STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION February 14, 2013 9:05 a.m.
v PHILLIP CHARLES GIBBS, Defendant-Appellant.	No. 306124 Genesee Circuit Court LC No. 11-028140-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TYRELL HENDERSON, Defendant-Appellant.	No. 306127 Genesee Circuit Court LC No. 11-028141-FC

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 306124, defendant, Phillip Charles Gibbs, was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unarmed robbery, MCL 750.530, and one count of conspiracy to commit armed robbery, MCL 750.529. Gibbs was sentenced to 17.5 to 30 years' imprisonment for each count of armed robbery, 100 months to 15 years' imprisonment for the unarmed robbery conviction, and 17.5 to 30 years' imprisonment for the conspiracy to commit armed robbery conviction.

In Docket No. 306127, defendant, Tyrell Henderson, was convicted by a jury of three counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.529, one count of assault with intent to rob while armed, MCL 750.89, one count of carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Henderson was sentenced to 225 months to 40 years' imprisonment for each count of armed robbery, 225 months to 40 years' imprisonment for the conspiracy to commit armed robbery conviction, 225 months to 40 years' imprisonment for

the assault with intent to rob while armed conviction, 24 to 60 months' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction.

Defendants were tried together in front of separate juries. They both appeal as of right.[1] We vacate Henderson's conviction for assault with intent to rob while armed, but otherwise affirm both defendants' convictions and sentences.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

This case arises from an armed robbery that occurred at a store called Wholesale 4 U in Flint, Michigan, on October 26, 2010. Nancy Anagnostopoulos and her husband, Costas Anagnostopoulos, owned the store and were present at the time of the robbery. Also present was employee Jeremy Kassing. Defendants had been to the store together on numerous times that day. Originally, they had hoped to pawn some jewelry. After finding out that the jewelry had no value, Henderson purchased a video game. He later decided to return it. Defendants entered the store and told Costas that the game did not work. As Costas attempted to help determine what was wrong with the game, Henderson struck him behind the head with a gun. Gibbs, who was not personally armed during the incident, approached Nancy and removed her necklaces and ring. He took her identification and her purse. Gibbs also took an iPod from the store, as well as a number of laptop computers. In the meantime, Henderson took Costas' jewelry, wallet, and money. He ordered Costas to open the store's register and then took Costas to a back room where a safe was kept. Part of Costas' ear was cut off as a result of the blow he received and he received stitches for the injury. Kassing's wallet was also taken. A subsequent search of the home Gibbs shared with his mother uncovered a sandwich bag containing jewelry, a sandwich bag containing papers and the identifications of the three victims, and several watches identified as those taken from the store.

In separate interviews with police, both defendants admitted to their involvement. However, Gibbs told the officer that his involvement was involuntary. Gibbs believed that they were going to the store to return the video game and had no idea that Henderson was planning a robbery. Gibbs stated that Henderson ordered him to take the victims' belongings and other store items. Gibbs testified at trial that he complied only because he did not want anything to happen to him.

The juries convicted defendants and they were sentenced as outlined above.

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[1] On September 14, 2011, Henderson filed a claim of appeal and on September 16, 2011, Gibbs filed his claim of appeal. On December 7, 2011, this Court entered an order consolidating the appeals. *People v Gibbs*, unpublished order of the Court of Appeals, entered December 7, 2011 (Docket Nos. 306124, 306127).

B. GIBBS'S MOTION FOR REMAND

On May 23, 2012, Gibbs filed a motion to remand with this Court in order to make two objections to his sentencing, develop his argument that he was denied the right to a public trial, and, alternatively, argue that his counsel was ineffective. We granted Gibbs's motion to remand and remanded for Gibbs to file a motion for resentencing regarding prior record variable (PRV) 5 and PRV 6 and to file a motion for a new trial. *People v Gibbs*, unpublished order of the Court of Appeals, entered June 20, 2012 (Docket No. 306124). We ordered the trial court to hold an evidentiary hearing based on the closure of the courtroom during voir dire. *Id.*

On remand, Gibbs argued that his right to a public trial was violated by the closing of the courtroom and the exclusion of his family from jury selection. Gibbs also argued that he was entitled to resentencing based on the incorrect scoring on PRV 5 and PRV 6. The trial court declined to conduct a full hearing on the court closure issue. The trial court admitted that its procedure was that, after jury selection begins, it does not allow people to enter or leave the courtroom. The trial court stated that if individuals came after they started, then they would not have been allowed in the courtroom. The trial court denied the motion for a new trial. The trial court also found that Gibbs was related to the criminal justice system on the date of the offenses for purposes of scoring PRV 5 and PRV 6 and denied the motion for resentencing.

II. GIBBS'S APPEAL

A. RIGHT TO A PUBLIC TRIAL

Gibbs argues that the trial court violated his right to a public trial and that he is entitled to automatic reversal. We disagree.

Defendant did not object to the closure at trial. The Michigan Supreme Court recently held that the plain error standard applies to a defendant's forfeited claim that the trial court violated his Sixth Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664, 674; 821 NW2d 288 (2012).

> [I]n order to receive relief on [a] forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.*, 491 Mich at 664-665 (footnote with citation omitted).]

The *Vaughn* Court found that the first two prongs of the analysis were satisfied because the trial court ordered the courtroom closed before voir dire without advancing "an overriding interest that is likely to be prejudiced" and the error was "clear or obvious" because it was "readily apparent" that the trial court closed the courtroom and it is "well settled" that the right to a public trial extends to voir dire. *Id.* at 665 (footnotes with citations and internal quotation marks omitted). The Court also found that the third prong was satisfied because the closure of the courtroom was "a plain structural error." *Id.* at 666. However, the Court found that the fourth prong was not satisfied because "both parties engaged in a vigorous voir dire process," "there were no objections to either party's peremptory challenges of potential jurors," and "each party

expressed satisfaction with the ultimate jury chosen." *Id.* at 668-669. Additionally, the Court found that presence of the venire, members of the public, lessened the extent to which the closure implicated the defendant's right and guaranteed that the proceedings were subject to a substantial degree of public review. *Id.* at 668 (citation omitted). The Court concluded that the defendant was not entitled to a new trial. *Id.* at 669.

In *People v Russell*, 297 Mich App 707; ___ NW2d ___ (Docket No. 304159, issued September 4, 2012), slip op at 7, this Court stated that "the effect of a partial closure of trial does not reach the level of total closure and only a substantial, rather than compelling, reason for the closure is required." The Court found that the voir dire proceedings were partially closed because of limited capacity in the courtroom and that the limited capacity was a substantial reason for the closure. *Id.* Accordingly, the partial closure did not deny the defendant his right to a public trial. *Id.*

Gibbs contends that his family and members of the public were prevented from entering the courtroom during jury selection. The record reveals that before jury selection began, the trial court stated, "And if any spectators would like to come in they're welcome but they do have to sit over here by the law clerk, not in the middle of the pool." Gibbs submitted affidavits indicating that individuals were not allowed to enter the courtroom during jury selection. Even accepting Gibbs's contention as true, we find no error given the trial court's statement. It appears that the courtroom was opened to the public initially, but then closed once jury selection began. On remand, the trial court did not conduct a full hearing and acknowledged that once jury selection began, the courtroom was closed and suggested that it was "too confusing" to allow individuals to come and go during jury selection. Even if we were to find error based on the trial court's admitted refusal to allow individuals to enter once jury selection began, Gibbs is not entitled to a new trial or evidentiary hearing. As in *Vaughn*, both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, and each side expressed satisfaction with the jury. Further, the venire itself was present. Accordingly, Gibbs fails to satisfy the fourth prong as set forth in *Vaughn* and is not entitled to a new trial.

B. PRE-ARREST SILENCE

Gibbs argues that the prosecutor violated his Fifth Amendment right to remain silent by using his pre-arrest silence to impeach his testimony and by referring to his pre-arrest silence during closing argument. We disagree.

Defendant failed to object to the prosecutor's questions during his cross-examination; therefore, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). To the extent that Gibbs's argument alleges prosecutorial misconduct, because Gibbs did not object to the prosecutor's statements, the issue is also unpreserved. *People v Cain*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301492, issued December 20, 2012), slip op at 2. "This Court reviews unpreserved constitutional errors for plain error affecting substantial rights." *Id.* at 5. This Court also reviews unpreserved claims of prosecutorial misconduct for plain error. *Id.* at 2.

During Gibbs's testimony, the prosecutor asked Gibbs when he told his mother what happened and when he told the police that Henderson made him rob the store. The prosecutor

asked Gibbs if he went to the police station on October 26, 2010, or after he talked to his brother the next day. In her closing argument, the prosecutor stated:

> Because remember despite what Phillip Gibbs testified to here in the courtroom about what his knowledge was, what his role or lack thereof was, he doesn't take an opportunity to run out of the store. He doesn't call 911 from inside the store. He doesn't run away separate from Mr. Henderson after this robbery occurred. He doesn't tell his mother. He doesn't go to the police.

The prosecutor again referred to Gibbs's failure to turn himself in during her rebuttal.

Contrary to Gibbs' assertion, the prosecutor did not violate his constitutional right to remain silent by questioning Gibbs about his failure to alert his mother or law enforcement as to the robbery.

> A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda* warnings have been given. A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact.
>
> A prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true. [*People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (citations and internal quotation marks omitted).]

However, "[w]here it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself—the prosecution cannot properly comment on the defendant's failure to contact the police." *People v Dye*, 431 Mich 58, 80; 427 NW2d 501 (1988).

The prosecutor's comments referred to Gibbs's pre-arrest silence and, therefore, did not violate his right to remain silent. *McGhee*, 268 Mich App at 634. The prosecutor's comments on Gibbs's failure to report the crime suggested that if Gibbs's testimony were true—that his participation in the robbery was coerced, then he would have called 911 or gone to the police immediately. Gibbs, however, claims that it would not have been natural for him to contact the police because he would have believed Henderson might harm him. We conclude that if Gibbs's version of the events were true—he did not know Henderson was going to rob the store and he was acting under duress by Henderson—then it would have been natural for him to contact the police. Therefore, the prosecutor's comments were proper and there was no plain error.

C. SENTENCING ERRORS

Finally, Gibbs contends that he is entitled to resentencing based on the erroneous scoring of PRV 5, PRV 6, and offense variable (OV) 13.

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for

> resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).]

1. PRV 5

"Prior record variable 5 is prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1). The sentencing court must score two points if "[t]he offender has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication." MCL 777.55(1)(e). The sentencing court must assess zero points if "[t]he offender has no prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1)(f).

> "Prior misdemeanor juvenile adjudication" means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States *if the order of disposition was entered before the sentencing offense was committed*." [MCL 777.55(3)(b) (emphasis added).]

Gibbs's presentence investigation report (PSIR) indicates that he pleaded guilty to illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. The PSIR indicates that the "Disposition Date" was November 9, 2010. The sentencing offense was committed on October 26, 2010. Accordingly, the order of disposition was not entered before the sentencing offense was committed and Gibbs's juvenile adjudication does not constitute a "[p]rior misdemeanor juvenile adjudication" for purposes of assessing points under PRV 5. MCL 777.55(3)(b). Therefore, the trial court erred in assessing two points under PRV 5. However, because a reduction by two points from defendant's prior record variable score would not change his PRV Level, MCL 777.62, resentencing is not required.

2. PRV 6

"Prior record variable 6 is relationship to the criminal justice system." MCL 777.56(1). The sentencing court must score five points if "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor." MCL 777.56(1)(d). The sentencing court must assess zero points if "[t]he offender has no relationship to the criminal justice system." MCL 777.56(1)(e).

As mentioned above, Gibbs's entered a plea to illegal entry without the owner's permission, a misdemeanor, on August 3, 2010, and was sentenced to probation for the offense on November 9, 2010. This was a juvenile adjudication. This Court has found that a defendant's prior juvenile adjudications supported the scoring of PRV 6. *People v Anderson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301701, issued October 23, 2012), slip op at 2 ("The phrase

‘criminal justice system’ is not limited to adversarial criminal proceedings.”) Thus, contrary to Gibbs’s assertion, points could be assessed under PRV 6 for his relationship with the juvenile justice system.

There is no evidence that Gibbs was on probation, delayed sentence status, or bond at the time of the sentencing offense. His PSIR indicates only that he was placed on probation at sentencing or disposition, which took place on November 9, 2010. It appears that Gibbs was, however, awaiting adjudication or sentencing at the time of the sentencing offense, given that he had already entered a plea. This Court has stated:

> *Endres* suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court’s refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists. [*People v Johnson*, 293 Mich App 79, 88; 808 NW2d 815 (2011).]

Therefore, the trial court properly assessed five points under PRV 6, even if Gibbs was not on bond at the time he committed the sentencing offense.

3. OV 13

“Offense variable 13 is continuing pattern of criminal behavior.” MCL 777.43(1). The sentencing court must assess 25 points if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). “For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). The sentencing court must assess zero points if “[n]o pattern of felonious criminal activity existed.” MCL 777.43(1)(g).

Gibbs was convicted of two counts of armed robbery and one count of unarmed robbery, which are all crimes against a person. Gibbs’s argues that his convictions arose out of one incident and that he could not be assessed 25 points. However, there is nothing in the language of MCL 777.43(1)(c) to support defendant’s argument that multiple convictions arising from the same incident cannot be considered for scoring OV 13. In *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001), the defendant was convicted of four counts of making child sexually abusive material. He photographed two fifteen-year-old girls. There were four photos in all – two of each girl, taken on a single date. *Id.* at 525. We held that 25 points were properly scored under OV 13 because of “defendant’s four concurrent convictions.” *Id.* at 532. Similarly, in this case, while the robberies arose out of a single criminal episode, defendant committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity. Additionally, although some subsections of MCL 777.43 contain limitations on a trial court’s ability to score for more than one instance arising out of the same criminal episode, subsection (1)(c) contains no such limitation. Accordingly, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not abuse its discretion in scoring 25 points for that variable.

III. HENDERSON'S APPEAL

A. DOUBLE JEOPARDY

Henderson contends that his convictions for both assault with intent to rob while armed and armed robbery violate double jeopardy. The prosecution concedes error and writes: "Plaintiff agrees that defendant's conviction for assault with intent to rob while armed must be vacated because he is also convicted for [sic] armed robbery involving the same victim during the same criminal episode." We agree and that for purposes of the "multiple punishment" analysis under double jeopardy, assault with intent to rob while armed is the "same offense" as armed robbery and that Henderson's conviction for the lesser crime must be vacated. This Court reviews de novo questions of law, such as a double jeopardy challenge. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009).

The prohibition against double jeopardy in both the federal and state constitutions protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The third of these protections exist to "protect the defendant from being sentenced to more punishment than the Legislature intended." *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). In this case, defendant claims that he has been punished twice for the same offense.

We have previously held that assault with intent to rob while armed is a necessarily included lesser offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). "A necessarily included lesser offense is a crime for which it is impossible to commit the greater offense without first having committed the lesser." *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). Stated differently, "[t]o be a necessarily included lesser offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense." *People v Heft*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307150, issued December 20, 2012) slip op at 3. However,

> [i]n *People v Smith,* 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the "same elements" test set forth in *Blockburger v United States,* 284 US 299, 304; 52 SCt 180; 76 LEd 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." . . .
>
> The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved. [*People v Baker*, 288 Mich App 378, 381-382; 792 NW2d 420 (2010) (citations omitted).]

Accordingly, it is necessary to consider the elements of each offense.

MCL 750.89 is the assault with intent to rob while armed statute and provides:

> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Therefore, in order to obtain a conviction for assault with intent to rob while armed, a prosecutor must demonstrate "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *Akins*, 259 Mich App at 554 (citation and internal quotation marks omitted).

The revised armed robbery statute, MCL 750.529, now provides:

> A person who engages in conduct proscribed under section 530 [robbery] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Therefore, in order to obtain a conviction for armed robbery, a prosecutor must prove:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

We discern no substantive difference between the elements of the two crimes. Because assault with intent to rob while armed is a necessarily included lesser offense of armed robbery and neither crime contains an element the other does not, defendant could not have been convicted of both. Under the "same elements" test that is now applicable to the "multiple punishments" strand of double jeopardy under *Smith*, defendant's assault conviction must be vacated. *Meshell*, 265 Mich App at 633-634. ("The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge.")

B. SENTENCING ERRORS

Henderson also contends that he is entitled to resentencing based on the erroneous scoring of OV 3, OV 4, OV 13, and OV 14. We disagree.

Henderson preserved his objection to the scoring of OV 13 by objecting at sentencing. See *Endres*, 269 Mich App at 417. Henderson did not preserve his objections to the scoring of OV 3, OV 4, or OV 14. See *Endres*, 269 Mich App at 417.

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. [*Endres*, 269 Mich App at 417 (citations omitted).]

This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights. *Id.* at 422.

1. OV 3

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). The sentencing court must assess 10 points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). "As used in this section, 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). This Court has stated that "'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

Costas testified that Henderson hit him between his neck and head and on the side of the face. According to Nancy, Costas, had blood dripping down his face and neck. Part of Costas's ear was cut off and he received four stitches at Hurley Medical Hospital. He also sees his physician for frequent headaches. Nancy suffered whiplash and completed seven weeks of physical therapy. Therefore, the trial court properly scored 10 points for OV 3.

2. OV 4

"Offense variable 4 is psychological injury to a victim." MCL 777.34(1). The sentencing court must assess 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The sentencing court must also "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

This Court has found that depression and personality changes are sufficient to uphold the scoring of OV 4. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010). This Court has also found that a victim's "statements about feeling angry, hurt, violated, and

frightened support his score under our case law." *People v Williams*, _ Mich App ___; ___ NW2d ___ (Docket No. 306917, issued October 16, 2012), slip op at 2.

Kassing testified that the experience was traumatic and he had bad dreams about it. At sentencing, Nancy stated, "Not to mention what you took from us psychologically." In Costas's impact statement, he indicated that he did not feel safe in his store. These statements support the scoring of 10 points for OV 4.

3. OV 13

As mentioned above, because multiple concurrent offenses arising from the same incident are properly used in scoring OV 13, the trial court did not abuse its discretion in scoring 25 points for that variable.

4. OV 14

"Offense variable 14 is the offender's role." MCL 777.44(1). The sentencing court must assess 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this variable, "[t]he entire criminal transaction should be considered." MCL 777.44(2)(a). See also *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004).

There was evidence that Henderson was the only perpetrator with a gun, did most of the talking, gave orders to Gibbs, and checked to make sure Gibbs took everything of value. Kassing specifically testified that he believed Gibbs was the leader. Further, Gibbs's testimony supports the finding that Henderson was the leader. While neither Nancy nor Costas believed that either of the defendants was "the leader," "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Accordingly, the trial court did not err in scoring 10 points for OV 14.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood