

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

JAMES ANTHONY MENZIE,

Defendant-Appellant.

No. 307172
Saginaw Circuit Court
LC No. 11-035567-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of domestic violence, third offense, MCL 750.81(4), and one count of resisting and obstructing a police officer (R&O), MCL 750.81d. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to a term of 36 months to 15 years' imprisonment for the domestic violence conviction, and 46 months to 15 years' imprisonment for the R&O conviction. Defendant appeals arguing that his sentencing guidelines were improperly scored. We affirm because the trial court properly scored offense variable (OV) 9 at 10 points.

Defendant's convictions stem from an altercation at his ex-girlfriend's home on February 19, 2011. During the altercation, the victim was able to text her daughter for help and her daughter contacted the police. Eventually, Saginaw Police Officer Justin Severs responded to the scene and arrested defendant.

Defendant was cooperative when he was first arrested. However, once defendant was being prepared for processing into the Saginaw County Jail, Severs described defendant as becoming argumentative, uncooperative, and disorderly. Defendant disregarded verbal commands, physically resisted the officers, and attempted to turn and confront the officers during the search. Moreover, during processing, two officers were required to hold defendant back, while the third officer conducted a search of defendant.

Following the conclusion of defendant's four-day trial, he was found not guilty of kidnapping, extortion, and unarmed robbery, but guilty of domestic violence, third offense, and R&O. At sentencing, plaintiff argued that OV 9 should be scored 10 points because defendant's actions during processing placed multiple officers at risk. The trial court agreed with plaintiff and scored the points.

On appeal, defendant asserts that OV 9 was incorrectly scored 10 points because when he was processed at the Saginaw County Jail, his actions did not actually injure the officers processing him, nor did his actions place the officers in danger of physical injury. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010) (citation omitted). A score must be supported by the preponderance of the evidence, and we review the trial court’s factual findings for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

OV 9 should be scored 10 points where “[t]here were 2 to 9 victims who were placed in danger of physical injury or death.” MCL 777.39(1)(c). However, “offense variables are generally offense specific.” Therefore, “unless stated otherwise, only conduct that relates to the offense being scored may be considered.” *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

Here, OV 9 was scored 10 points for the “conduct that relate[d] to the offense being scored.” *Id.* at 350. Here, because R&O was the highest crime class conviction, it was the offense that was scored. MCL 771.14(2)(e)(ii). The conduct that justified OV 9 being scored 10 points occurred during the commission of the R&O—namely, defendant’s physical resistance during processing. Additionally, there were three officers present when defendant was processed, satisfying the multiple victims element required for OV 9.

Furthermore, the officers were placed in danger of physical injury. As defendant was being prepared for processing into the Saginaw Count Jail, his physical resistance required the intervention of three officers. Defendant physically resisted to the extent that two officers were required to forcefully restrain defendant, while the third officer conducted the search of defendant. During the search, defendant refused to obey the officers’ commands and kept trying to turn and face the officer conducting the search. The officers felt threatened enough by defendant’s actions that defendant was warned he might be shot with a Taser if he remained uncooperative.

Finally, the fact that none of the officers were actually injured is immaterial. Actual injury is not required by the statute, MCL 777.39(1)(c), and caselaw has upheld a score of 10 points under OV 9 where the victims were not actually injured. See, e.g., *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). Moreover, there were two video cameras that captured defendant’s actions and video from both cameras was played at trial. Therefore, the trial court was in the best position to determine whether defendant’s actions during processing put the officers in danger of physical injury.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen Fort Hood
/s/ Douglas B. Shapiro