

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LISA RAE BRYAN,

Defendant-Appellant.

UNPUBLISHED

September 28, 2023

No. 346294

Emmet Circuit Court

LC No. 18-004677-FC

Before: SHAPIRO, P.J., and M. J. KELLY and CAMERON, JJ.

PER CURIAM.

Defendant, who pleaded guilty to involuntary manslaughter, MCL 750.321, appeals by leave granted¹ her sentence, as a second-offense habitual offender, MCL 769.10, to 120 to 270 months’ imprisonment. On appeal, defendant contends the trial court erred by (1) improperly assessing Offense Variable (OV) 6, and (2) imposing a disproportionate departure sentence by failing to justify the reasons for the departure and its extent. For the reasons set forth in this opinion, we vacate defendant’s sentence and remand for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

At 12:00 a.m., on October 31, 2016, defendant took her daughter, IP, home from the hospital after IP spent three weeks in the Neonatal Intensive Care Unit for neonatal abstinence syndrome or narcotic withdrawal. That night, after returning home, defendant was unable to sleep because IP would wake every few hours from hunger. At about 8:00 a.m. the following morning, defendant brought IP to her bed to breastfeed and fell asleep with IP on her breast. IP died as a result of suffocation caused by her positioning on defendant’s breast. When interviewed by police, defendant asserted she fed IP at 8:00 a.m. before putting IP in the bassinet next to defendant’s bed, but later admitted that IP had slept in defendant’s bed most of the night. Defendant confessed she

¹ *People v Bryan*, unpublished order of the Court of Appeals, entered December 8, 2022 (Docket No. 346294).

lied about the bassinet because she was afraid of getting in trouble for failing to follow the Safe Sleep guidelines from the hospital instructing her that cosleeping was dangerous and potentially fatal for an infant.

Defendant had three other children, one of whom was deceased. One of her sons, then eight years old, was living with her at the time of this incident. Her other son apparently lived elsewhere. Her other daughter, HZ, born in 2010, drowned after defendant passed out on drugs and alcohol while bathing her. Defendant was convicted of manslaughter in Oklahoma as a result.

After IP's death, defendant volunteered to have her blood drawn to show that she was not using drugs or alcohol and intoxication did not play a role in IP's death as it had in the death of HZ. The test revealed that the only drug in defendant's system was "therapeutic levels of buprenorphine, the active ingredient in Subutex[,]” a drug used to treat opiate addiction. Furthermore, the prosecution did not assert that drugs or alcohol were involved in IP's death when discussing the case at the plea and sentencing hearings.

Defendant pleaded guilty to involuntary manslaughter, and admitted she “fell asleep while hugging [IP] to [her] chest[,]” and that IP died from being suffocated. Defendant acknowledged she was a second-offense habitual offender because of her previous involuntary manslaughter conviction. The trial court assessed OV 6 (Offender's Intent to Kill or Injure Another Individual) at 25 points, resulting in a guidelines sentence range of 29 to 71 months as a second-offense habitual offender. The trial court upwardly departed from this range, imposing a minimum term of 10 years—the highest minimum sentence that can be imposed for involuntary manslaughter. The trial court provided the following justifications for its departure sentence:

The relevant factors in this case which the Court believes are not addressed, or not appropriately addressed by the guidelines as scored, include the seriousness of the offense; that is the death of an infant child of Defendant's own; the relationship between her and the child; that is I think it would be one thing and very horrible for someone to act to endanger another person's child as this Defendant did, but it's even more culpable to show this degree of reckless disregard for the safety of one's own child as this Defendant has done.

The third factor not accounted for by the guidelines is that this Defendant continued to abuse drugs during her pregnancy knowing full well, again, from her prior experience with [HZ] that this would, and in fact in this case did subject her child to the horrible and painful ordeal of drug withdrawal once she was born, and the high likelihood that the child would be permanently impaired. Again, the same circumstance was present with [HZ], that she was born drug addicted and had to go through special treatment before she was discharged by the hospital because of drug addiction.

Finally, the Court believes that the guidelines, . . . fail to adequately account for the fact that the Defendant here has by her gross negligence caused the death of a second defenseless infant after having had the experience of very much the same thing with her previous child [HZ].

Defendant now appeals.

II. ANALYSIS

Defendant argues she is entitled to resentencing because the trial court erroneously assessed OV 6 at 25 points and her departure sentence was disproportionate and unreasonable. Because the proper assessment of OV 6 changes defendant's guidelines range, and therefore mandates resentencing, we decline to address defendant's challenge to the proportionality of her sentence.²

OV 6 is assessed for "the offender's intent to kill or injure another individual[.]" and, if applicable, may be assessed at 10, 25, or 50 points. MCL 777.36(1). The requirements to assess these point amounts are consistent with manslaughter, second-degree murder, and first-degree murder, respectively.³ An assessment of 10 points requires a showing of either the elements of voluntary manslaughter or "gross negligence amounting to an unreasonable disregard for life," MCL 777.36(1)(c), i.e., involuntary manslaughter. See *People v Fredell*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 351971); slip op at 8; M Crim JI 16.18. An assessment of 25 points requires an unpremeditated intent to kill, an intent to do great bodily harm, or actions which created a "very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result," MCL 777.36(1)(b), i.e., the three ways in which second-degree murder can be committed. See *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). Lastly, an assessment of 50 points requires either premeditation or a concurrent felony, MCL 777.36(1)(a), i.e., the two primary ways in which first-degree murder may be committed. See MCL 750.316(a) and (b). "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

As noted, to assess 25 points for OV 6, a defendant's action must have created "*a very high risk of death or great bodily harm*" and the defendant must have known that "death or great bodily harm was the *probable result*." MCL 777.36(1)(b) (emphasis added). While the caselaw generally

² "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Brooks*, 304 Mich App 318, 319-320; 848 NW2d 161 (2014) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

³ See e.g., *People v Herron*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2022 (Docket No. 354433), p 3 n 2 ("OV 6 sets for the various scores that are effectively based on elements attendant to first-degree murder, second-degree murder and voluntary and involuntary manslaughter[.]" (statutory cites omitted)). While we recognize unpublished opinions are not binding, they can still be used as persuasive authority. *People v Roy*, ___ Mich App ___, ___ n 2; ___ NW2d ___ (2023) (Docket No. 359894); slip op at 4 n 2.

does not specifically define “probable result,” the term “probable consequence” is defined as: “An effect or result that is more likely than not to follow its supposed cause.” *Black’s Law Dictionary* (11th ed). “Consequence” is synonymous, and often used interchangeably with, “result.” See *Merriam-Webster’s Collegiate Dictionary* (11th ed) (defining “consequence” as “as a result[.]” and defining “result” as “something that results as a consequence, issue, or conclusion.”). The prosecution and the presentence investigation report provided evidence that cosleeping with an infant or falling asleep while breastfeeding increases the likelihood that the child could suffer serious injury or death. But the prosecution offered no evidence that this was the probable, i.e., more likely than not, result of cosleeping or breastfeeding while in bed. Nor was there evidence that cosleeping “created a very high risk” of death or great bodily harm. We conclude that there was a sufficient basis to assess OV 6 at 10 points, for when “there was gross negligence amounting to an unreasonable disregard for life.” MCL 777.36(1)(c). Grossly negligent behavior that shows an unreasonable disregard for life and increases the level of risk, but does not make death or great bodily harm probable, is not sufficient to assess OV 6 at 25 points.

It is clear that defendant was counseled at the hospital regarding “Safe Sleep guidelines,” and, given the particular circumstances of this case, we would not dispute a finding that defendant’s failure to follow those guidelines may be considered grossly negligent and “an unreasonable disregard for life.” However, we can find no evidence in the record that it is “probable” that cosleeping with an infant will cause its death or great bodily harm, nor that doing so creates a “very high risk of death or serious injury.” Of the over three million babies born annually in the United States,⁴ the number of infants who die from accidental suffocation in bed, *from all causes*, was 905 in 2020 according to the United States government.⁵ Thus, while cosleeping has been shown to significantly increase the generally very low risk of sudden infant death, given this data, it is clear that there is not a factual basis to find this behavior creates a “very high risk” of death or that death or serious injury is the “probable result.”

Assessing OV 6 at 10 points, rather than 25, changes the guidelines range from 29 to 71 months’ to 19 to 47 months’ imprisonment. A defendant must be “sentenced according to accurately scored guidelines and in reliance on accurate information[.]” *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). “When the defendant’s sentence is based on an *error in scoring* or based on inaccurate information, a remand for resentencing is required.” *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010) (emphasis added). The impact of this assessment on the trial court’s departure sentence is not clear from the record. As such, we must remand this case for resentencing. See *People v Whitman*, 481 Mich 874, 875; 748 NW2d 821 (2008) (determining resentencing was required because “the sentencing court’s statements on the record in denying the defendant’s postjudgment motion for resentencing [did] not clearly indicate whether the court would impose the same sentences regardless of any scoring error.”); *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003) (declining to address the challenge to the assessment of OV 11 because “the circuit court clearly expressed its view that the sentences

⁴ National Center for Health Statistics, U.S. Department of Health and Human Service, <<https://www.cdc.gov/nchs/data/vsrr/vsrr020.pdf>> (accessed September 20, 2023).

⁵ Centers for Disease Control and Prevention, *Sudden Unexpected Infant Death and Sudden Infant Death Syndrome*, <<https://www.cdc.gov/sids/data.htm>> (accessed September 20, 2023).

imposed in this case were the proper sentences without regard to how OV 11 might be scored.”). Because the improper assessment of OV 6 necessarily requires resentencing, we decline to address whether the departure sentence was reasonable.

III. CONCLUSION

We vacate defendant’s sentence and remand for resentencing consistent with this opinion. We retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Michael J. Kelly
/s/ Thomas C. Cameron

Court of Appeals, State of Michigan

ORDER

People of MI v Lisa Rae Bryan

Docket No. 346294

LC No. 18-004677-FC

Douglas B. Shapiro
Presiding Judge

Michael J. Kelly

Thomas C. Cameron
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, remand shall be limited to resentencing.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 28, 2023
Date


Chief Clerk