

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY OLDHAM,

Defendant-Appellant.

UNPUBLISHED

July 12, 2002

No. 229334

Wayne Circuit Court

LC No. 00-001946

Before: Hood, P.J., and Saad and E. M. Thomas*, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to 38 to 120 months' imprisonment for the assault conviction, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant shot the victim, striking him in the face as he was turning his head. At sentencing, defendant objected to the scoring Offense Variable 3, physical injury to a victim, MCL 777.33. At the time defendant was sentenced, MCL 777.33 provided that 100 points should be scored when a victim was killed, 25 points should be scored when a victim suffered a "[l]ife threatening or permanent incapacitating injury," 10 points when a victim suffered "[b]odily injury requiring medical treatment," 5 points when a victim suffered bodily injury not requiring medical treatment, and zero points when the victim sustained no physical injury. The trial court scored OV 3 at 25 points over defense counsel's objection that the victim's injury was a grazing wound across the side of his face. The court rejected defendant's argument for the reason that "[s]hooting someone in the face to me is life threatening."

Defendant argues that resentencing is required because OV 3 was misscored. Because this case presents an issue concerning the proper application of the statutory sentencing guidelines, review is de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The plain language of MCL 777.33 requires scoring based on the degree of physical injury actually sustained by a victim. In this case, the judge's explanation for the score did not address the severity of the victim's injury. Instead, the judge simply concluded that a shot to the face is

* Circuit judge, sitting on the Court of Appeals by assignment.

per se life threatening. In light of this erroneous application of MCL 777.33, we must vacate defendant's sentence and remand for resentencing with consideration of the severity of this particular victim's injuries. We express no opinion whether OV 3 should be scored at 25 or 10 points on resentencing.

Vacated and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Edward M. Thomas