STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012
v	No. 303870 Wayne Circuit Court
GLYNN MILLS, Defendant-Appellant.	LC No. 10-009305-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

GLEICHER, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that defense counsel's performance did not qualify as ineffective. But I cannot agree that the trial court correctly scored offense variable (OV) 5. When defendant challenged the scoring of OV 5, the prosecutor vouched for facts rather than proving them. Because the prosecutor's comments cannot substitute for evidence, I respectfully dissent.

OV 5 addresses "psychological injury sustained by a member of a victim's family." MCL 777.35. Pursuant to MCL 777.35(1)(a), the sentencing court may assign a defendant 15 points when the crime causes the victim's family to suffer "serious psychological injury requiring professional treatment." "[T]he fact that treatment has not been sought is not conclusive." MCL 777.35(2). OV 5 is an all-or-nothing variable; if the crime does not cause "serious psychological injury" to the victim's family, the court must not assign any points. MCL 777.35(1)(b).

No evidence supported that the victim's family members sustained serious psychological injury requiring professional treatment. The presentence information report (PSIR) makes no mention of psychological injuries sustained by either of the victim's daughters. The victim's impact statement contains no reference to any psychological problems. Rather than referencing psychological injuries, the victim's impact statement details the costs of the victim's funeral and burial. Indisputably, the probation agent who prepared the PSIR attempted to gather information relevant to OV 5. He interviewed one of the victim's daughters and unsuccessfully attempted to speak with the other daughter, whose "telephone was disconnected during the conversation on two different occasions." Based on his investigation, the agent scored OV 5 at zero.

At defendant's sentencing hearing, the trial court referred to the probation department's proposed scoring while conducting the following colloquy with counsel:

The Court: . . . In regard to the offense variables, OV-1, is scored at ten points.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes.

The Court: OV-2 is scored at one point.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes, Your Honor.

The Court: OV-3 is scored at fifty points.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes.

The Court: OV-6 is scored at ten points.

Is that an accurate scoring?

The Prosecutor: Can we go to five, please?

The Court: Oh, sure.

The Prosecutor: Your Honor, OV-5 is psychological injuries sustained by member of victims families [sic].

Both daughters are incredibly distraught, and they are, I think without question, gonna need some significant psychological counseling.

They have been just chewed up by this.

So, I –

The Court: Are they present in the courtrrom?

The Prosecutor: They are. They're right behind me.

The Court: Okay.

Defense Counsel: And Your Honor, without any proof, I mean, I would object.

The Court: I'll tell you what, let's take the victim's impact statement first, before we score that then.

The Prosecutor: Very well.

I'm gonna shift gears here.

With the Court's permission?

The Court: Yes.

The Prosecutor: Your Honor, the victim's impact statement only speaks to the financials in here.

We have – the daughters do not wish to address. They are, again, incredibly distraught.

So, I will say that, that I am entirely comfortable asking the Court for fifteen points on the psychological issues . . . .[1]

Defense Counsel: Your Honor, again, same objections.

The Court: Uhm, well, I, I can understand the emotional upheaval about this, in regard to Mr. Tucker's death, and the manner in which he died, being brutally beaten by the defendant, and his brother.

Uhm, I'll change OV-5 from zero to fifteen.

At the conclusion of the hearing the court again offered the victim's daughters an opportunity to address the court, but the prosecutor reiterated, "We have spoken at some length . . . [a]nd they have asked me to address on their behalf."

The majority opines, "The evidence is sufficient to support the scoring of OV 5 relative the victim's daughters' serious psychological injury." But no *evidence* was presented to the court. A prosecutor's statement does not qualify as evidence, and construing it as such disregards that the sentencing court's fact-finding process must satisfy due process requirements. See *Gardner v Florida*, 430 US 349, 358; 97 S Ct 1197; 51 L Ed 2d 393 (1977); *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). While a court may consider relevant information without regard to its admissibility under the Rules of Evidence, this relaxed standard does not permit fact-finding in the absence of evidence.

[1] I have omitted the names of the victim's daughters.

In *People v Walker*, 428 Mich 261, 267; 407 NW2d 367 (1987), the Supreme Court adopted Standard 18-6.4(c) of the American Bar Association Standards for Criminal Justice (2d ed), which provides:

> In reaching its findings on all controverted issues [of fact which are relevant to the sentencing decision], the sentencing court should employ the preponderance of the evidence standard and may treat the contents of a verified presentence report as presumptively accurate, provided, however, that material factual allegations made in the presentence report and effectively challenged by the defendant should not be deemed to satisfy the government's burden of persuasion unless reasonable verification of such information can be shown to have been made [by the person who prepared the presentence report] or adequate factual corroboration otherwise exists in the sentencing or trial record.

The *Walker* Court explained that when a defendant challenges a factual assertion, "the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts." *Id.* at 268. The Supreme Court has repeatedly emphasized that judicially ascertained facts impacting a defendant's sentence must derive from an evidentiary preponderance: "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Ostantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Accordingly, this Court reviews a scoring decision "to determine whether the trial court properly exercised its discretion and whether the record *evidence* adequately supports a particular score." *People v Johnson***,** 293 Mich App 79, 84; 808 NW2d 815 (2011) (emphasis added). "'Scoring decisions for which there is any *evidence* in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (emphasis added), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

In the sentencing context, "evidence" refers to facts of record. While admissible evidence is not required to score an offense variable, some *evidence* is essential. A prosecutor's statement is simply not evidence. Every jury in a criminal case is instructed in this elementary premise: "The lawyers' statements and arguments are not evidence." See CJI2d 3.5(5). 1 Wigmore, Evidence (Tillers rev), § 1, p 11, describes "evidence" as "any matter of fact that is furnished to a legal tribunal *otherwise than by* reasoning or *a reference to what is noticed without proof* . . . ." (Emphasis added.) Here, no facts of record support the prosecutor's non-evidentiary observation that the daughters were "incredibly distraught" or his subsequent speculation that they would need counseling. The PSIR contains no information concerning the daughters' psychological states or the necessity of professional treatment, and the balance of the record similarly lacks any factual foundation for the prosecutor's vouching on behalf of this offense variable. Absent any evidence to support the OV 5 score, the circuit court clearly abused its discretion.

The majority asserts that "[i]t requires little inference from the factual record to conclude that it was traumatic for the victim's daughters to hear of his brutal death by the hand of a close friend." This assertion is incorrect for three reasons. First, there is no factual record addressing psychological injury. Second, while it is possible to infer that a victim's family member has suffered emotional distress requiring treatment, inferences are not evidence – inferences flow *from* evidence. Third, scoring of the sentencing guidelines may not be premised on inferences

unsupported by the record. See *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) ("While the prosecutor's file notes indicated that the victim experienced rectal pain as a result of defendant's assaults, that information was not placed on the record. Despite the trial court's determination that there 'appears to be some basis to have scored' OV 3 at five points, we find that such an assessment was erroneous when there was no record evidence to support the score.").

Moreover, the majority's approval of sentencing decisions based on factually unsupported prosecutorial statements rather than an evidentiary preponderance directly contradicts well-established law. In *People v Ewing*, 435 Mich 443, 450-451; 458 NW2d 880 (1990), our Supreme Court clearly set forth the procedure that trial courts must employ when confronted with a scoring variable challenge. That procedure "requires that the prosecutor prove a disputed variable by a preponderance of the evidence once the defendant has 'effectively' challenged its accuracy." This rule "places a limit on the trial judge's discretion to consider some types of disputed information at sentencing without entertaining further proofs at the defendant's request." *Id.* at 450. At his sentencing, defendant challenged the prosecutor's statement that the victim's daughters required counseling. Rather than questioning the daughters or requiring that the prosecutor provide some evidence to support the conjectured need for counseling, the circuit court accepted at face value the prosecutor's statement of personal belief. The circuit court's failure to seek some factual foundation concerning this variable violated *Ewing* and *Walker*.[2]

To accept the majority's view that sentencing decisions may be based solely on the *ipse dixit* of counsel we must disregard *Ewing* and *Walker* and cast aside the Supreme Court's admonition that "the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information[.]" *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). Unmoored from any factual record, the accuracy of sentencing "information" cannot be tested. It is for this reason that the Supreme Court has repeatedly emphasized that scoring decisions must be rooted in *evidence*. A sentence derived from assumption rather than an evidentiary preponderance cannot stand.

When combined with the improper score assigned for OV 10, the unsupported OV 5 score requires resentencing. The prosecutor concedes on appeal that the circuit court erred in

[2] The majority attempts to support its conclusion by relying on an unpublished opinion, *People v Royster*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 280676). Contrary to the majority's assertion that we should consider persuasive the "reasoning" of *Royster*, that opinion provides no reasoning whatsoever. Instead *Royster* asserts a bald conclusion utterly devoid of analysis, reasoning, or citation to authority. Moreover, the fact that the Supreme Court denied leave to appeal in *Royster* is of no import; the denial simply signifies that the Supreme Court did not find the case to be jurisprudentially significant. A denial of leave to appeal has no precedential value. *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.); *id*. at 371 n 2, (opinion by RYAN, J.); *id*. at 380 n 18, (opinion by LEVIN, J.).

scoring 10, rather than 5, points for OV 10, exploitation of a vulnerable victim. A score of 10 points is proper when a defendant exploits "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). None of these factors applies in this case. Rather, the victim was asleep when defendant attacked him. The court may only score 5 points for OV 10 when a defendant exploits a sleeping victim. MCL 777.40(1)(c).

The subtraction of the 20 points erroneously assessed in defendant's OV score reduces the applicable legislative minimum sentencing guidelines range. Defendant's total OV score was 106 points, placing him in OV Level III. Defendant's corrected total OV score is only 86 points, placing him in OV Level II. The minimum sentencing guidelines range for second-degree murder for a defendant in OV Level II and Prior Record Variable Level C is 180 to 300 months' imprisonment. Defendant's minimum sentence of 370 months' imprisonment exceeds the corrected range. As such, I believe that we must vacate defendant's sentences and remand for resentencing based on the corrected OV scores. MCL 769.34(10).[3]

/s/ Elizabeth L. Gleicher

[3] The prosecutor challenges the circuit court's score of 10 points for OV 6 under MCL 777.36(1)(c), "[t]he offender had intent to injure or the killing was committed in an extreme emotional state . . . or there was gross negligence amounting to an unreasonable disregard for life." The circuit court was required to sentence defendant consistent with the jury verdict of second-degree murder to 25 points "unless the judge had information that was not presented to the jury." MCL 777.36(2)(a). The circuit court did not cite the information it relied upon in scoring OV 6. Accordingly, I would direct the court to correct its error on remand by supporting its new scoring decision with specific information.