STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2009
v	No. 280534 Kalkaska Circuit Court
DALE WAYNE MAGEE, Defendant-Appellant.	LC No. 06-002763-FH

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of failing to stop at the scene of an accident causing serious impairment or death, MCL 257.617, and felonious driving, MCL 257.626c. The trial court sentenced defendant to serve 38 to 60 months' imprisonment for failing to stop at the scene of an accident causing serious impairment or death, and 16 to 24 months' imprisonment for felonious driving. Defendant received 21 days jail credit on each sentence. Because the trial court did not err in scoring defendant under OVs 4, 14, 18, and 19, we affirm.

I

Defendant, who was approximately 19 years old, and several others celebrated Independence Day in the town of Fife Lake on July 3, 2006. Drinking was involved during the celebration. At some point that evening, a group of people decided to drive to the home of Ashley Mendor. In all, four cars traveled together to Mendor's house: Ray Thompson was in one vehicle with Jeremiah Gordon; in a second vehicle was Paul Keene, Ashlee Sims, and Mae Voss; in a third vehicle was Clinton Crandall; and defendant drove the fourth vehicle, his Jeep, with passengers Shane Kelley and Jason Robinson. Thompson testified that the cars were driving about 55 or 60 miles per hour when he saw defendant pass going extremely fast—"like a bat out of hell"—and then he saw defendant's taillights disappear.

Kelley testified that he was in the front passenger seat of the Jeep, defendant was driving, and Robinson was in the backseat when the accident occurred. Kelley opined that just before the accident, defendant was driving between 75 and 80 miles per hour. After the accident, Kelley climbed out of defendant's window, found defendant, and then went back to the Jeep to check on Robinson. When the others arrived, Kelley walked home because he was scared.

Thompson testified that he drove for roughly another minute or two after defendant sped past and then saw defendant's overturned Jeep and defendant on the side of the road. Thompson and others went to the Jeep to find Robinson. They could hear Robinson groaning in the back of the Jeep, but they could not get to him. Thompson said that he told defendant, along with the others there, that they needed to call 911 because Robinson could have internal injuries. Ashlee Sims also testified that she and others encouraged defendant to call 911 stating that, "[w]hen we saw the car, when we saw [Robinson] in the back, when we knew he couldn't move his legs, we knew that something was wrong, and we had to call the cops because someone was hurt very badly." Thompson testified that defendant did not want to the call the police and that instead he was going to call his dad, Magee. At trial, the parties stipulated to the fact that defendant called Magee at 11:31 p.m. on July 3, 2006 and the call lasted one minute.

Magee arrived shortly thereafter. Thompson testified that at that point he volunteered to tell the police he was driving the Jeep, not defendant. According to Magee, he asked Thompson why he would want to do that, but Thompson did not really respond. At trial, Thompson said it was his idea, not defendant's idea because he was trying to help Robinson get the help he needed and also trying to help defendant. Magee then called Kalkaska County 911 on Thompson's cell phone at 11:44 p.m. on July 3, 2006 and the call lasted 83 seconds. After the call was made, Magee told the rest of the people at the accident scene that they should leave. At trial, when asked if he told people to leave the scene, Magee stated, "I asked the girls to take [defendant] to my house, and I asked . . . Thompson to go up to the road and summon[] help." Magee also said that he asked defendant and the girls to leave so that they would not be around Robinson, making him more excited, and so they would not be tempted to move him. Sims testified that she and Voss drove defendant to Magee's house in Magee's truck and stayed there for approximately one hour.

Officer Harry Shipp arrived at the scene at approximately 12:01 a.m. on July 4, 2006. When Shipp arrived, EMS rescue vehicles and Thompson and Robinson were present. Shipp indicated that Thompson identified himself as the driver of the Jeep, but Thompson was not making eye contact and struggled to answer questions about when he borrowed the vehicle or the location of the Jeep's owner. Shipp began to question whether Thompson was being truthful about being the driver. Approximately 15 minutes into the conversation, Thompson admitted that defendant was driving the Jeep and that Kelley was also in the vehicle at the time of the crash.

Robinson testified that he and his friends, defendant, Crandall, and Kelley, were drinking on July 3, 2006. Robinson said that he does not remember leaving Fife Lake because he was "in black out" because of the drinking. Robinson testified that the next thing he remembers is waking up in the hospital and being paralyzed from the waist down.

II

Defendant raises only sentencing issues on appeal. Defendant argues that the trial court incorrectly scored offense variables (OVs) 4, 14, 18, and 19. To be properly preserved for appellate review, an issue must be raised in and decided by the trial court. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). Defendant objected to the scoring of OV 14, but did not object to the scoring of OVs 4, 18, and 19. Therefore, defendant has only properly preserved his challenge to the scoring of OV 14. MCL 769.34(10).

"A sentencing court has discretion in determining the number of points to be scored [under the relevant offense variables], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, this Court reviews a trial court's sentencing decision for an abuse of discretion, and to determine whether the record adequately supports a given OV score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). This Court reviews unpreserved scoring decisions for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 309-312; 684 NW2d 669 (2004); see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

III

Defendant's main argument on appeal concerns OV 14. During sentencing, defense counsel raised an objection to the scoring of ten points under OV 14. MCL 777.44(1)(a) provides that the sentencing court should score ten points if the defendant was the leader in a multiple offender situation. The trial court must consider the entire criminal episode when scoring. MCL 777.44(2)(a). Defendant argued that the others present at the accident scene were not offenders and thus OV 14 was improperly scored. The prosecutor asserted that Thompson, Sims, and Voss were offenders in the situation, and could have been charged on an aiding and abetting theory. The prosecutor specifically argued that defendant was leading the group present at the accident scene not to call 911 in order to cover up the situation. The trial court indicated that it "could see that maybe as to Thompson," but wondered how Sims and Voss would be considered to have aided and abetted the crime. The prosecutor responded that, "[t]he girls drove the defendant away from the scene, knowing that there had been a serious crash, that somebody was injured, that 911 needed to be called." The trial court ruled, "[w]ell, there is some evidence that more than one person may have been involved in . . . assisting in the non-reporting and leaving the scene, I should say, so I'll keep the scoring that way."

MCL 257.617(1) provides as follows:

> (1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619(a) and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.

MCL 257.619 provides as follows:

> The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident with an individual or with another vehicle that is operated or attended by another individual shall do all of the following:
>
> (a) Give his or her name and address, and the registration number of the vehicle he or she is operating, including the name and address of the owner, to a

police officer, the individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(b) Exhibit his or her operator's or chauffeur's license to a police officer, individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(c) Render to any individual injured in the accident reasonable assistance in securing medical aid or arrange for or provide transportation to any injured individual.

MCL 767.39 provides as follows:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The evidence adduced at trial supports the conclusion that the group who stopped at the accident knew the severity of Robinson's injuries. Thompson testified that he told others that Robinson might have internal injuries, and Sims testified that "we knew [Robinson] couldn't move his legs." The evidence also showed that defendant encouraged others present not to call for help despite the severity of the injuries. Both Thompson and Sims testified that instead of calling the authorities, defendant wanted to call his father. Sims and Voss drove defendant away from the scene prior to the arrival of the police. Under these facts, Thompson, Sims, and Voss can reasonably be characterized as aiding and abetting defendant's commission of the felony. MCL 257.617. Accordingly, they can be considered offenders for purposes of OV 14.

