

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v
ANTHONY ELIJAH RHODES,
Defendant-Appellant.

FOR PUBLICATION
May 6, 2014
9:00 a.m.

No. 310135
Wayne Circuit Court
LC No. 11-011532-FC

ON REMAND

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to five and one-half years' to ten years' incarceration for the assault conviction and to a consecutive sentence of two years for the felony firearm conviction. Defendant appealed by right and, in our prior opinion, we affirmed his convictions and sentence. *People v Rhodes*, unpublished opinion per curiam of the Court of Appeals, issued August 1, 2013 (Docket No. 310135).¹ In lieu of granting leave to appeal, our Supreme Court vacated the portion of our opinion affirming defendant's sentence and remanded the matter to us for reconsideration in light of *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). *People v Rhodes*, 495 Mich 938; 843 NW2d 214 (2014). In all other respects, our Supreme Court denied leave to appeal. *Id.* We now vacate defendant's assault with intent to commit great bodily harm sentence and remand for resentencing.

Defendant's challenge to his sentence is predicated on asserting that the trial court erroneously scored Offense Variable (OV) 14, which is scored at either ten points or zero points, depending on whether the defendant was "a leader in a multiple offender situation" when considering the "entire criminal transaction." MCL 777.44. We affirmed the trial court's score of ten points in reliance on *People v Davis*, 300 Mich App 502, 508; 834 NW2d 897 (2013), wherein this Court held that a trial court's sentencing decision would not be considered clearly

¹ Judge KELLY concurred in the result only.

erroneous if *any* evidence in the record would have supported the trial court's finding. We noted that defendant had been the only offender present at the time of the charged offenses who was in possession of a gun, and we concluded that this was at least some evidence of leadership. We were therefore unable to find that the trial court clearly erred in scoring OV 14.

In *Hardy*, however, our Supreme Court explicitly rejected the “any evidence” standard and held that any decisions from this Court citing the “any evidence” standard were incorrect. *Hardy*, 494 Mich at 438. “Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *Id.* However, we review *de novo* whether the facts found by the trial court are adequate to satisfy the trial court’s scoring decision. *Id.* Consequently, we can no longer affirm a trial court’s scoring decision merely because *any* evidence in the record supports that decision.

The testimony indicates that several other people were present at the scene of the assault, but only one other person, Terence Adams, who was initially a codefendant but ultimately pleaded guilty to a reduced charge in exchange for testifying against defendant, was actually involved in the assault. Multiple defendants may be “leaders” if there are at least three offenders involved. MCL 777.44(2)(b). Because the record only supports a finding that two offenders were involved, only one individual may be considered a “leader” in the instant criminal transaction.

The trial court concluded at sentencing that defendant “was clearly the leader” because defendant “was the one with the gun.” The trial court initially opined that defendant had also “sort of led the charge against” the victim and “may have been the one that had the beef, too, or thought he did.” However, the prosecutor and defendant’s attorney subsequently disputed the extent to which defendant said anything to the victim, and it is unclear from the transcript of the sentencing proceedings whether the trial court maintained its belief that defendant had been the instigator beyond possessing a gun.

The victim testified that two men approached him, one of whom he had seen a few minutes previously in a gasoline station and the other of whom had the gun. The former was later identified as Adams, and the latter was later identified as defendant. The victim testified that both men ordered him to get on the ground, and Adams asked him what he had been “laughing at in the gas station.” When the victim did not comply, both men began hitting him, and at some point the gun discharged, injuring the victim. More shots were fired at the victim as he ran away. Adams testified that both he and defendant punched the victim, that defendant had something that “looked like a gun” in his hand, and he heard gunshots before he and defendant returned to their car. Adams denied knowing why the driver stopped the car, why defendant got out of the car, or that defendant had a gun prior to getting out of the car; but he conceded that he got out with the intention “to hit the guy.” Other than Adams, defendant, and the victim, the only witnesses were the three other people in the car, of whom the driver did not testify and one passenger did not recall anything. The last passenger only recalled defendant and Adams getting out of the car and arguing with a man and hitting him, hearing a single gunshot, and seeing defendant put a gun under the seat.

The Legislature did not define by statute what constitutes a “leader” for the purposes of OV 14. We have not found any binding case law defining “leader” in this context.

Consequently, we turn to the dictionary. See *Ter Beek v City of Wyoming*, 495 Mich 1, 20; ____ NW2d ____ (2014). According to *Random House Webster's College Dictionary* (2001), a "leader" is defined in relevant part as "a person or thing that leads" or "a guiding or directing head, as of an army or political group." To "lead" is defined in relevant part as, in general, in some way guiding, preceding, showing the way, directing, or conducting. The evidence unequivocally supports the trial court's factual determination that defendant possessed a gun and the only other person involved in the criminal transaction did not. However, the evidence does not show that defendant acted first, gave any directions or orders to Adams, displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in Adams's participation in the criminal transaction, or was otherwise a primary causal or coordinating agent.

We remain of the opinion that defendant's exclusive possession of a gun during the criminal transaction is *some* evidence of leadership, however it does not meet the preponderance of the evidence standard found in *Hardy*. This fact alone does not support the finding by the trial court that defendant issued orders that Adams did not. The record simply fails to reflect any other evidence of leadership. Pursuant to the dictionary definition of leadership, we cannot conclude that merely posing a greater threat to a joint victim is sufficient to establish an individual as a "leader" within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some manner of guiding or initiating role in the transaction itself. We are therefore constrained to reverse the trial court's scoring of OV 14, which should have been scored at zero points.

"Where a scoring error does not alter the guidelines range, resentencing is not required." *People v Sims*, 489 Mich 970; 798 NW2d 796 (2011). However, a defendant *is* entitled to resentencing if his or her sentence is based on an inaccurate guidelines score that affects the applicable sentencing guidelines range. *Id.*; *People v Jackson*, 487 Mich 783, 792-794; 790 NW2d 340 (2010). According to the record, defendant's total OV score is presently 50, resulting in an OV level of V and a guidelines range of 34 to 67 months. If the score of OV 14 is corrected, defendant's total OV score would be 40 and his OV Level would change to IV. This would result in a corrected guidelines range of 29 to 57 months. MCL 777.65. Defendant's present minimum sentence of 66 months is therefore outside his applicable guidelines range, and the trial court has not articulated on the record substantial and compelling reasons for a departure. See *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Defendant is therefore entitled to resentencing.

Defendant's sentence for assault with intent to commit great bodily harm is vacated, and the matter is remanded to the trial court for resentencing. In all other respects, pursuant to our prior opinion, we continue to affirm. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause