STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ESTER POWELL, III,

Defendant-Appellant.

UNPUBLISHED
April 17, 2008

No. 274264
Washtenaw Circuit Court
LC No. 06-000479-FH

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to a prison term of 10 to 20 years. We affirm.

Defendant first challenges his sentence. He asserts that the trial court erred by assessing 100 points under offense variable (OV) 3 for Ryan Taylor's death and by assessing a different number of points for OV 3 than the court previously assessed with respect to another offender involved in the assault, Dirrick Roberts. Defendant also contends that the habitual offender enhancement was erroneous. We first address defendant's challenge to the 100 point score for OV 3. We review the legal issue of statutory construction presented by this challenge de novo, but the trial court's decision in regard to the number of points to be scored is discretionary, provided that there exists evidence in the record to support the score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). In *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), our Supreme Court noted that Michigan's indeterminate sentencing scheme "allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a *preponderance of the evidence*[.]" Emphasis added; see also *People v Uphaus (On Remand)*, __ Mich App __; __ NW2d __ (2008) (Docket No. 267238), slip op at 6; *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). This Court, however, has stated that "[s]coring decisions for which there is *any evidence* in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (emphasis added); see also, e.g., *Hornsby*, *supra* at 468; *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Regardless whether we apply a "preponderance of the evidence" standard or an "any evidence" standard, we conclude, for the reasons stated below, that the evidence was sufficient to support the trial court's assessment of 100 points on OV 3.

OV 3 requires sentencing courts to "[s]core 100 points if death *results from* the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b) (emphasis added). In *People v Wood*, 276 Mich App 669; 741 NW2d 574 (2007), this Court interpreted the phrase "results in the death" as used in the fleeing and eluding statute, MCL 257.602a(5). The *Wood* panel, explaining that such language differs from the Legislature's use of the term "cause," which implicates legal or proximate causation principles, stated:

> Defendant contends that "interpretation of the term 'result' necessarily requires consideration of the term 'cause.'" In essence, defendant is arguing that interpretation of the term "result" should be the same as when the term "cause" is used in a statute. We disagree. Although it is axiomatic that a result must be caused, by using the word "result" instead of "cause" in the statute, the Legislature specifically directed that only *factual causation* need be established. The phrase "results in" is more general and broader in scope than the term "causes," which has acquired a unique, technical meaning in the law. [*Wood, supra* at 672 (emphasis added; citation omitted).]

Given that the Legislature mandated a score of 100 points if a death "results from" the commission of a crime, and did not provide that the death must be "caused" by the commission of a crime, factual causation is all that is required for purposes of MCL 777.33(2)(b). This Court in *Wood, supra* at 676, further stated:

> The only causation required by the statutory language is factual causation, not proximate causation. Factual causation means just that: was defendant's criminal conduct a factual cause of the officer's death; or, but for defendant's fleeing and eluding, would the officer's death have occurred? Because the officer's death would not have occurred absent defendant's fleeing and eluding, i.e., the police officer would not have lost control of his vehicle during the pursuit of the fleeing defendant, factual causation exists. [Citation omitted.]

Here, the record supports the trial court's factual conclusion that the commission of the crime and defendant's actions and participation therein caused Taylor to run into the street, where he was struck by the vehicle. There was evidence that defendant aggressively assaulted Taylor, punching him and kicking him. Further, there was definitive testimony that Taylor ran into the street shortly after the assault. Despite defendant's contention that there was no evidence that defendant chased Taylor into the street, the evidence was sufficient to demonstrate that Taylor was running from the area as a result of the assault.[1] Further, the prosecution's chief witness testified that she saw defendant and another man chase Taylor through a gate that led to the street where Taylor was struck by the vehicle. A reasonable inference that arises from all the evidence is that defendant caused Taylor to run into the street. But for the assault and defendant's conduct, Taylor would not have been fleeing, running across the road, and he would

[1] Defendant concedes that if the prosecution's theory, i.e., that defendant chased Taylor into the street where he was struck and killed, is correct, 100 points would properly be scored under OV-3.

not have died. Thus, the evidence was sufficient to allow the trial court to determine that defendant's crime resulted in Taylor's death for the purpose of assigning 100 points under OV 3.

Regarding defendant's assertion that the trial court erred by assessing a different OV 3 score than that assessed against Roberts, the trial court clearly erred in assessing 50 points against Roberts. Under OV 3, a score of 50 points is appropriate only when the sentencing offense "involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive" and the offender was under the influence of drugs or alcohol. MCL 777.33(2)(c). Here, the sentencing offense against Roberts was the same as the offense against defendant, assault with intent to do great bodily harm. Roberts' sentencing offense did not involve the operation of a vehicle while under the influence of alcohol or drugs, and the trial court should not have assessed 50 points under OV 3 to Roberts.

Although the 50-point score against Roberts was erroneous, resentencing is not required in this case. We recognize that in multiple offender cases, all offenders are required to be assessed the same number of points for OV 3. MCL 777.33(2)(a). This Court has held, however, that an erroneous score for one defendant does not bind a trial court to assign the same erroneous score for another defendant. *People v Libbett*, 251 Mich App 353, 367; 650 NW2d 407 (2002). Our Supreme Court acknowledged and validated this holding in *People v Morson*, 471 Mich 248, 259; 685 NW2d 203 (2004) ("we agree that the sentencing court should not be bound to apply an erroneous score in the multiple offender context"). Where, as here, the score assessed against the first offender was erroneous, it would compound the error to require the trial court to carry the same score into the remaining offenders' sentences. Such compounding of error would violate the express requirement that offenders be assessed the highest number of points applicable to the offense. MCL 777.33(1). We find that the trial court correctly assessed 100 points against defendant under OV 3.

In his Standard 4 brief, defendant argues that his habitual offender enhancement was erroneous due to procedural errors in the habitual offender information. The record contradicts this assertion. The prosecutor timely filed the habitual offender information against defendant on June 15, 2006, within the time period required by MCL 769.13. Further, the presentence investigation report provided adequate proof of defendant's prior felony convictions.

Aside from the challenges to sentencing, defendant argues that the trial court erred by denying his motion in limine, which sought to exclude evidence of Taylor's death. According to defendant, the evidence was irrelevant and unduly prejudicial. A trial court's decision to admit evidence is reviewed by this Court for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). In *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), our Supreme Court stated that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." A cohesive and intelligible presentation of this case to the jury could not have been made without providing the jury with the full story and the sequence or chronology of all the events that transpired at and around the time of the assault, which necessarily included testimony regarding Taylor's death. The evidence was also relevant and probative under MRE 401 on the issue of defendant's intent. In *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod in part on other grounds 450 Mich 1212 (1995), the Supreme Court noted that all evidence offered by the prosecution is prejudicial to some extent, but the fear of prejudice does not render the evidence inadmissible unless the probative value is substantially outweighed by the danger of unfair

prejudice. "Unfair prejudice" does not mean damaging. *Id.* Here, under MRE 403, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence.

In his Standard 4 brief, defendant asserts that his counsel was ineffective for a variety of reasons and that the photographic array used by the investigating detective was unduly suggestive. To establish an ineffective assistance of counsel claim a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's deficient performance, such that there exists a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). We have reviewed the record as to defendant's assertions of ineffective assistance of counsel, and we find them meritless. Defendant's counsel adequately and properly cross-examined witnesses to demonstrate potential shortcomings in their perceptions and to demonstrate any improper suggestions by the detective concerning the identity of the suspects. With respect to defendant's claim that the trial included fabricated evidence, we find that record evidence expressly refutes the claim. Further, reversal is unwarranted on the basis that the photographic array was unduly suggestive or on the basis that a corporeal lineup was not undertaken. See *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993). Moreover, the evidence reflected that the witness who participated in the photographic array was personally familiar with defendant and the others who engaged in the assault, dissipating any perceived taint. Finally, there is no basis for us to remand the case for a *Ginther*[2] hearing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).