

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ACIE MAHON,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 283086

Macomb Circuit Court

LC No. 2006-004728-FC

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant pleaded guilty to assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 57 months to 30 years for the assault with intent to commit murder conviction, two to four years for the felonious assault conviction, and three to five years for the carrying a firearm conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. This Court denied defendant’s delayed application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court “for consideration as on leave granted of the challenge to the scoring of Offense Variable 10, MCL 777.40, in light of *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).” *People v Mahon*, 482 Mich 979; 755 NW2d 187 (2008). Because the trial court errantly scored OV 10 and the resultant minimum sentence range on rescoring is reduced, we vacate defendant’s sentences and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty pursuant to a plea agreement, whereby an additional alternative charge of assault with intent to do great bodily harm less than murder, MCL 750.84, was dismissed, and the trial court agreed to sentence defendant within the appropriate guidelines range as scored for assault with intent to do great bodily harm. The guidelines as scored placed defendant in the D-V cell of the applicable sentencing grid, resulting in a guidelines range of 29 to 57 months. MCL 777.65. The trial court imposed a minimum sentence of 57 months for the assault with intent to commit murder conviction, consistent with the plea agreement.

Defendant now argues that resentencing is required because the trial court improperly scored 15 points for OV10. When scoring the guidelines, “[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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). 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).

OV 10 takes into account exploitation of a vulnerable victim. The trial court assessed defendant 15 points, which is appropriate where predatory conduct was involved. MCL 777.40(1)(a). Vulnerability is defined as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). Factors to be used in deciding whether a victim is vulnerable include the following: (1) whether the victim had a mental or physical disability, (2) whether the victim was impaired due to the use of alcohol or drugs, (3) whether the victim was asleep or unconscious, (4) whether the victim was particularly young or old, (5) whether the victim had a domestic relationship with the defendant, (6) whether the defendant held a position of authority over the victim, and (7) whether the defendant overcame the victim due to a difference in size or strength. *Cannon, supra* at 158. Exploit is defined as “to manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). Thus, to assess 15 points under OV 10, the defendant must exploit a vulnerable victim and engage in conduct that meets the statutory definition of predatory. *Cannon, supra* at 159. A court may assess 15 points only if it can answer all three of the following questions in the affirmative:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender’s primary purpose for engaging in the preoffense conduct? [*Id.* at 162.]

Here, the circumstances surrounding the offense permit a finding that defendant engaged in preoffense conduct directed at a specific victim. Specifically, he became upset with a bartender who refused him service and told her that he was “going to come back and get revenge” on her. He went home, obtained a loaded shotgun and extra shells, returned to the bar, and waited outside for the bartender to leave. However, there is no evidence from which to conclude that the bartender was vulnerable, i.e., suffered from a readily apparent susceptibility that defendant took advantage of in order to commit the offense. She was initially subdued only because defendant pointed a gun at her. Because there was no evidence that defendant exploited a vulnerable victim, the trial court should have scored OV 10 at zero points.

The 15-point reduction in defendant’s total offense variable score places him in the D-IV cell, instead of the D-V cell, thereby reducing his minimum sentence range from 29 to 57 months to 19 to 38 months, MCL 777.65. Thus, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). Here, however, defendant pleaded guilty

pursuant to a *Cobbs*¹ sentencing agreement whereby the trial court agreed to sentence defendant within the sentencing guidelines range or allow defendant to withdraw his plea if it determined that such a sentence was not appropriate. Accordingly, we vacate defendant's sentences and remand for further proceedings. The trial court shall either resentence defendant within the corrected guidelines range consistent with the plea agreement, or allow defendant to withdraw his guilty plea if it determines that such a sentence would not be appropriate. Other than the limitations contained herein with respect to the scoring of OV 10, we do not limit the trial court's authority or discretion on remand.

Defendant's sentences are vacated and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).