The next question concerns whether defendant can properly be characterized as the "leader" of this group of offenders. To "lead" is defined, in part, as "to influence or induce" and "to guide in direction, course, action." *Random House Webster's College Dictionary* (1997). It is true that Thompson testified that it was his idea, not defendant's, to claim that he had been driving. And, Magee testified that he asked Sims and Voss to leave the scene, not defendant. But it was defendant who initially did not want the authorities called, and according to Sims told the group assembled that "nobody is calling anybody." As portrayed by Sims, defendant was not requesting, but was directing that no one call the authorities. Defendant also chose to call his father to come to the scene rather than authorities when he knew Robinson was severely injured. Again, "[s]coring decisions for which there is any evidence in support will be upheld." *Hornsby*, *supra* at 468 (internal quotations and citations omitted). Therefore, this evidence supports the trial court's decision to score OV 14 as ten points. Because the evidence supports a score of ten points for OV 14, the trial court did not abuse its discretion in scoring OV 14.

Defendant's remaining arguments regarding his OV scoring are unpreserved. Yet, we will review them for plain error affecting defendant's substantial rights. *Kimble, supra* at 309-311; see *Carines*, *supra* at 763-764. Under OV 4, the trial court should score ten points if defendant caused a serious psychological injury that may require professional treatment. MCL

777.34(2). Defendant argues that he did not cause his victim to suffer serious psychological injury that may require professional treatment. However, the PSIR indicates that Robinson's mother has "advised that [Robinson] has been extremely depressed since the accident." Further, Robinson's sister stated that Robinson was not at the sentencing hearing because he could not "handle it. It's hard enough on him as it is, let alone to be here." Under these circumstances, it was not error for the trial court to score ten points for OV 4.

Defendant also argues that he should not have been scored five points under OV 18. According to MCL 777.48(1)(d), five points may be scored under the following circumstances:

> The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content.

The phrase "any bodily alcohol content" is defined as follows:

> (a) An alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
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> (b) Any presence of alcohol within an individual's body resulting from the consumption of alcoholic or intoxicating liquor other than the consumption of alcoholic or intoxicating liquor as part of a generally recognized religious service or ceremony. [MCL 777.48(2).]

Defendant argues that because his bodily alcohol content was not measured, the only way that five points can be scored under OV 18 is if he was visually impaired. He admits that there was testimony that he had been drinking during the day of the accident, but he argues there was no evidence he was visually impaired at the time of the accident.

Defendant's argument is misguided. In context, MCL 777.48(1)(d) allows for the scoring of points if there is any evidence—not just scientific measurement—that alcohol was present in the body of an underage drinker at the time of the accident in issue. The section includes a reference to "any bodily alcohol content," and that reference is only made with respect to offenders under 21 years of age. As defined, the phrase "any bodily alcohol content" can be either (1) a measured amount of alcohol more than 0.02 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, but less than the statutorily defined threshold, MCL 257.625; or (2) any present amount of alcohol, unless specifically exempted. MCL 777.48(2)(a)-(b). MCL 777.48(1)(a)-(c) allow for increased scoring of points for alcohol consumption depending on how far above the statutorily defined threshold the measured amount of alcohol is in the offender's body. As defendant concedes, he was underage at the time of the accident and there was evidence he had been drinking prior to the accident. Therefore, no plain error occurred when the trial court scored five points under OV 18.

Next, defendant argues that he was improperly scored under OV 19. A defendant is scored ten points if he or she interfered with or attempted to interfere with the administration of justice. MCL 777.49(c). Defendant argues that he did not affirmatively act to thwart an investigation. However, defendant indicated to others at the scene that he did not want to call the police, he left the scene of the accident prior to the arrival of authorities despite apparently painful injuries, and he allowed, if not encouraged, another party to lie to authorities and falsely confess to driving the Jeep. Defendant also called his father to the scene, and allowed him to orchestrate how and when the authorities would be called. Under these circumstances, the trial court did not commit plain error in scoring ten points under OV 19.

IV

Finally, primarily relying on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and reiterated in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), defendant argues that he is entitled to resentencing because the trial court violated his due process rights when scoring points for all of his OVs by considering facts that were not proved beyond a reasonable doubt at trial. However, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. See also *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007). Defendant is not entitled to relief on this issue.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio