the consumption of alcoholic or intoxicating liquor other than the consumption of alcoholic or intoxicating liquor as part of a generally recognized religious service or ceremony. [MCL 777.48(2).]

Defendant argues that because his bodily alcohol content was not measured, the only way that five points can be scored under OV 18 is if he was visually impaired. He admits that there was testimony that he had been drinking during the day of the accident, but he argues there was no evidence he was visually impaired at the time of the accident.

Defendant's argument is misguided. In context, MCL 777.48(1)(d) allows for the scoring of points if there is any evidence—not just scientific measurement—that alcohol was present in the body of an underage drinker at the time of the accident in issue. The section includes a reference to "any bodily alcohol content," and that reference is only made with respect to offenders under 21 years of age. As defined, the phrase "any bodily alcohol content" can be either (1) a measured amount of alcohol more than 0.02 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, but less than the statutorily defined threshold, MCL 257.625; or (2) any present amount of alcohol, unless specifically exempted. MCL 777.48(2)(a)-(b). MCL 777.48(1)(a)-(c) allow for increased scoring of points for alcohol consumption depending on how far above the statutorily defined threshold the measured amount of alcohol is in the offender's body. As defendant concedes, he was underage at the time of the accident and there was evidence he had been drinking prior to the accident. Therefore, no plain error occurred when the trial court scored five points under OV 18.

Next, defendant argues that he was improperly scored under OV 19. A defendant is scored ten points if he or she interfered with or attempted to interfere with the administration of justice. MCL 777.49(c). Defendant argues that he did not affirmatively act to thwart an investigation. However, defendant indicated to others at the scene that he did not want to call the police, he left the scene of the accident prior to the arrival of authorities despite apparently painful injuries, and he allowed, if not encouraged, another party to lie to authorities and falsely confess to driving the Jeep. Defendant also called his father to the scene, and allowed him to orchestrate how and when the authorities would be called. Under these circumstances, the trial court did not commit plain error in scoring ten points under OV 19.

IV

Finally, primarily relying on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and reiterated in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), defendant argues that he is entitled to resentencing because the trial court violated his due process rights when scoring points for all of his OVs by considering facts that were not proved beyond a reasonable doubt at trial. However, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. See also *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007). Defendant is not entitled to relief on this issue.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DANIEL OLSEN,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 271267

Allegan Circuit Court

LC No. 05-014404-FC

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction and sentence for assault with intent to commit murder, MCL 750.83. He was sentenced to 10 to 25 years' imprisonment with credit for 52 days served. We affirm.

Defendant admitted that he stabbed his acquaintance, Andrew Tosh, in the neck and finger during an altercation that took place on a two-track driveway in the woods in Allegan County. Defendant claimed self-defense, arguing that the victim was angry and started to fight. The victim claimed that defendant pulled out a knife while they were both sitting in the parked car and then tried to slash the victim's throat before stabbing the victim in the neck.

Defendant first argues that the trial court erred when it instructed the jury using the standard flight instruction. CJI2d 4.4. Defendant argues that he merely walked away from the scene of the crime and did not flee in the sense the flight instruction requires. Defendant also argues that his counsel was ineffective for failing to object to the flight instruction.

We review the unpreserved instruction error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, to establish ineffective assistance of counsel, a defendant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms and (2) there is a reasonable probability that, but for the deficient performance, the outcome would have been different. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004).

Defendant has a constitutional right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). This Court reviews jury instructions as a whole to determine whether the defendant's rights were adequately protected by fairly presenting to the jury all the issues to be tried. *People v Martin*,

271 Mich App 280, 337-338; 721 NW2d 815 (2006). An instruction should not be given unless there is evidence to support giving it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Defendant is correct that simply walking away from a crime scene after committing a crime is not sufficient evidence of "flight" to justify giving a flight instruction; rather, for "flight" in the legal sense, there must be some evidence that defendant "feared apprehension" when he left the scene. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). Nevertheless, we conclude that the trial court did not err when it gave the flight instruction, and thus, that counsel was not ineffective for failing to object to the instruction. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Flight has been defined as "fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant left the scene and ran through the woods after he stabbed the victim. Instead of contacting police for help, he walked and hitchhiked 20 miles to Covert, Michigan. In addition, defendant admitted that he knew he was being investigated for the crime and that police wanted to talk to him, yet he stayed in Van Buren County for thirteen weeks avoiding police until he turned himself in to authorities. His actions support a reasonable inference that he feared apprehension and was running from the police. See *Johnson, supra* at 804. The trial court did not abuse its discretion because there was sufficient evidence to support the flight instruction. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Moreover, the instructions as a whole fairly presented the issues to be tried. Defendant did not deny that he ran from the scene or that he avoided police, but claimed he did so because he was afraid. He claimed he stabbed the victim in self-defense and ran because he thought the victim was looking for him. The prosecutor argued that the fact defendant ran was evidence that he had a guilty conscience. The jury was instructed to weigh the competing claims and decide whether defendant ran away, and if he did so, whether he left the scene out of a consciousness of guilt. The jury was also instructed regarding self-defense, and defendant's counsel argued that defendant's admission that he ran in fear from the victim supported his claim of self-defense. Thus, the instructions as a whole fairly presented both sides of the issue, and sufficiently protected defendant's rights. *Martin, supra* at 337-338. Counsel's performance was not deficient, and defendant's claim that he was deprived of his right to effective assistance of counsel is without merit.

