

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN RAMOS RIVERA,

Defendant-Appellant.

UNPUBLISHED

July 31, 2012

No. 302608

Oakland Circuit Court

LC No. 2010-234248-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

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

I agree with the majority's opinion on all grounds, except one. The majority concludes that defendant Juan Rivera is entitled to resentencing because the trial court erred in scoring ten points for offense variable (OV) 4. I disagree.

I. OV 4

A. STANDARD OF REVIEW

This Court reviews claims of sentencing error for an abuse of discretion to determine if the record offers adequate evidence in support of the scores.¹ And this Court should uphold scoring decisions supported by "any evidence."²

B. ANALYSIS

As the majority states, ten points is an appropriate score for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim."³ And the trial court

¹ *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

³ MCL 777.34(1)(a).

may score ten points even if “the serious psychological injury *may* require professional treatment” but the victim has not actually sought professional treatment.⁴

The majority finds it significant that OV 4 requires that the victim suffers “serious psychological injury.”⁵ And I agree that the facts in *People v Apgar* presented support for a finding that the psychological injury in that case was “serious.” However, in applying OV 4, this Court in *Apgar* simply held that evidence was sufficient to support the trial court’s decision to score OV 4 at ten points where “the victim testified that she was fearful during the encounter with [the] defendant.”⁶ Further, this Court has repeatedly confirmed that “the victim’s expression of fearfulness is enough to satisfy the statute[.]”⁷ without resort to analysis of the severity of the underlying circumstances. Therefore, on the basis of this Court’s precedent, I believe that the threshold for scoring ten points under OV 4 is a low one, as the victim’s testimony of having suffered fear during the encounter is alone sufficient to support the trial court’s scoring decision.

Here, the record presents evidence of the fear that Murphy suffered as a result of Rivera’s actions. Murphy testified at trial regarding how she felt upon seeing the men and hearing one of them say he had a gun:

A. . . . I turned around and went to my car as fast as I could, and I just hoped I didn’t get shot in the back or that they didn’t grab me and pull me back in my house.

Q. Okay, so when I ask you what you’re thinking, you’re telling me you’re thinking you’re going to get shot?

A. Yes. I—yeah.

Q. Okay. Were you quite upset at the scene?

⁴ MCL 777.34(2); see *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (“There is no requirement that the victim actually receive psychological treatment.”).

⁵ MCL 777.34(1)(a).

⁶ *Apgar*, 264 Mich App at 329.

⁷ *People v Davenport*, 286 Mich App 191, 200; 779 NW2d 257 (2009), citing *Apgar*, 264 Mich App at 329; see also *People v Hamblin*, 477 Mich 1129 (2007) (indicating that a victim’s testimony that her encounter with the defendant “was traumatic” satisfied scoring ten points for OV 4 under the interpretation set forth in *Apgar*) (CORRIGAN, J., *concurring*), and *People v Ericksen*, 288 Mich App 192, 203-204; 793 NW2d 120 (2010) (holding that testimony that the victim suffered from “depression” and that his “personality” had changed following the assault was sufficient evidence to uphold the ten-point scoring decision).

A. I was in a state of shock. I—I wasn't crying then, I was just in a state of shock, I guess. When I was talking to the 911 operator, I almost threw up because it was just—so much was happening inside.

Therefore, on the basis of Murphy's testimony regarding her fear of being shot and her actual shock during the robbery, I would conclude that there was adequate evidence to support the trial court's scoring of ten points for OV 4.⁸

I would affirm on all grounds.

/s/ William C. Whitbeck

⁸ *Wilson*, 265 Mich App at 397; *Hornsby*, 251 Mich App at 468.