

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORINNE MICHELLE MELTON,

Defendant-Appellant.

FOR PUBLICATION

July 20, 2006

9:05 a.m.

No. 257036

Tuscola Circuit Court

LC No. 03-008812-FH

Official Reported Version

Before: Davis, P.J., and Neff, Fitzgerald, Saad, Bandstra, Markey, and Murray, JJ.

MURRAY, J. (*dissenting*).

I. Introduction

This case involves the interpretation and application of MCL 777.39, which dictates a sentencing court's scoring of offense variable (OV) 9. In particular, the statute requires the sentencing court to score points for "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). The specific question is whether OV 9 can only be scored when a victim is placed in danger of a physical injury. In *People v Melton*, 269 Mich App 542; 711 NW2d 430 (2006), this Court affirmed the sentencing court's scoring of OV 9 at ten points for the two victims placed in danger of injury. *Id.* at 548-550. Nevertheless, the *Melton* panel opined that, were it permitted, it would hold that "OV 9 should only be scored for a crime against property when a victim is placed in actual danger or is placed within the zone of danger." *Id.* at 548. The panel concluded that financial injury is already taken into account when scoring OV 16, which combines victims for scoring the degree of property damage and, when determining the aggregate value of the property at issue, includes the value of property owned by multiple victims. *Id.* According to the panel, the sentencing court "double dipped" when it scored both OV 9 and OV 16. However, because both *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), and *People v Dewald*, 267 Mich App 365; 705 NW2d 167 (2005), held that OV 9 should be scored at ten points for financial injuries to two different victims, the panel determined that it was prevented from remanding this case for resentencing. *Melton*, *supra* at 549.¹

¹ We agree with Judge Neff that this case could also have been resolved through application of the language "in danger of" within MCL 777.39. However, because the full Court decided that the "financial injury" part of the *Melton* decision was outcome determinative, and that a conflict

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Contrary to the *Melton* panel and the lead opinion, we would hold that the plain language of the statute, which requires scoring of OV 9 where the victims were "placed in danger of injury," includes being placed in danger of both physical and financial injury.

II. Analysis

MCL 777.39 requires a sentencing court to count the number of persons placed in "danger of injury or loss of life" in scoring OV 9:

(1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Multiple deaths occurred 100 points

(b) There were 10 or more victims 25 points

(c) There were 2 to 9 victims 10 points

(d) There were fewer than 2 victims 0 points

(2) All of the following apply to scoring offense variable 9:

(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) Score 100 points only in homicide cases.

The *Melton* panel reasoned that the Legislature did not intend for OV 9 to apply to victims who merely suffered financial injury:

While the general language of subsection (1) suggests that OV 9 should be scored regardless of the crime involved, we do not believe that this was the Legislature's intent.

"The doctrine of *ejusdem generis* provides that, if a law contains general words and an enumeration of particular subjects, those general words are presumed to include only things of the same kind, class, character, or nature as the subjects enumerated. The doctrine of *noscitur a sociis* [similarly] provides that words or phrases should be given meaning by their context."

Pursuant to the more specific instructions in subsection (2), it is clear that the Legislature only intended OV 9 to apply when a victim is placed in actual danger or is placed within the zone of danger. Accordingly, OV 9 should only apply

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panel should be convened to resolve the issue, we are bound to decide that issue.

when there is a "danger of injury or loss of life." [*Melton, supra* at 547-548 (citation omitted).]

Although we see the facial appeal of this argument, we believe the words used by the Legislature preclude that holding. This is primarily so because the plain language of the statute does not limit the number of victims to those "in danger of *physical* injury." Rather, it contains without modification the words "injury" and "victim," which we believe play a crucial role in the statute. "Injury" is defined generally as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice," and "[h]arm or damage," Black's Law Dictionary (7th ed), while "victim" means "[a] person harmed by a crime, tort, or other wrong," *id.* See *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) (stating that resort to a dictionary is proper for defining undefined statutory terms). Because the Legislature provided no restrictions to these words (such as "physical" injury), we cannot either.

Additionally, when read in context, the statute indicates that the Legislature intended for OV 9 to be scored for a nonphysical injury, including damage to property. The sentencing guidelines divide offenses into six different offense categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety. MCL 777.5(a) to (f). Only the offense variables that are statutorily designated for a particular offense category should be scored. MCL 777.22. Although MCL 777.22 limits scoring for certain offenses, the statute instructs a sentencing court to score OV 9 for all crimes against a person, *property*, public order, public trust, and public safety. Thus, to interpret the statute at issue as limiting scoring of OV 9 to victims in danger of *physical* injury is inconsistent with the guidelines' requirement to score OV 9 for all crimes in the designated offense categories because there are crimes within those categories in which it is unlikely that the victim would be placed in danger of any physical harm, i.e., embezzlement, false pretenses, fraud, and uttering and publishing.²

Here, the *Melton* panel ignored the expansive nature of subsection 2(a) and sought to narrow the definition of "victim" by applying OV 9 only when "a victim is placed in actual danger or is placed within the zone of danger" of a physical injury. *Melton, supra* at 548. According to the plain language used by the Legislature, subsection 2(a) does not require the court to count only a person placed in danger of a *physical* injury. Rather, it incorporates as victims all persons placed in danger of any injury, including a financial injury. MCL 777.22.

Not surprisingly, our conclusion is supported by this Court's opinion in *Knowles*, in which we upheld the assignment of ten points where two financial victims suffered direct injuries. *Knowles, supra* at 61-63. In *Knowles*, the defendant was convicted of uttering and publishing. *Id.* at 54. The defendant took a check from Amanda Schroeder's checkbook, made the check out to himself for \$225, signed Schroeder's name, and wrote "loan" on the check. *Id.* at 55-56. The defendant's father then cashed the check at his credit union for the defendant because the defendant indicated that he did not have a bank account. The check was returned to

² See e.g., MCL 750.174 and 750.181 (embezzlement); MCL 750.218 (false pretenses); MCL 750.274 and 750.279 (fraud); MCL 750.249 (uttering and publishing).

the credit union because of "nonsufficient funds" in the account. *Id.* at 56. Thereafter, the defendant's father repaid the credit union the \$225. *Id.* at 56-57. The sentencing court scored ten points for OV 9 on the basis of its conclusion that there were two victims placed in danger of injury. *Id.* at 61. The defendant asserted that the sentencing court erroneously counted the credit union as a victim. *Id.* at 61-62. This Court disagreed and held that "the trial court properly treated the credit union as a victim because it was placed in danger of, and in fact suffered, *financial injury* in being wrongly deprived of \$225 for a period as a direct result of defendant's crime." *Id.* at 62 (emphasis added).

The *Melton* panel further reasoned that a restrictive interpretation was appropriate because OV 16, which scores the degree of property damage, already accounts for the number of victims. *Melton, supra* at 548. Although it is true that, pursuant to MCL 777.46, the sentencing court may add together the aggregate value of the property obtained, damaged, lost, or destroyed, including the property owned by multiple victims, OV 16 addresses the total value of the property involved, not the number of victims affected by the crime. Thus, under OV 16, a defendant would receive the same score for the theft of \$100,000 worth of property belonging to one victim as for the theft of the same value of property belonging to five different victims. Only OV 9 addresses the breadth of the crime by counting the number of victims injured.

We recognized this distinction in *Dewald*, in which this Court concluded that the trial court properly scored OV 9 at 25 points because each of the more than 600 people the defendant defrauded in his operation of two political action committees was properly considered a victim of his criminal actions. *Dewald, supra* at 380, citing *Knowles, supra* at 62. Thus, through subsection 2(a), the statutory sentencing guidelines recognize the difference between injury to one victim versus injury to multiple victims in the perpetration of a crime because, under subsection 2(a), every person who was placed in danger of injury is counted without limitation of the type of injury.

Accordingly, we would hold that the trial court properly scored OV 9 at ten points because defendant stole property belonging to two separate victims. There was evidence that, among other items, defendant stole six guns from the cabinet in the Elberses' home, "five belonging to Ms. Elbers and one belonging to Mr. Elbers." *Melton, supra* at 544. Therefore, both Mary Ann and Jeffrey Elbers suffered financial injury and were properly considered victims of defendant's criminal conduct. Accordingly, we would affirm the trial court's ruling.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Richard A. Bandstra

Saad and Bandstra, JJ., concurred with Murray, J.