

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN EDWARD IVEY,

Defendant-Appellant.

UNPUBLISHED

July 29, 2010

No. 291592

Wayne Circuit Court

LC No. 08-012499-FC

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

BECKERING, J. (*dissenting in part*).

I write separately because I respectfully disagree with the majority's conclusion regarding the scoring of offense variable (OV) 3.

According to the testimony at trial, on August 17, 2008, defendant shot Kerry LaMont Booker five times, resulting in Booker's death. At approximately 5:00 p.m. that evening, defendant and his girlfriend, Teressa Parker, left Parker's apartment to go out to dinner. Booker, who was Parker's ex-boyfriend, telephoned defendant, challenging him to a fight and saying, "Bring your bitch-ass outside." Almost immediately, Booker's car pulled up, and Booker got out of his car. Defendant also got out of his car. Booker lifted up his shirt to show he had no weapon, and defendant did the same. Booker then grabbed a steel pipe out of his car and began chasing defendant. Parker yelled at Booker, telling him to stop. Booker then approached the car in which Parker was sitting, and began smashing the car windows.

Defendant testified that Booker subsequently returned to his own car and produced a gun. Defendant and Booker approached each other. When they were within close range of one another near Booker's car, Booker shot at defendant but missed. Defendant then grabbed the gun from Booker's hand. Booker reached back into his car to grab another weapon. When Booker lunged at defendant, defendant shot him. Defendant and Parker left the scene in their car. Defendant took Parker to her mother's house. Afterwards, he disposed of the gun in the Detroit River.

At trial, defendant argued that he acted in self-defense when he shot Booker. The jury found defendant guilty of one count of felon in possession of a firearm, MCL 750.224f, but acquitted him of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. In sentencing defendant, the trial court acknowledged defendant's claim of self-defense. Specifically, the court stated:

Well, in this particular case the defendant is being sentenced on the issue of being a felon in possession of a firearm. The jury found certainly that there was a reasonable doubt about the defendant acting in self-defense. I have to accept that. That's the jury's verdict in this particular matter, though the jury also found beyond a reasonable doubt that he was not legally permitted to have that weapon.

Defendant argues on appeal that the trial court erred in scoring OV 1 at 25 points and OV 3 at 100 points. According to defendant, because the jury acquitted him, it must have accepted his claim of self-defense, and he should not be sentenced for discharging a firearm at a victim or causing a victim's death. As noted by the majority, "[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 Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.* When interpreting statutes, this Court must determine and give effect to the intent of the Legislature by applying the plain language of the statute. *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009).

OV 1 involves the "aggravated use of a weapon." MCL 777.31(1). MCL 777.31 provides, in part:

(1) . . . Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon[:] 25 points

* * *

(f) No aggravated use of a weapon occurred[:] 0 points

I agree with the majority that OV 1 was properly scored at 25 points. MCL 777.31(1)(a) provides that the trial court must score OV 1 at 25 points if the defendant discharged a firearm "at or toward a *human being*" (emphasis added). The statute does not require that the human being be a victim. Further, nothing in the statute requires the trial court to take the possibility of self-defense into consideration in scoring OV 1. In this case, Booker was a human being and defendant discharged a firearm at him. Thus, under the plain language of MCL 777.31, OV 1 was properly scored.

On the other hand, OV 3 involves "physical injury to a *victim*" (emphasis added). MCL 777.33(1). MCL 777.33 provides, in part:

(1) . . . Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed[:] 100 points

* * *

(f) No physical injury occurred to a victim[:] 0 points

(2) All of the following apply to scoring offense variable 3:

* * *

(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

The majority states that OV 3 was properly scored at 100 points because defendant “was convicted of felon-in-possession, and [Booker] died as a result of defendant’s possession of a firearm. . . . There is no question here that defendant factually caused [Booker’s] death, regardless of whether it was in self-defense.” But the plain language of MCL 777.33 does not require that a defendant simply caused the death of a human being in order to score OV 3 at 100 points. Rather, the statute requires that a “victim was killed” and that “death result[ed] from the commission of a crime.” MCL 777.33(1)(a), (2)(b) (emphasis added). For purposes of OV 3, a victim “includes any person harmed by the *criminal actions* of the charged party.” *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003) (emphasis added). In *People v Dupree*, 284 Mich App 89, 106; 771 NW2d 470 (2009) (citation omitted), this Court held that “a defendant who is otherwise prohibited from possessing a firearm will only be justified in temporarily possessing a firearm if the possession is immediately necessary to protect the defendant or another from death or serious physical harm. Likewise, the defendant’s unlawful possession must end as soon as the immediacy of the threatened harm has passed.” Here, defendant presented evidence from which a jury could find and, as the trial court acknowledged at sentencing, apparently did find that he acted in self-defense in shooting Booker. Thus, defendant’s firearm possession was justified at the time of the shooting. The possession only became wrongful when defendant failed to rid himself of the firearm after the shooting. He failed to terminate his possession at the earliest possible opportunity after the danger had passed. See *id.* at 106-108. Accordingly, because defendant’s possession of the firearm was justified at the time he shot Booker, Booker should not be considered a victim for purposes of OV 3. Booker died as a result of a justifiable act, not the commission of a crime, MCL 777.33(2)(b), or criminal actions, *Albers*, 258 Mich App at 593. OV 3 was improperly scored.

Because reducing defendant’s OV 3 score from 100 points to zero points would affect his guidelines range, I would remand for resentencing.

/s/ Jane M. Beckering