

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MARK THEMICAL HOWELL,

Defendant-Appellant

UNPUBLISHED

February 14, 1997

No. 193844

Ingham Circuit Court

LC No. 95-69463-FC

Before: O'Connell, P.J., and Markman and M. J. Talbot,* JJ.

PER CURIAM.

Defendant appeals by right his guilty plea conviction of conspiracy to commit breaking and entering of an occupied dwelling, MCL 750.110; MSA 28.305, carrying a concealed weapon in an automobile, MCL 750.227(2); MSA 28.424(2), and second-degree murder, MCL 750.317; MSA 28.549. Defendant and several codefendants broke into a home for purposes of burglary; one of the codefendants fatally shot an occupant of the home. The court sentenced defendant to concurrent prison terms of ten to fifteen years, three to five years, and fifteen to forty-five years, respectively for these three offenses. We affirm.

Defendant challenges the sentencing court's scoring of two sentencing guideline factors. He objected below to the scoring of these factors. In *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), this Court stated:

Our review of sentencing guidelines calculations is very limited. A sentencing judge has discretion in determining the number of points to be scored, provided that there is evidence on the record which adequately supports a particular score. Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence. [Citations omitted.]

First, defendant claims that the court wrongly scored fifty points for offense variable 3 (OV-3) - intent to kill or injure. The guidelines instruct that fifty points are to be scored when there is a

* Circuit judge, sitting on the Court of Appeals by assignment.

“premeditated intent to kill” or when there is a “homicide committed during the perpetration or attempt to perpetrate . . . robbery [or] breaking and entering of a dwelling” Here, defendant’s plea demonstrated that the murder occurred during a robbery and breaking and entering of a dwelling. Further, defendant admitted that he and two of the codefendants were armed with guns “in case somebody was up in there” and that before the incident one of the codefendants said “he might have to kill somebody.” Accordingly, there was sufficient evidence to support the scoring of OV-3.¹

Defendant next argues that the court wrongly scored forty points for OV-4 -- aggravated physical abuse. The guidelines instruct that forty points are to be scored when “torture or sadism [are] involved.” The guidelines state, “Torture or sadism occurs whenever the offender subjected the victim to extreme or prolonged pain or humiliation, apparently inflicted to produce suffering or for the gratification of the offender.” The sentencing court stated:

[I]t is sadistic to point a gun at someone’s head, put them on the floor, keep them there and leave them all that time not knowing whether or not they’re going to live or die and then ultimately kill them. . . . But I think the minutes that he spent lying on the floor terrified for his life clearly support a scoring of 40 for sadism

Defendant’s plea indicates that one of the codefendants told the occupant of the home to “get down on the floor,” that the occupant complied, that two codefendants held guns on him while the others searched the house for money, and that one of the codefendants ultimately shot the occupant. Accordingly, there was sufficient evidence to support the scoring of OV-4.

For these reasons, we affirm defendant’s judgment of sentence.

Affirmed.

/s/ Peter D. O’Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot

¹ We note that *People v Buck*, 197 Mich App 404, 430; 496 NW2d 321 (1992), modified on other grounds 444 Mich 853; 508 NW2d 502 (1993) cited by defendant, held that a score of 25 for OV-3 was proper in the matter before it; it did not consider whether there was sufficient evidence to support a score of fifty for OV-3 there.