Defendant also argues that the trial court erred when it scored offense variable (OV) 19 and OV 3. Defendant's claims of error in the scoring of his offense variables are not properly preserved for appeal. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). However, defendant further contends that his trial counsel was ineffective for failing to object to the scoring of these variables. Therefore, we shall review these claims of error in that context. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Because defendant's trial counsel was not required to make a meritless objection, if the trial court properly scored the variables, defendant's trial counsel cannot be faulted for failing to object to the scoring. *Harmon, supra* at 531.

The interpretation and application of the legislative sentencing guidelines is a question of law, which is reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). A sentencing court's scoring of points under the guidelines is reviewed for an abuse of discretion, and this Court will uphold the score as long as there is some evidence in the record to support that scoring decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.49(b) authorizes the trial court to score ten points for OV 19 when the defendant "otherwise interfered with or attempted to interfere with the administration of justice." Defendant argues that he did not interfere with the administration of justice because he left the scene of the crime before police arrived or were aware of the incident. Interference with the administration of justice is not limited to acts that constitute "obstruction of justice." *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Any acts by a defendant that interfere with law enforcement officers and their investigation of a crime, even if they occur before charges are filed, may be conduct sufficient to support a score for OV 19. *Id.* at 288. Those actions may include deterring a witness from testifying or reporting a crime, *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006); running from police to escape apprehension, *People v Cook*, 254 Mich App 635, 638, 658 NW2d 184 (2003); or providing a false name to investigating officers, *Barbee*, *supra* at 288.

Although defendant did not directly flee from police at the scene, he admittedly ran from the scene and left the county to avoid contact with police, even though he was aware that he was wanted in connection with the assault. Although he did not give a false name, or threaten witnesses, he hindered law enforcement efforts by remaining outside the county for thirteen weeks. The fact that he was unavailable for questioning prevented the timely investigation and prosecution of the crime. Because there is some support for the score in the record, the trial court did not abuse its discretion and counsel's failure to object to the score for OV 19 does not amount to a deficient performance.

The trial court should score 25 points for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c); *People v Houston*, 473 Mich 399, 402, 407; 702 NW2d 530 (2005). Although there was record evidence that the victim's neck injury did not require extensive medical intervention, the description of the wound was sufficient to support the trial court's conclusion that it was life threatening. Therefore, the trial court did not abuse its discretion in scoring OV 3 at 25 points and defendant's trial counsel was not ineffective for failing to object to that scoring.

Finally, defendant argues that his sentence violated his constitutional rights as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court based its sentence on facts not found by a jury beyond a reasonable doubt. Defendant's argument is without merit. See *People v McCuller*, 479 Mich 672, 689-690; ___ NW2d ___ (2007).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY ANTHONY WALLER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2011

No. 297639

Ingham Circuit Court

LC No. 09-001029-FC

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by jury trial of one count each of second-degree murder, MCL 750.317, one count of possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b, and one count of carrying a concealed weapon (CCW), MCL 750.227. The court sentenced defendant to 28 to 60 years' imprisonment for the second-degree murder conviction, with a concurrent sentence of two to five years for CCW. These sentences are to be served consecutive to the two-year sentence for felony-firearm. We affirm.

Defendant's convictions stem from the shooting death of Dominique Carter. After the killing, defendant fled to North Carolina and changed his name. In North Carolina, defendant began living with Catrina Kay. During a domestic altercation, defendant threatened Kay and recounted the circumstances of the murder in Michigan. Defendant argues that testimony concerning the domestic dispute was impermissible other acts evidence that should not have been allowed into evidence. We disagree.

MRE 404(b)(1) governs admission of other acts evidence. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of legal relevance, and limits the use of evidence that is logically relevant. *People v VanderVliet*, 444 Mich 52, 61-62; 508 NW2d 114 (1993), amended 445 Mich

1205 (1994). Our Supreme Court articulated the following test for admissibility of evidence of prior bad acts in *VanderVliet*: (1) the prosecutor must offer the evidence to prove something other than a bad character or “propensity for criminality” theory; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* at 74-75. Upon request, the evidence should be accompanied by a proper limiting instruction. *Id.* at 75.

The prosecutor indicated below that the evidence of the circumstances in which defendant made his confession to Kay was being offered “under the context of the statement made as probative of the veracity of the statement made.” This is a proper purpose under MRE 404(b). Further, evidence of the context in which the confession was made was relevant because it gave the jury a complete understanding of the circumstances in which the confession was offered, as well as providing evidence that could assist the jury in assessing Kay’s credibility.

Additionally, the jury was given a limiting instruction on how to use the evidence:

You may only think about whether this evidence tends to show the context in which the Defendant’s alleged statements to . . . Kay were made. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

“It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that Kay’s testimony was more prejudicial than probative, and should have been excluded under MRE 403. In this context, prejudice means “an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.” *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Defendant states that the testimony was unfairly prejudicial because it was perjured and it confused the issues because of a lack of a timeline. But defendant provides no evidence that the testimony was perjured beyond his own bare assertion, and he does not explain why the lack of timeline would have confused the jury. The crucial part of Kay’s testimony was straightforward: defendant told her that he had intended to kill Carter before the altercation and that he had done so. This testimony was highly probative of the key issue of defendant’s mental state.

Although defendant argues that he received ineffective assistance of counsel, he did not preserve this argument below, so our review is for plain error apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To be deficient, counsel’s representation must be so severely lacking as to deprive the defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, “the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689 (quotation marks and citation omitted).¹

Defendant argues that his trial counsel allowed exculpatory evidence to go unheard. The only exculpatory evidence defendant identifies is that Kay knew of defendant’s “wanted” status prior to March 11, 2009. There is no evidence in the record that Kay knew defendant was wanted for murder prior to March 11, 2009, and defendant does not explain why he thinks she knew this or how it would have more than a marginal impact on Kay’s credibility.

Defendant finally complains that his counsel “allowed the jury to speculate on unresolved charges in North Carolina.” The record does not reveal that defendant was ever charged with a crime in North Carolina. To the extent that defendant is referring to Kay’s testimony regarding her altercation with defendant, that testimony was admissible, and the jury was properly instructed on how to consider it. Based on the record, defendant cannot overcome “the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 US at 689.

Next, we address defendant’s argument that the court erred in denying his motion for a directed verdict on the first-degree murder charge because the evidence did not support a finding that he possessed the requisite mental state. In conducting a de novo review of the court’s ruling, we consider the evidence produced by the prosecution in the light most favorable to it to determine whether a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To secure a conviction for first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation may be inferred from surrounding circumstances “including the parties’ prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself.” *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

The evidence showed that defendant was angry with Carter and believed that Carter had stolen from him, and that he took a gun to the scene. The medical evidence established that Carter was shot in the back. This evidence was consistent with Kay’s testimony, in which she

¹ Defendant also claims that his counsel was ineffective because he failed to object to Kay’s testimony regarding the domestic dispute. However, his counsel did object, as defendant himself notes when stating that the evidentiary issue was preserved for review. Defendant’s argument that counsel’s failure to “[s]tack MRE’s to achieve the objective of introduction left an incomplete analysis of the reason(s) behind the court’s ruling” is not immediately clear. In any event, defendant fails to make further argument or provide any supporting authority. Therefore, the argument is abandoned. *Matuszak*, 263 Mich App at 59.

recounted how defendant had confessed to the killing, and that he had told a friend prior to the shooting that he was going to kill Carter. Given that the credibility of witnesses is best left to the trier of fact, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), the evidence was sufficient to warrant the denial of the motion for a directed verdict.

We likewise reject defendant's argument that there was insufficient evidence of his intent to support his conviction for second-degree murder. In reviewing the sufficiency of the evidence to support a conviction, this Court must decide whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987).

"The elements of second-degree murder are (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009), aff'd 488 Mich 922 (2010). Defendant argues that there was insufficient evidence to prove that he acted with malice in that it failed to show he intended to kill, intended to do great bodily harm, or intended to act "in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the use of a weapon, and it may be inferred from circumstantial evidence. *People v Roper*, 286 Mich App 77, 85-86; 777 NW2d 483 (2009).

