

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TESHARRA LASANDRA SMITH,

Defendant-Appellant.

UNPUBLISHED

June 17, 2010

No. 291177

Ingham Circuit Court

LC No. 07-001590-FH

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right from her conviction for first-degree child abuse, MCL 750.136b(2). Defendant was sentenced to serve 50 to 180 months in prison. Defendant's conviction stems from the physical abuse of her daughter, who was 17 months old at the time of the incident in question. We affirm.

On appeal, defendant challenges the sentencing court's scoring of offense variable (OV) 7 and OV 4. "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). Thus, we review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

Defendant first argues that the sentencing court erred in scoring OV 7 at 50 points because it relied on defendant's conduct that occurred after the sentencing offense was complete. We disagree. OV 7 covers aggravated physical abuse, and 50 points is appropriate if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). "Excessive brutality" is not statutorily defined. "[W]hen terms are not expressly defined by a statute, a court may consult dictionary definitions." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997).

Contrary to defendant's assertion, there is no indication that the sentencing court relied on conduct after the crime was completed as a basis for scoring OV 7. The primary definition of "brutality" found in *The American Heritage Dictionary of the English Language* (1996) is, "The state or quality of being ruthless, cruel, harsh, or unrelenting." "Excessive" means "[e]xceeding a normal, usual, reasonable, or proper limit." *The American Heritage Dictionary of the English Language* (1996). Presuming as axiomatic that in the context of child abuse no brutality is properly characterized as reasonable or proper, or normal in the sense that it is not typical of the population as a whole, excessively brutal conduct is understood to be that which exceeds the norm for child abusers.

The sentencing court specifically stated that the lacerated frenulum and neck bruising showed evidence of choking, an action that it considered to be excessively brutal. The court prefaced this finding by linking it to what the prosecutor had just argued, i.e., that the lacerated liver and broken femur was evidence of excessive brutality. In context, the court agreed with the prosecutor and noted that additional injuries likewise supported a finding of excessive brutality with respect to the infliction of the child's numerous physical injuries. Infliction of all of these injuries constituted conduct occurring within the sentencing offense, *People v McGraw*, 484 Mich 120, 127; 771 NW2d 655 (2009), and supported the scoring of 50 points for OV 7, *Hornsby*, 251 Mich App at 468.¹

Defendant also argues that the sentencing court erred when it scored OV 4 at 10 points based on speculation that the child would suffer psychological injury in the future. We agree, but conclude that defendant is not entitled to resentencing because a correction of the total OV score would not result in a different recommended sentence range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

In sum, the record supports a score of 50 points for OV 7, but does not support a score of 10 points for OV 4. However, defendant is not entitled to resentencing because a correction of the total OV score would not result in a different recommended sentence range.

Defendant's conviction and sentence are affirmed. We remand for the ministerial task of modifying defendant's OV score in accordance with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

¹ Defendant also points to the sentencing court's statement that it "consider[ed] the overall circumstances" in scoring OV 7 at 50 as evidence that the sentencing court considered conduct after the crime was completed. Given that the sentencing court first articulated specific instances of abuse that it considered excessive brutality, its subsequent statement that it was considering the overall circumstances does not create error.