

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HENRY TAYLOR,

Defendant-Appellant.

UNPUBLISHED

October 27, 2009

No. 284983

Tuscola Circuit Court

LC No. 07-010401-FH

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's affirmance of defendant's sentence.

First, I conclude that under the bright line rule defined in *People v McGraw*, 484 Mich 120; ___ NW2d ___ (2009), the trial court erred in scoring offense variable (OV) 9 on the basis of there being two victims, even though there was only one victim of the charged offense. The majority concludes that the scoring was proper because immediately before his assault on the victim and possibly as part of a plan to incite a confrontation with the victim, defendant menaced the victim's girlfriend. Such a scoring would certainly be reasonable if OV 9 could be scored based on any actions during the criminal transaction. However, *McGraw* specifically holds that OV 9 is only to be scored for actions that are specific to the charged offense and that other actions that occur during "the entire criminal transaction" may not be scored. *Id.* at 133. In the instant case, the battery of the victim did not necessarily include or require a prior assault or menacing of the girlfriend. *McGraw* is clear that action that is within the criminal transaction, but not offense-specific, may be considered by the sentencing court "when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation." *Id.* at 129. Moreover, "the prosecution is always free to charge a defendant with multiple offenses if they exist, rather than a single offense." *Id.* at 130. However, *McGraw* holds that transactional conduct that is not offense-specific may not be scored under OV 9.

Second, after reviewing the record, I conclude that defendant should not have been scored any points for OV 10. The mere fact that the victim was 16 years old is insufficient to score this variable and the record does not support a finding that defendant "exploited the victim's youth" as required by MCL 777.40(1)(b).

Changing the scoring for either OV 9 or OV 10 would result in defendant's minimum guideline range changing from the F-V cell (38 to 152 months) to the F-III cell (29 to 114 months). Omitting the scoring for both offense variables would result in defendant's minimum guideline range changing to the F-II cell (19 to 76 months).¹ In either case, remand for resentencing is required. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

In all other respects, I concur with the majority.

/s/ Douglas B. Shapiro

¹ These numbers reflect the enhancement for defendant's status as a fourth-offense habitual offender. MCL 777.21(3)(c).