There was sufficient evidence of intent. Defendant shot Carter twice after accusing him of theft. This is sufficient for the jury to find that defendant intended to cause great bodily harm, or at the very least, intended to act "in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464. Defendant later told Kay that he had shot Carter and that he had intended to kill him. The confession also contradicts defendant's argument that no evidence of defendant's state of mind was presented at trial.

With respect to defendant's argument that the trial court erred by restricting the amount of testimony re-read upon a request by the jury, defendant has the responsibility to furnish this Court "with a record to verify the factual basis of any argument upon which reversal [is] predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not done so. Moreover, "[w]hen a jury requests that testimony be read back to it, both the reading and the extent of the reading rest within the sound discretion of the trial judge." *People v Sullivan*, 167 Mich App 39, 48; 421 NW2d 551 (1988). On the record before us, there is no indication that the court abused its discretion.

Defendant next contends that misconduct by the prosecutor violated his Sixth and Fourteenth Amendment rights to a fair trial. Defendant did not raise this argument below. "Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

The primary allegation of misconduct is that the prosecutor allowed a number of witnesses to lie on the stand. However, there is no evidence that the witnesses lied, let alone that the prosecutor was aware of it if they had lied. Similarly, defendant cites to no evidence supporting his contention that the prosecution withheld material evidence.

Defendant also argues that the prosecutor improperly vouched for the credibility of a prosecution witness during closing argument by referencing the witness's plea-bargain. Although a prosecutor may not vouch for the credibility of a witness by suggesting that he has special knowledge about the witness's truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a reference to a plea agreement that requires the witness to testify truthfully does not violate this stricture unless the prosecution uses it to suggest "special knowledge, not known to the jury, that the witness was testifying truthfully." *Id.* The prosecutor did refer to the witness's plea agreement, but only in response to defense insinuations that the witness would have testified differently if the prosecution had not struck a deal with him.²

As to defendant's contention that the prosecutor committed misconduct by telling the jury that defense counsel's role was to confuse the jury, we have no doubt that the prosecution may not question the defense attorney's truthfulness. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, defendant does not point to any specific comment by the prosecutor that crosses this line. In fact, the prosecution's references to defense counsel appear to us to have been consistently respectful.

Finally, defendant argues that the prosecutor impermissibly compared this case with a case of child molestation, citing *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). It is true that the record shows that the prosecutor was contrasting the theft of a camcorder with child molestation, but only to show that defendant did not have sufficient cause to shoot Carter. The prosecutor did not compare defendant to a child molester. Therefore, this does not constitute an attempt to prejudice the jury against defendant.

Defendant's last argument is that the trial court improperly assessed him 10 points under offense variable (OV) 19 for interference with the administration of justice for fleeing and changing his name. When scoring an offense variable, the trial court should not consider anything outside of the sentencing offense unless the language of the offense variable statute specifically provides otherwise. *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). MCL 777.49 states in pertinent part as follows:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

² Defendant also complained that this witness was shackled while he testified. However, he fails to show how the shackling of a prosecution witness would be damaging to his case.

* * *

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice . . . 10 points

Our Supreme Court has held that OV 19 specifically provides for consideration of conduct after completion of the sentencing offense. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Defendant's flight and name change interfered with his capture and arrest as justice is not fully administered until the accused is brought to trial. See *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004) (holding that "administration of justice" incorporates more than just actual judicial process). The fact that the investigation could proceed without defendant's presence in Michigan does not mean that the administration of justice was not hampered.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment D

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRK ARON HOLM,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

No. 256985
Jackson Circuit Court
LC No. 03-000541-FH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing stolen property over \$20,000, MCL 750.535(2)(a). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to nine to twenty years' imprisonment. He appeals as of right. We affirm.

I

Defendant was convicted of receiving and concealing stolen property for his involvement in taking money that was in a safe stolen from a home. According to evidence presented at trial, the safe at one point was taken to defendant's business, where the safe was dismantled. There was more than \$70,000 and possibly upwards of \$180,000 in cash in the safe. Although defendant denied any knowledge of the theft, there was evidence that defendant and several other males and females were involved in various aspects of the criminal activity. Defendant was arrested in Florida with another of the men involved after their vehicle was stopped by the police. More than \$75,000 was recovered from the vehicle. The three males who were directly involved in breaking into the home and stealing the safe or sharing in the money taken from the safe were convicted following guilty pleas.

