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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012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

BOONSTRA, J. (*concurring*).

I fully concur in the majority opinion. I write separately to briefly respond to the arguments raised by partial dissent.

The dissent characterizes the prosecutor's statements as "factually unsupported" "non-evidentiary observation" merely describing his "personal belief," based on "assumption," "speculation," and "conjecture." I find the record to be otherwise. As reflected in the majority opinion, the record reflects that the prosecutor had spoken to the victim's daughters "at some length," and that while they were present in the courtroom, they were so "incredibly distraught" that they "[did] not wish to address" the court. Instead, they "asked [the prosecutor] to address [the court] on their behalf." The prosecutor did as they requested, noting that the brutal slaying of their father "has been an event which really has damaged the survivors incredibly." I concur in the majority view that, under these circumstances, this was a sufficient evidentiary basis for the OV 5 scoring.

The dissent disavows any effort to create a rule requiring that only admissible evidence be allowed support an OV score. Nor could it appropriately do so. The statutory scheme relating to OV scoring does not so provide. MCL 777.1 *et seq*. The rules of evidence "do not apply" to sentencing proceedings. MRE 1101(b)(3). Nor is a PSIR typically introduced as admissible evidence, yet it is commonly and appropriately considered in scoring OVs.[1] Hearsay

[1] The dissent finds it noteworthy that the PSIR in this case "contains no information concerning the daughters' psychological states or the necessity of professional treatment." I find it noteworthy that several of the OVs (and prior record variables (PRVs) were changed from their original scoring (by the probation agent in the PSIR) by the trial court at sentencing. I also find it noteworthy that the effect of those changes, notwithstanding the increase of the OV 5 score (to

information may be considered. *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). Importantly here, information relating to OV 5 (psychological injury to a member of a victim's family) also is not by its very nature likely to be admitted as evidence in a trial of the underlying crime. I would not create, as a hurdle to the consideration of psychological injury, a requirement, even a *de facto* one, that it be supported by admissible evidence.

MCL 769.34(10) provides in part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and *shall not remand* for resentencing *absent an error in scoring* the sentencing guidelines *or inaccurate information relied upon in determining the defendant's sentence*. [*Id*. (emphasis added); see also *People v. Kimble*, 470 Mich 305; 684 NW2d 669 (2004) (same).]

I find no basis for concluding that the trial court relied on "inaccurate information," or otherwise erred in scoring OV 5. Under the circumstances, and consistent with *People v Royster*, 483 Mich 1111; 766 NW2d 839 (2009),[2] I find the prosecutor's statements at the sentencing to be a sufficient basis in the record (including appropriate inferences therefrom) for the OV 5 score of 15. I find no clear error or abuse of discretion with respect to that scoring. Because the trial court's scoring decision was within the range of principled outcomes, it should be granted the deference it is due. *Carnicom*, 272 Mich App at 616.

Finally, notwithstanding that the arguably errant OV 6 scoring was not supported by any known "evidence," the dissent "would direct the [circuit] court to correct its error on remand by supporting its new scoring decision with specific information." For reasons left unexplained, the dissent would not afford that same option to the circuit court, on remand, relative to OV 5. It instead would simply reverse the OV 5 scoring, require the subtraction of 15 points in the scoring of OV 5, and order resentencing in accordance with its view of the "evidence." In my view, the dissent's approach is thus additionally wrong in that it fails to exercise a consistency of equal treatment, and instead would allow the circuit court to further consider, articulate, and support its rationale with respect to the scoring of OV 6, but not OV 5.

/s/ Mark T. Boonstra

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15 from zero) was to reduce defendant's total OV score to 106 (from (176) and total PRV score to 10 (from 20). The record supports the conclusion that the trial court conducted a thorough, detailed review of the sentencing variables and was willing to reduce and adjust defendant's scores where appropriate.

[2] I find the dissent's dismissive characterization of *Royster* unfortunate. I note also that our Supreme Court denied leave to appeal in *Royster*, stating that the Court was "not persuaded that the questions presented should be reviewed by this Court." 483 Mich 1111. While the dissent minimizes the import of that action by our Supreme Court, I infer that the Court did not find *Royster*'s affirmance of a sentencing decision based on information provided by the prosecutor to "directly contradict[] well-established law governing sentencing challenges," as the dissent claims the instant case does.