

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM RAPHAEL MCCALLUM,

Defendant-Appellant.

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UNPUBLISHED

July 6, 2006

No. 260285

Oakland Circuit Court

LC No. 03-192972-FC

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentences imposed on his plea-based convictions for assault with intent to murder, MCL 750.83, conspiracy to commit armed robbery, MCL 750.529, two counts of assault with intent to rob while armed, MCL 750.89, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of 13 to 30 years in prison for each of the assault and robbery convictions. These sentences were to run consecutively to two-year terms for each felony-firearm conviction, both of which were concurrent to each other. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant pled no contest to the charges in exchange for a *Cobbs*<sup>1</sup> agreement of ten years as a maximum minimum sentence for the assault and robbery offenses. The trial court indicated that defendant could withdraw his plea if the court felt that he deserved a higher sentence. During sentencing, defense counsel objected to the scoring of Offense Variable (OV) 13. The trial court rejected the challenge, resulting in minimum sentence ranges of 135 to 225 months for the assault with intent to murder convictions and 126 to 210 months for the remaining assault and robbery convictions. After the probation department representative indicated a recommended sentence of 15 to 30 years for all charges, the trial court told defendant that it would not follow the *Cobbs, supra*, agreement. After a brief discussion off the record and a

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<sup>1</sup> *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

recess, defense counsel indicated that defendant would agree to the court's offer of sentencing to 13 years, plus the additional two years for the felony-firearm convictions.

## II. STANDARD OF REVIEW

The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 *et seq*, both of which are legal questions that this Court reviews de novo. *People v Morson*, 471 Mich. 248, 255; 685 N.W.2d 203 (2004).

## III. ANALYSIS

Offense variable (OV) 13 is continuing pattern of criminal behavior and its scoring guidelines are given in MCL 777.43. MCL 777.43(1)(b) states that the sentencing offense must be "part of a pattern of felonious criminal activity involving 3 or more crimes against a person" and MCL 777.43(2)(a) defines a "pattern" as three or more crimes committed "within a five-year period, including the sentencing offense . . . ." Therefore, in order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern. *People v. Francisco*, 474 Mich 82, 86-87; 711 NW2d 44 (2006). Defendant challenges the scoring of OV 13. He continues to maintain that scoring 25 points for OV 13 was improper here where his crimes occurred on the same day and do not indicate a continuing pattern of criminal behavior. We disagree.

Defendant has arguably waived this issue by foregoing his right to withdraw his plea<sup>2</sup> and accepting a longer sentence once he learned the trial court could not adhere to the initial sentencing agreement. See *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005); *People v Vitale*, 179 Mich App 420, 422; 446 NW2d 504 (1989).

Even were we to find this issue properly preserved, defendant's substantive claim is without merit. A score of 25 points for OV 13 requires a determination that "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) provides that "for determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." Defendant asserts that a continuing pattern of criminal behavior cannot be established using only his concurrent offenses. However, we have held that OV 13 was appropriately scored at 25 points where the defendant was convicted of four concurrent felonies arising out of the photographing of two nude 15-year-old girls in one photography session. *People v Harmon*, 248 Mich App 522, 526, 532; 640 NW2d 314 (2001). Defendant has failed to distinguish this case from *Harmon*, *supra*.

Affirmed.

/s/ Alton T. Davis  
/s/ David H. Sawyer  
/s/ Bill Schuette

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<sup>2</sup> *Cobbs*, *supra* at 283.