II

Defendant first argues that he was denied a fair trial when, in response to defendant's interruption during defense counsel's cross-examination of a prosecution witness,¹ the trial court

¹ The substance of defendant's interruption is not apparent from the record. It is not identified by the parties and is recorded only as "inaudible" in the trial transcript.

stated, "Quiet, if you want to remain, or we will proceed but you will be sitting in the lock up. Do we understand each other here now?" Because defendant did not object to the trial court's response, this issue is unpreserved and we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A judge's comments deny a defendant a fair trial when the comments may well have unjustifiably raised the jury's suspicions concerning witness credibility or when partiality quite possibly could have influenced the jury to the defendant's detriment. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). Defendant asserts that the trial court's comment improperly conveyed to the jury the court's belief that defendant belonged in jail and thereby lessened defendant's credibility in the eyes of the jury before he testified. We disagree. The court's comment was brief and served as a warning that outbursts during trial would not be tolerated. Moreover, the record discloses that the trial court did not single out defendant during trial, but rather consistently interjected when any witness was not cooperative or following instructions. Viewed in context, the trial court's brief comment was not calculated to unduly influence the jury against defendant. We find no plain error.

III

Next, defendant argues that he is entitled to resentencing because the trial court erroneously scored offense variables 13 and 19 of the sentencing guidelines. We disagree.

A trial court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, this Court reviews a scoring decision to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Statutory interpretation of the sentencing guidelines is reviewed de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005).

A

Defendant argues that the trial court erroneously scored ten points for OV 13 for criminal activity directly related to an organized criminal group. MCL 777.43(1)(d). We disagree.

OV 13 is scored at ten points if the "offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group." MCL 777.43(1)(d). Defendant contends there was no group. What comprises an "organized criminal group" is not specifically defined in the statute, but the Legislature provided some guidance:

The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense. [MCL 777.43(2)(b).]

The evidence adequately supports the scoring. It was undisputed that defendant and at least three others were involved in various stages of the criminal activity at issue. According to the testimony of Mark Granger, who stole the safe from the home of his former employer, where

Granger had previously lived, defendant agreed to dispose of the safe and was to receive a share of the stolen money. Granger and Joseph Ely broke into the home and stole the safe, which was taken to defendant's business. Evidence established that defendant was thereafter involved with Granger, Ely, and Kyle Reder, defendant's roommate, in concealing the criminal activity and sharing the stolen money. There was adequate evidence to infer the existence of an organized criminal group. Moreover, it is clear that defendant did not act alone, but instead was part of a group that worked together to perpetrate the criminal activity. See *People v Johnson*, 144 Mich App 497, 502; 376 NW2d 122 (1985) (no organized criminal group because defendant acted alone).

B

Defendant also argues that ten points should not have been scored for OV 19 (interference with the administration of justice) because the "undisputed" evidence showed that he went to Florida as part of a pre-planned trip, the purpose of which was to visit a friend and scope out potential new business locations, not to evade the police and avoid prosecution. The only evidence that the trip was pre-planned, however, was defendant's own testimony. Other evidence indicated that defendant left town within a week after coming into contact with the stolen money, that an accomplice told defendant that the police were looking for him near the time he left, that defendant gave the accomplice a bogus destination, and that defendant and another accomplice, who went to Florida with defendant, never registered for hotel rooms in their own names. The evidence supports an inference that defendant left the state to evade the police and avoid prosecution.

In *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003), this Court recognized that conduct involving fleeing the police constitutes interfering with or attempting to interfere with the administration of justice for purposes of OV 19. In *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004), our Supreme Court concluded that the language under OV 19, "interfered with or attempted to interfere with the administration of justice," is a broad phrase that is not limited to acts that constitute the "obstruction of justice." The Court observed that "[t]he investigation of crime is critical to the administration of justice," and held that giving the police a false name constitutes interfering with the administration of justice. *Id.* at 288. Because there was evidence here that defendant attempted to hinder the investigation of the crimes and sought to elude the police by fleeing to Florida, we conclude that ten points were properly scored for OV 19.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment E

USSG, § 3C1.1, 18 U.S.C.A.

0756

UNITED STATES CODE ANNOTATED
FEDERAL SENTENCING GUIDELINES
CHAPTER THREE—ADJUSTMENTS
PART C—OBSTRUCTION

Copr. (C) West Group 1999. No Claim to Orig. U.S. Govt. Works

§ 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

<[Commentary to Guideline is located in Historical Note field. The following credit reflects amendments to both Guideline and Commentary.]>

CREDIT(S)

1999 Pocket Part

(Effective November 1, 1987, and amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1997; November 1, 1998.)

COMMENTARY

<Application Notes:>

- <1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.>
- <2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.>
- <3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 5

sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this enhancement is warranted in a particular case.>

<4. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:>

<(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;>

<(b) committing, suborning, or attempting to suborn perjury;>

<(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;>

<(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;>

<(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;>

<(f) providing materially false information to a judge or magistrate;>

<(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;>

<(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;>

<(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511).>

<This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.>

<5. Some types of conduct ordinarily do not warrant application of this adjustment, but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.>

<The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:>

<(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;>

<(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;>

<(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;>

<(d) avoiding or fleeing from arrest (see, however, § 3C1.2) (Reckless Endangerment During Flight);>

<(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).>

<6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.>

<7. If the defendant is convicted for an offense covered by § 2J1.1 (contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).>

<8. If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.>

<9. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.>

HISTORICAL NOTES

1998 Amendments

The Commentary to § 3C1. 1 captioned "Application Notes" is amended in Note 6 by striking "Where" and inserting "If"; and by striking "where" both places it appears and inserting "if".

The Commentary to § 3C1. 1 captioned "Application Notes" is amended in Note 7 in the first sentence by striking "Where" and inserting "If"; by striking "both of the" and inserting "both of an"; by inserting "(e.g., 18

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals
Judges Elizabeth L. Gleicher, Mark J. Cavanagh, and Peter D. O'Connell**

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 144762

JOHNNY LEE WILLIAMS,
Defendant-Appellant.

Third Circuit Court No. 09-031564-FC
Court of Appeals No. 299484

Attachment F

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SCOTT GAJOS,

Defendant-Appellant.

UNPUBLISHED

February 3, 2009

No. 281344

Oakland Circuit Court

LC No. 06-210018-FH

ON RECONSIDERATION

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant pleaded no contest to charges of breaking and entering with intent to commit a larceny or felony, MCL 750.110, and possession of marijuana, MCL 333.7403(2)(d), and was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent terms of incarceration of 19 months to 25 years for the breaking and entering conviction, and 67 days for the marijuana conviction. Defendant appeals by delayed leave granted, challenging his sentence for the breaking and entering conviction. We reverse and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a breaking and entering that took place at a store in Berkley in August of 2006. The presentence investigation report indicates that defendant used a screwdriver to break into the store, and was attempting to pry the cash register open when he saw the police arriving at the premises. Defendant ran out of the back of the store, stole a bicycle and rode away, saw the police, abandoned that bicycle, stole another and rode further, but then, as the police closed in on him, attempted to flee on foot. Defendant was caught, and was "arrested and booked without incident." While at the police station, the police found a small quantity of marijuana in defendant's possession.

The trial court's scoring of ten points for OV 19 resulted in raising the low end of the recommended range for defendant's minimum sentence under the sentencing guidelines to 19 months. Defendant's sole issue on appeal is whether the trial court correctly scored the variable. We agree that it did not.

The trial court assessed ten points for OV 19, which MCL 777.49(c) prescribes where the offender "interfered with or attempted to interfere with the administration of justice." Our Supreme Court has noted that, "[l]aw enforcement officers are an integral component in the administration of justice," and so concluded that providing law enforcement with a false name

constitutes interference with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). In this case, however, there is no allegation that defendant provided any false information, or otherwise interfered with the police response to his crime, but for his attempt to flee in the first instance.

If merely attempting to evade discovery or capture constituted interference with the administration of justice, OV 19 would have to be scored for virtually every criminal conviction. In this case, the alternative to running away upon sighting the police would have been to stand still and await capture. We do not deem such uncharacteristic submission and surrender necessary to avoid a penalty for interfering with the administration of justice. There is no indication that, in the course of his flight from the police, defendant in fact disobeyed a command to stop. In the absence of a lawful such command, merely running from the police is no more pernicious an activity than running from anyone else, or for any other reason.

Because the evidence indicates that defendant merely ran away, without disobeying any commands to the contrary, then surrendered without incident when caught, we conclude that the trial court erred in scoring any points for OV 19.

We note that defendant has already served the 19-month minimum sentence imposed by the trial court. We conclude, however, that his request for resentencing is not moot. Scoring OV 19 at zero points moves defendant to a "straddle cell," making him eligible to receive an intermediate sanction and immediate release at resentencing. *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007).

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis