STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 1, 2004
v	No. 246043 Osceola Circuit Court
ROBERT LEE MONGAR, Defendant-Appellant.	LC No. 02-003416-FC

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Robert Lee Mongar appeals by right from the trial court's order sentencing him to 57 months to 10 years' imprisonment for assault with intent to commit criminal sexual conduct, MCL 750.520g(1), after a jury trial. Because we find that the trial court understood and complied with the sentencing guidelines, and because the trial court did not abuse its discretion or make improper factual findings regarding the sentencing variables, we affirm.

Defendant first argues that the trial court committed error requiring reversal when the trial court stated that it had no control over the maximum sentence it must impose. We disagree. Defendant confuses the standard for sentencing under the Habitual Offender Act, MCL 769.10 *et seq.*, with the standard for sentencing where a defendant is not a habitual offender. Defendant is correct that where a defendant is sentenced under the Habitual Offender Act, the trial court errs if it does not recognize that it has discretion whether to impose the maximum sentence permitted under that Act. See *People v Turski*, 436 Mich 878; 461 NW2d 366 (1990), *People v Mauch*, 23 Mich App 723, 730; 179 NW2d 184 (1970), and MCL 769.10. But in cases where the defendant is not a habitual offender, the trial court has no discretion over the maximum sentence:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. *The maximum penalty provided by law shall be the maximum sentence in all cases* except as provided in this chapter and shall be stated by the judge in imposing the sentence. [MCL 769.8(1).]

Thus, where the maximum penalty for defendant's crime was ten years, MCL 750.520(g), the trial court did not err by imposing it.

Defendant also argues the trial court assessed excessive points for three offense variables (OV), OV 1, OV 4, and OV 7. We review a trial court's factual findings at sentencing for clear error. MCR 2.613(C). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

Regarding OV 1, which pertains to the use of a weapon during a crime, the trial court assigned 15 points. MCL 777.31(c) requires 15 points where "A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." *Id.* Here, the victim, defendant's estranged wife, testified that defendant bound the victim's wrists, ankles, and mouth with duct tape, tied her into a fetal position with an electrical cord, and cut off her clothes with a knife. After the victim struggled to get the knife away from defendant, and after defendant raped her, he cut off the duct tape and some of the victim's hair. The victim's finger was cut during the struggle.

Defendant unpersuasively argues that because he did not point the knife at the victim or threaten to use it on her, the facts did not support assigning 15 points for this variable. We find that the facts amply support a finding that defendant put the victim in fear of an immediate battery by binding her and cutting off her clothes and hair and that his actions at the very least carried with them an implied threat that he would harm her with the knife. The victim testified that she was in fear and that she thought defendant was going to kill her that day. Thus, MCL 777.31(c) was satisfied, and the trial court did not err by assigning 15 points.

Defendant also argues that the trial court improperly scored 10 points under OV 4, psychological injury to a victim. Ten points are appropriate for OV 4 where the defendant caused "[s]erious psychological injury requiring professional treatment . . . ." MCL 777.34(1)(a). The statute also instructs, "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." MCL 777.34(2). Here, the trial court observed that the ordeal defendant put the victim through would psychologically injure any person and that although the victim did not seek professional treatment, the effects of the ordeal were visibly manifest in her subsequent behavior. The facts supported this finding. The victim testified that in addition to the constraints and rape, defendant continually threatened to commit suicide in front of their fourteen-year-old son and threatened to have the son watch defendant rape the victim if she did not follow defendant's instructions. He whipped the victim with a belt before raping her. He also took the victim in her car and forced her to select a location at which he would kill himself. Defendant had a shotgun and shotgun shells with him in the car and told the victim that if she made any "funny moves," he would go back to the house to have their son witness the suicide. After several hours of pleading with defendant not to kill himself, he took the victim back to her home. One of the victim's coworkers testified that the victim was extremely upset in the days and weeks following the incident. Under these facts, we cannot find that the trial court erred by assigning 10 points for OV 4.

Defendant last argues that the trial court improperly scored 50 points under OV 7, which pertains to aggravated physical abuse. At the time of sentencing, MCL 777.37 had been recently amended but neither the court nor the parties realized it. Because the date of the offense was May 28, 2002 and the amendment was effective April 22, 2002, the amended version should have applied. However, because the trial court relied on a portion of the statute still in effect, we find no error.

Before the amendment, the statute instructed to score 50 points where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a), amended 2002 PA 137. The statute defined terrorism as follows:

> "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense. [MCL 777.37(2)(a), amended 2002 PA 137.]

In its amendment, the Legislature removed references to terrorism and created a new variable relating to terrorism, OV 20. See MCL 777.49a. But the Legislature incorporated the former meaning of terrorism into MCL 777.37(1)(a) so that it now reads that 50 points must be scored where "[a] victim was treated with sadism, torture, or excessive brutality or *conduct designed to substantially increase the fear and anxiety a victim suffered during the offense*." MCL 777.37(1)(a) (emphasis added).

Regarding this variable, the trial court remarked as follows:

> What do you think, Mr. Talaske, it would be if, as it was here, he threatens to kill himself in front of the children? What do you call that? If you don't know, I'll call it – that's terrorism to me, okay?
>
> So let's go through it. The victim was treated with terrorism, yes. I think, in addition to what I've just asked the question, I'm assuming – that to me is terrorism. Then some of the other things he did, as far as I am concerned, would fall under that category.
>
> And it says "terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense. My, oh my, wrapped with duct tape, put a rope around the neck, attempted sex, threatening to kill, the children – excuse me – kill himself in front of the children. That is 50 points, no question.

Clearly, the trial court relied on the definition of terrorism in the former version of MCL 777.37. But because the definition has been incorporated into the amended version of the statute, the trial court's failure to recognize the revised statute is harmless.

Moreover, we find no error in the trial court's conclusion that defendant's actions warranted 50 points. As discussed, defendant controlled or restrained the victim for several hours, taped and bound her, used a knife, had a gun, threatened to involve their child, threatened to kill himself in front of her and the child, and raped the victim. The trial court could have reasonably found, at the least, that defendant's continual use of the child as a pawn was designed

to substantially increase the fear and anxiety the victim suffered during the offense so that she would do what defendant told her to do.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello