

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS E. HOLTSCHLAG,

Defendant-Appellant.

UNPUBLISHED

October 19, 2004

No. 226715

Wayne Circuit Court

LC No. 99-473103

ON REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA M. COLE,

Defendant-Appellant.

No. 227941

Wayne Circuit Court

LC No. 99-004731

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL BRAYMAN,

Defendant-Appellant.

No. 227942

Wayne Circuit Court

LC No. 99-004731

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant Joshua M. Cole was convicted of involuntary manslaughter¹ and two counts of mixing a harmful substance in a drink² as a result of the death of Samantha Reid and the drugging of Melanie Sindone.³ Defendant Cole was sentenced to concurrent terms of seven to fifteen years' imprisonment for his involuntary manslaughter conviction and thirty months to five years' imprisonment for each mixing a harmful substance in a drink conviction. In a joint trial before a separate jury, defendants Nicholas E. Holtschlag and Daniel Brayman were also convicted of one count of involuntary manslaughter and two counts of mixing a harmful substance in a drink. Both defendants Holtschlag and Brayman were sentenced to concurrent terms of sixty-nine months to fifteen years' imprisonment for their involuntary manslaughter convictions and thirty months to five years' imprisonment for their mixing a harmful substance in a drink convictions. We originally reversed defendants' convictions for involuntary manslaughter.⁴ However, the Michigan Supreme Court reversed and reinstated those convictions.⁵ On remand, we are directed to consider those sentencing challenges raised in defendants' briefs on appeal affecting their sentences for involuntary manslaughter.⁶ We affirm defendants' sentences. However, we remand to allow the trial court to correct the presentence investigation reports (PSIRs) of defendants Holtschlag and Brayman.

I. Standard of Review

Defendants challenge the scoring of several offense and prior record variables. Defendants preserved the claimed errors for review by raising these challenges at sentencing.⁷ Sentences that are within the guidelines range shall be affirmed on appeal absent an error in the scoring of the guidelines or the use of inaccurate information to determine the defendant's

¹ MCL 750.321. Involuntary manslaughter is a class C crime against a person. MCL 777.16p.

² MCL 750.436(1). Mixing a harmful substance in a drink is a class E crime against a person. MCL 777.16v.

³ As a lengthy recitation of the facts appears in our original opinion, *People v Holtschlag*, unpublished per curiam opinion of the Court of Appeals, issued March 27, 2003 (Docket Nos. 226715, 227941, 227942, and 241661), we need not reiterate here.

⁴ We also vacated defendant Erick Limmer's conviction of accessory after the fact to manslaughter, MCL 750.505. Although the Supreme Court reinstated his conviction, we were not ordered to consider his appeal on remand and have partially vacated the order consolidating these cases. *People v Holtschlag*, unpublished order of the Court of Appeals, entered October 1, 2004 (Docket No. 241661).

⁵ *People v Holtschlag*, 471 Mich 1; 684 NW2d 730 (2004).

⁶ In lieu of granting a rehearing, the Supreme Court remanded to this Court for consideration of defendants Brayman, Cole and Holtschlag's sentencing issues. *People v Holtschlag*, ___ Mich ___, ___ NW2d ___ (entered September 14, 2004).

⁷ MCL 769.34(10).

sentence.⁸ A sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score.⁹

II. Defendant Holtschlag—Docket No. 226715

Defendant Holtschlag challenges the trial court's scoring of offense variable (OV) 1 at ten points, OV 2 at one point, and OV 13 at twenty-five points. Combined with the unchallenged scores, defendant Holtschlag received a total OV score of sixty-six, with a recommended minimum sentencing guidelines range of fifty to one hundred months.

A. OVs 1 and 2

Pursuant MCL 777.31, OV 1 (aggravated use of a weapon) is to be scored ten points when the victim is "touched by any other type of weapon," as differentiated from a knife or cutting or stabbing weapon.¹⁰ MCL 777.32 similarly permits one point to be assigned to OV 2 (lethal potential of weapon possessed) for the lethal potential of any other type of weapon.¹¹ Defendant Holtschlag contends that the record fails to indicate that any defendant used any type of weapon against the girls.

It appears from the record that the trial court determined that GHB/GBL, as a poison, was a weapon that made contact with the girls in scoring these variables against defendant Holtschlag. Although poison may be pernicious, this Court has never seen it defined as a weapon.¹² However, we are not required to resolve this issue today, as the trial court improperly scored these offense variables on another ground.

Defendant Holtschlag was the only defendant scored for OV 1 and OV 2, even though the record evidence reveals that he and defendant Brayman both acquiesced in defendant Cole's placement of GHB/GBL in the girls' drinks. In a multiple-offender situation, all offenders must be assessed the same number of points under OV 1 and OV 2 if it is determined that a weapon was present.¹³ Accordingly, the trial court, even if it properly determined that GHB/GBL was a weapon, improperly assessed points against only defendant Holtschlag for OV 1 and OV 2.

Correcting the improper scores for OV 1 and OV 2 would reduce defendant Holtschlag's total OV score to fifty-five. With this corrected score, defendant Holtschlag would still remain

⁸ MCL 769.34(10); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

⁹ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁰ MCL 777.31(1)(d). Defendant Holtschlag was actually scored pursuant to an identical provision in the prior MCL 777.31(1)(c).

¹¹ MCL 777.32(1)(e). Defendant Holtschlag was actually scored pursuant to an identical provision in the prior MCL 777.32(1)(d).

¹² See, e.g., Black's Law Dictionary (6th ed).

¹³ MCL 777.31(2)(b); MCL 777.32(2); *People v Morson*, 471 Mich 248, 258-259; 685 NW2d 203 (2004).

within Offense Level V. As correcting this error would not affect the recommended sentencing guidelines range, remand for resentencing is not required.¹⁴ However, we remand for the ministerial task of correcting defendant Holtschlag's PSIR to reflect scores of zero for OV 1 and OV 2.¹⁵

B. OV 13

OV 13 (continuing pattern of criminal behavior against a person) is to be scored twenty-five points when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."¹⁶ In determining the number of points to score a defendant, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."¹⁷ Defendant Holtschlag asserts that this score was improper because there were only two victims in this scenario.

However, defendant Holtschlag was convicted of one count of involuntary manslaughter, relating to Ms. Reid, and two counts of mixing a harmful substance in a drink, relating to Ms. Reid and Ms. Sindone. As previously noted, both of these offenses are categorized as crimes against a person. These three concurrent convictions for crimes against a person are sufficient to support the trial court's score for OV 13.¹⁸ Furthermore, no charges were brought in relation to the drugging of Jessica VanWessehora, the third girl present in the apartment, as she did not become ill as a result of ingesting GHB/GBL. However, Ms. VanWessehora testified that she was actually served beverages laced with GHB/GBL and that, although she drank very little due to the beverages' taste, she became sleepy as a result. The trial court could infer from this evidence that Ms. VanWessehora was also an intended victim. As uncharged offenses may also be included in the scoring of this variable, defendant Holtschlag's actions toward Ms. VanWessehora constitute part of the pattern of criminal behavior. Accordingly, the trial court properly assessed twenty-five points for OV 13.

We also reject defendant Holtschlag's contention that considering the three concurrent convictions in scoring OV 13 amounts to impermissible double counting, as these same convictions were considered in scoring prior record variable (PRV) 7. As OV 13 and PRV 7 "are two separate categories addressing two different situations," the trial court properly scored both variables.¹⁹ Points are assessed under OV 13 for a continuing pattern of felonious criminal behavior against a person within a five-year time period.²⁰ "PRV 7 provides for the assessment

¹⁴ *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

¹⁵ MCL 777.14(6); MCR 6.425(D)(3)(a); *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

¹⁶ MCL 777.43(1)(b).

¹⁷ MCL 777.43(2)(a).

¹⁸ *Harmon*, *supra* at 524, 532 (concurrent convictions, and offenses occurring concurrently, may form the basis of a pattern of criminal behavior for OV 13).

¹⁹ *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

²⁰ MCL 777.43.

of points for two or more subsequent or concurrent felony convictions.”²¹ Accordingly, the trial court properly scored both variables based on these convictions.

III. Defendant Cole—Docket No. 227941

Defendant Cole challenges the trial court’s scoring of OV 6 at ten points, OV 10 at fifteen points, OV 13 at twenty-five points, and OV 14 at ten points.

A. OV 6

OV 6 (intent to kill or injure another individual) is scored ten points when:

The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life[.]^[22]

The trial court must score this offense variable consistent with the jury verdict unless the judge receives information not presented to the jury.²³

Defendant Cole asserts that, in order to convict him of involuntary manslaughter, the jury must have concluded “that he acted in a grossly negligent manner under circumstances where ‘it must have been apparent that the result was likely to be serious injury.’” He argues that such a finding does not amount to “an unreasonable disregard for life” as required to score OV 6. We disagree. Acting in a grossly negligent manner where it was apparent that serious injury could result, implies that defendant Cole was acting with an unreasonable disregard for life. The evidence showed that defendant Cole secretly poured GHB/GBL into the girls’ drinks. Furthermore, defendant Cole knew that ingesting too much GHB/GBL could cause illness and that the substance would eat through plastic. Defendant Cole waited several hours after Ms. Reid and Ms. Sindone became ill to seek medical assistance. Accordingly, the trial court properly scored OV 6 at ten points.

²¹ *Jarvi*, *supra* at 164. See also MCL 777.57.

²² MCL 777.36(1)(c).

²³ We note that MCL 777.36(2)(a) appears on its face to be in opposition to the recent United States Supreme Court decision of *Blakely v Washington*, ___ US ___, 124 S Ct 2531; 159 L Ed 2d 403 (2004), as the statute explicitly allows a sentencing court to consider factors not before the jury. However, a majority of the Michigan Supreme Court recently decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan).

B. OV 10

A sentencing court scores OV 10 when a defendant exploits a vulnerable victim. Fifteen points are assigned where predatory conduct was involved in the exploitation.²⁴ For purposes of this variable,

(a) “Predatory conduct” means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.^[25]

Defendant Cole argues that there was no evidence of predatory *conduct* to support this score. The trial court properly found, however, that the totality of the circumstances surrounding the placement of the GHB/GBL into the girls’ drinks indicated preoffense conduct showing an intent to victimize by deceit. Defendant Cole continually served fourteen-year-old girls alcoholic drinks following their arrival in Mr. Limmer’s apartment and suggested that the party play drinking games. The evidence shows that defendant Cole discussed his plan to secretly slip GHB/GBL into the drinks with defendants Brayman and Holtschlag. Placing a substance into the drinks of young girls to alter their consciousness, encouraging underage girls to continue to drink alcoholic beverages and concocting these plans with others clearly amounted to predatory conduct. Furthermore, defendant Cole acknowledged that he purchased the GHB/GBL with Mr. Limmer at an earlier date. Purchasing a harmful substance to keep on hand for use on the right victims is clearly predatory conduct.²⁶ The evidence also revealed that the purpose of this deceptive conduct was to sexually exploit the girls once they were affected by the drug. Based on the record evidence, the trial court properly assessed fifteen points for OV 10.

C. OV 13

Defendant Cole also challenges the trial court’s score for OV 13. Defendant Cole contends that the three crimes forming the criminal pattern must be against one person. However, this interpretation is not supported by the wording of the statute. “Crimes against a person” refers to the class of crimes and not the number of people against whom the crimes were directed.²⁷ Furthermore, as discussed previously, the trial court properly scored OV 13 at twenty-five points based on defendant Cole’s three convictions and based on the uncharged offenses against Ms. VanWessehora.

²⁴ MCL 777.40(1)(a).

²⁵ MCL 777.40(3).

²⁶ *People v Witherspoon (After Remand)*, 257 Mich App 329, 335-336; 670 NW2d 434 (2003), quoting *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002).

²⁷ MCL 777.22.

D. OV 14

OV 14 (offender's role) is scored ten points to reflect a defendant's role as "a leader in a multiple offender situation."²⁸ Defendant Cole contends that defining him as the leader in this situation is inconsistent with the trial court's finding that preoffense conduct created a pattern of felonious behavior. As defendants Holtschlag and Brayman brought the girls to the apartment, defendant Cole could not be the leader in the situation.

However, the prosecution presented sufficient evidence that defendant Cole was in fact the leader and this score is consistent with OV 13. Defendant Cole was the only person directly involved in the plan who knew that GHB/GBL was present in the apartment. He devised the plan to drug the girls, secured the agreement of defendants Brayman and Holtschlag, and encouraged the girls to continue drinking. Defendant Cole actually placed the GHB/GBL into the drinks. There was also evidence that defendant Cole invented the cover story to tell police and medical personnel when defendants finally sought assistance. This plan was created after the girls arrived at the apartment, and therefore, the fact that defendants Holtschlag and Brayman brought the girls there is irrelevant.²⁹ As defendant Cole took the leadership role in the preoffense conduct of creating the plan and securing the other defendants' acquiescence, this score is consistent with a finding of preoffense conduct. Therefore, the trial court properly assessed ten points for this variable.

E. Proportionality of Sentence

Defendant Cole also argues that the trial court abused its discretion in setting his minimum sentence at the top of the recommended guidelines range, as he cooperated with the police. However, as defendant Cole's minimum sentence is within the appropriate guidelines range, we must affirm his sentence.³⁰

IV. Defendant Brayman—Docket No. 227942

Defendant Brayman challenges the trial court's scoring of OV 10 at fifteen points, OV 13 at twenty-five points, and PRV 5 at five points. Defendant Brayman was assessed a total of eighty-five OV points and twenty-five PRV points. This placed him in Offense Level VI and Prior Record Level D, with a recommended minimum sentencing range of fifty to one hundred months.

²⁸ MCL 777.44(1)(a).

²⁹ See *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993) (in determining if a defendant was the leader in a multiple-offender situation under prior OV 9, the trial court must take the entire criminal episode into account).

³⁰ MCL 769.34(10); *Babcock*, *supra* at 256.

A. OV 10

Defendant Brayman challenges the trial court's scoring of OV 10 at fifteen points. However, as previously noted, defendant Brayman acquiesced in a plan to secretly lace alcoholic beverages served to fourteen-year-old girls with a drug to alter their state of consciousness in order to have sex with them. As the evidence reveals that defendant Brayman engaged in predatory conduct for the purpose of sexually exploiting young girls, the trial court properly assessed fifteen points for this variable.

B. OV 13

Defendant Brayman also challenges the trial court's scoring of OV 13 at twenty-five points. Once again, we note that the trial court's assessment was proper based on defendant Brayman's convictions for involuntary manslaughter and two counts of mixing a harmful substance in a drink and the uncharged offense committed against Ms. VanWessehora.

C. PRV 5

However, defendant Brayman correctly asserts that the trial court erred in scoring PRV 5. PRV 5 (prior misdemeanor convictions or juvenile adjudications) is to be scored five points when a defendant has two prior misdemeanor convictions or juvenile adjudications and two points when the defendant has only one prior conviction or adjudication.³¹ Other than operating under the influence, only those convictions or adjudications amounting to an "offense against a person or property, a controlled substance offense, or a weapon offense" are to be counted.³²

Defendant Brayman did have two prior misdemeanor convictions. The sentencing court agreed, however, that his minor-in-possession conviction could not be counted in scoring PRV 5. The court failed to correct defendant Brayman's PSIR to reflect this change. Reducing defendant Brayman's PRV score to twenty-three places him in Prior Record Level C. The recommended minimum sentencing range for a defendant in Offense Level VI and Prior Record Level C is forty-three to eighty-six months. Defendant Brayman's minimum sentence of sixty-nine months is within the corrected sentencing range. Therefore, we need not remand for resentencing.³³ However, we remand for the ministerial task of correcting defendant Brayman's PSIR to reflect these changes.³⁴

³¹ MCL 777.55(1)(d)-(e).

³² MCL 777.55(2)(a)-(b).

³³ *Houston, supra* at 473.

³⁴ MCL 777.14(6); MCR 6.425(D)(3)(a); *Harmon, supra* at 533.

Affirmed in part and remanded in part for the ministerial correction of defendants Holtschlag and Brayman's PSIRs. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot