STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2004
v	No. 243021 Tuscola Circuit Court
ERIC SEAN DRAPER, Defendant-Appellant.	LC No. 01-008085-FC

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of sentence entered following his jury convictions of first-degree home invasion, MCL 750.110a, felonious assault, MCL 750.82, and possession of a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant to six years and six months' (78 months) imprisonment for first-degree home invasion, two years and eight months' imprisonment for felonious assault (to be served concurrently), and a consecutive two-year sentence for felony-firearm. Defendant objected at sentencing to the scoring of one prior record variable and four offense variables. He appeals as of right. We affirm.

I

Defendant was charged with two counts of assault with intent to murder, one count of home invasion, and one count of felony-firearm, arising from his breaking into the trailer home of his former girlfriend (Christine Best) and shooting her boyfriend (Bart Stevens). Stevens was hospitalized for five days as a result, but survived. On the first day of trial, the prosecution dismissed the assault with intent to murder count pertaining to Best. On the count of assault with intent to murder Stevens, the jury found defendant guilty of the lesser-included offense of felonious assault. Defendant was also found guilty of first-degree home invasion and felony-firearm.

The PSIR guidelines range was 57 to 95 months, reflecting a PRV 7 score of 10 points, and a total OV score of 100 points. Defendant objected at sentencing to the scoring of PRV 7, OV 3, OV 4, OV 9 and OV 13, thereby preserving the challenges he raises on appeal. MCR 6.429(C), *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002).

II

The statutory sentencing guidelines set forth at MCL 777.1 *et seq.*, apply, as the offenses occurred after January 1, 1999. MCL 769.34(2), *People v Hegwood,* 465 Mich 432, 438-439; 636 NW2d 127 (2001). Under the sentencing guidelines act, a court must impose a sentence in accord with the appropriate sentence range. MCL 769.34(2), *Hegwood*, *supra* at 439. The sentencing 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). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score, *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on in determining the defendant's sentence. MCL 769.34(10), *People v Babcock,* 469 Mich 247, 261; 666NW2d 231 (2003). An error in scoring the sentencing guidelines that does not affect the total OV score enough to change the applicable sentencing guidelines' range is harmless. *People v Johnson,* 202 Mich App 281, 290; 508 NW2d 509 (1994).

A

Defendant contends that PRV 7 (subsequent or concurrent felony convictions), MCL 777.57, should have been scored at zero, rather than ten, points. Zero points are scored under PRV 7 if the offender "has no subsequent or concurrent convictions." Ten points are scored if the offender "has 1 subsequent or concurrent convictions."

MCL 777.57 provided at pertinent times:

> 1. Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.
>
> 2. Do not score a felony firearm conviction in this variable.
>
> 3. Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction.

Defendant asserts that PRV 7 is not intended to apply in cases such as this, where the crimes are the result of the same transaction. Defendant maintains that his home invasion charge required the element of forcible entry into the home to commit, in this case, felonious assault. Defendant asserts that the intent of the statute is not to increase the sentencing variables, and consequently the minimum sentence, where the crimes result from the same transaction.

Defendant cites only one case in support of his argument, *People v Polus,* 197 Mich App 197; 495 NW2d 402 (1993), abrogated in *People v Bivens,* 206 Mich App 284; 520 NW2d 711 (1994), noting:

> [*Polus*] sets forth a 'transactional' analysis in interpreting the sentencing guidelines which is consistent with the Defendant's position regarding MCL 777.57 or PRV 7. The [*Polus*] court states, in its analysis of OV 12, that this variable is designed to address multiple acts in course [sic] of the crime for which the defendant was convicted. In the case before the court the same principle applies. In this case, the Defendant enters the home with the intent of committing felonious assault upon the victim. This act is one transaction for which there are two convictions. Based upon the transaction principle PRV 7 should be zero as there were no concurrent or subsequent convictions.

Nothing in the statute's plain language supports defendant's argument. The case defendant relies on, *Polus*, which was decided in 1992, before the legislative sentencing guidelines took effect, is distinguishable.

In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material, after having taken nude photographs of two underage girls at two separate photography sessions. At trial, the prosecution introduced four photographs, two of each girl, all of which were taken at one photo session. The *Harmon* Court upheld the trial court's PRV 7 score of twenty points (2 or more subsequent or concurrent convictions), rejecting the defendant's arguments that the evidence supported only two convictions, one for each girl, because the photos came from a single photo session:

> The evidence presented at trial established that defendant took nude photographs of two fifteen-year-old girls with a digital camera in a studio located in defendant's house. Testimony indicated that photographs were taken on two separate occasions: July 10 and July 20, 1999. At trial the prosecution introduced four photographs, two of each girl, that were taken on July 20.
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> * * *
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> . . . the trial court specifically concluded that [the four photographs] were lascivious. In light of this evidence, we can discern no reason why defendant could not be convicted of four counts of "mak[ing] . . . child sexually abusive material" under MCL 750.145c(2). Indeed, defendant made four "photograph[s]" under MCL 750.145c(1)(i) and therefore could be convicted of four counts under the plain language of the relevant statutes. . . .
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> * * *
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> Regarding PRV 7, MCL 777.57(1)(a) dictates a score of twenty points if "[t]he offender has 2 or more subsequent or concurrent convictions." Defendant argues that because of his arguments regarding the sufficiency of the evidence and because he could be convicted of only two counts under MCL 750.145c(2) in this case, the proper score for PRV 7 was ten points for "1 subsequent or concurrent conviction" under MCL 777.57(1)(b). Because we have upheld all four of defendant's instant convictions, this argument is without merit. No error occurred in the scoring of PRV 7. [248 Mich App at 527-528, 532.]

Absent authority supporting defendant's position, and given the plain language of MCL 777.57, we conclude that PRV 7 was properly scored at ten points to reflect defendant's concurrent conviction of felonious assault.

B

Defendant also challenges the scoring of twenty-five points for OV 3, MCL 777.33 (physical injury to a victim), maintaining that a ten point score was proper. Twenty-five points is scored for "Life threatening or permanent incapacitating injury occurred to a victim." Ten points is scored for "Bodily injury requiring medical treatment."

The shooting occurred in the late evening of April 28, 2001. The prosecutor stated at sentencing that "there was evidence presented involving the injury to Bart Stevens being shot in the neck in the vicinity of the carotid artery, seems that's a life threatening injury the way it was inflicted, and the way it occurred." The record showed that defendant shot at Stevens twice. The first shot was at close range (testimony varied from one to three feet from Stevens) and wounded him in the left shoulder and left side of his neck, and the second shot lodged in the floor, grazing Stevens in the chest and under the right armpit. The PSIR states that Stevens ran out of the trailer home after being shot and was transported to the hospital by ambulance. One of the treating doctors at St. Mary's hospital testified that Stevens needed surgery to stop the bleeding and a skin graft for the wound on his arm.

We find that the evidence showed by a preponderance that at least one of Stevens' injuries was life threatening. Stevens sustained a shot gun blast to the neck that was near his carotid artery, which required surgery to stop the bleeding. These facts establish that this injury was indeed life threatening. Therefore, the trial court did not err in scoring twenty-five points for OV 3.

C

Defendant challenges the scoring of ten points under OV 4, MCL 777.34(1), for serious psychological injury to the victim.

MCL 777.34 provided at pertinent times:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 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) Serious psychological injury requiring professional treatment occurred to a victim. 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim. 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

The PSIR section entitled "Victim's Personal Reactions" stated: "It has upset me so much I jump everytime [sic] I see a truck like his. I cannot stay at my parents because it brings back memories." The PSIR stated in response to the PSIR question "Do you fear retaliation from the offender?" Stevens answered "Yes."

While this is a close question, we conclude that the trial court properly exercised its discretion in concluding there was adequate evidence to support that "serious psychological injury requiring professional treatment occurred to" Stevens, taking into account the direction to score ten points if the serious psychological injury may require professional treatment, and the admonition that the fact that treatment has not been sought is not conclusive. It is reasonable to conclude that someone who continues to be as upset and fearful as Stevens, and who restricts his movement based on fear of memories of the event, may require professional treatment.

D

Defendant also challenges the scoring of OV 9 (number of victims), MCL 777.39, at ten points (2 to 9 victims), rather than zero points (fewer than 2 victims). MCL 777.39(2) provided at pertinent times:

> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (b) Score 100 points only in homicide cases.

Defendant argues that because the prosecutor dismissed the assault with intent to murder pertaining to Christine Best, his former girlfriend, Best could not be counted as a victim under OV 9. The prosecution maintains that since Best was present in the trailer home when defendant discharged the gun twice, she was placed in danger of injury.

In *People v Chesebro*, 206 Mich App 468, 469-473; 522 NW2d 677 (1994), in applying offense variable 6 (number of victims) of the judicial sentencing guidelines,[1] which is identical to OV 9 of the statutory sentencing guidelines, this Court reversed the trial court's scoring of 10 points based on conduct that occurred not during the commission of the conviction offense, but over the course of a number of years prior. The Court held that "offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise." In the instant case, however, the trial court assessed points based on the events occurring during the conviction offense, and not upon unrelated conduct.

[1] Neither party cites authority, and we found no published cases addressing OV 9 under the statutory sentencing guidelines.

Under the circumstances that Best was in the trailer home and near Stevens when defendant discharged the weapon, at least the first time, she was properly counted as a victim under OV 9, and ten points were properly scored.

E

Defendant's final challenge is to OV 13 (continuing pattern of criminal behavior), MCL 777.43. Twenty-five points applies where the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Zero points are scored where "No pattern of felonious criminal activity existed." MCL 777.43(1)(e). MCL 777.43(2) provides:

> (a) 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.

The trial court scored OV 13 at twenty-five points. Defendant maintains he should have received zero points because he had no prior criminal record and no prior arrests before the instant incident, and thus no "pattern" of felonious criminal activity existed:

> The Defendant's contact with the criminal justice system, for purposes of this variable, is non-existent. The crime for which the Defendant is convicted is an isolated incident and is not part of a pattern of criminal behavior. The only crime that the Defendant committed is the crime that he is now incarcerated for. This crime was an anomaly. It did not occur in the course of other crimes. The Defendant was convicted of this isolated incident that occurred in a very short time. On this isolated incident the Defendant was sitting home with his grandmother watching television, when he received a series of phone calls that caused him to react and commit the crimes for which he was convicted. Prior to and subsequent to that isolated incident the Defendant has not engaged in any criminal activity . . . . This simply does not satisfy the requirements of a "pattern of criminal behavior."

The prosecution's appellate brief responds only by stating: "The trial court applied the statute and counted three crimes against a person that defendant had committed in five years."

The proper application of the statutory sentencing guidelines is a legal question reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). In interpreting OV 13, we must assign the words their plain and ordinary meaning. *Id.* We believe that the Legislature's use of the word "pattern" and the fact that the Legislature permitted all crimes within a five-year period to be considered evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable. In this case, there was no such pattern, and no repeated conduct. Defendant had no prior record. For these reasons, we conclude that OV 13 should have been scored at zero points.

III

In conclusion, we find that there was a scoring error in OV 13. However, resentencing is not warranted because a reduction of twenty-five points does not change defendant's sentencing guidelines range. Therefore, the error in scoring OV 13 was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael R. Smolenski