

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL P. MCNABNEY,

Defendant-Appellant.

UNPUBLISHED

June 21, 2002

No. 232018

Wayne Circuit Court

LC No. 00-006522

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of unarmed robbery, MCL 750.530, and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to 7 to 15 years' imprisonment for each of the unarmed robbery counts, and a concurrent term of 5 to 10 years for the assault conviction. Defendant also was ordered to pay, jointly and severally with codefendant Arbry Matthews, restitution totaling \$1,800 to the victims. We affirm in part, vacate in part and remand.

Defendant first contends that the trial court erred in ordering him to pay restitution to the victims without first establishing the amount of their losses by a preponderance of the evidence. We review for an abuse of discretion a trial court's order that a defendant pay restitution. *People v Law*, 223 Mich App 585, 589; 568 NW2d 90 (1997), modified on other grounds 459 Mich 419; 591 NW2d 20 (1999).

The Crime Victim's Rights Act, MCL 780.751 *et seq.*, mandates that defendants convicted of crimes pay restitution to their victims:

Except as provided in subsection (8),¹ when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. [MCL 780.766(2).]

¹ Subsection (8), MCL 780.766(8), does not apply in this case.

When determining the appropriate amount of restitution to order, a court “shall consider the amount of the loss sustained by any victim as a result of the offense.” MCL 780.767(1). This statutory language does not require the trial court in every case to hold a separate hearing regarding restitution, or otherwise to make a separate factual inquiry and individual findings on the record regarding the restitution amount. *People v Grant*, 455 Mich 221, 235, 243; 565 NW2d 389 (1997). When the defendant challenges the appropriate amount of restitution, however, the trial court must resolve the dispute by making express findings by a preponderance of the evidence, and the prosecutor bears the burden of demonstrating the amount of the victim’s loss. MCL 780.767(4); *Grant, supra*.

Regarding the female victim, defendant did not dispute the amount owed. Therefore, the trial court was not required to conduct a factual inquiry or make individual factual findings regarding the amount owed when awarding restitution. *Grant, supra* at 243. To the extent defendant suggests that his actions during the crimes could not have occasioned the entire amount of restitution awarded the female victim, which amount included nearly four hundred dollars for the week of work that the female victim missed following the crimes, we reject this suggestion. According to the trial testimony, defendant severely beat and pulled a knife on the male victim, then forced both victims to ride around in the male victim’s pickup truck, both before and after picking up codefendant Matthews, whom defendant directed to get inside the truck. The testimony further indicated that both defendants participated in taking various items of the victims’ property. Defendant then left both victims with his codefendant, who sexually assaulted the female victim. Under the circumstances, we conclude that the trial court’s award of the total amount of the female victim’s restitution against defendant properly constituted “full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction.” MCL 780.766(2); See *People v Gahan*, 456 Mich 264, 271; 571 NW2d 503 (1997) (explaining that the phrase “course of conduct” within MCL 780.766(2) should be given a broad construction).

Defendant did dispute the amount of restitution owed to the male victim. Defendant specifically asserted at the sentencing hearing that the prosecutor had failed to prove values for the items defendant took from the male victim. Because defendant disputed the amount, the trial court was required to conduct a factual inquiry and make individual factual findings regarding the amount owed. *Id.*² The record reflects that the prosecutor did not meet his burden of proving the amount of the male victim’s losses, and that the trial court failed to make factual findings on the record to support its restitution award. Accordingly, we vacate the trial court’s restitution order concerning the male victim and remand to the trial court to fulfill the statutory requirements before ordering restitution. MCL 780.767(4); *Law, supra*, 459 Mich at 431.

Defendant also argues that the trial court erred in scoring several offense variables when determining defendant’s minimum sentence range under the legislative sentencing guidelines. We review for an abuse of discretion a trial court’s scoring of offense variables. We will not

² While defendant asserts that the trial court also should have conducted a hearing regarding defendant’s ability to pay, we note that a 1996 amendment to MCL 780.767(1) eliminated the defendant’s ability to pay from the factors to be considered when determining the amount of restitution. 1996 PA 562.

reverse a scoring decision if evidence exists to support the score. *People v Hornsby*, ___ Mich App ___, ___ NW2d ___ (Docket No. 227945, issued 5/24/02), slip op. at 3; *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). We must affirm a minimum sentence that falls within the appropriate guidelines sentence range. MCL 769.34(10).

Because defendant committed these crimes in April 2000, the legislative sentencing guidelines applied. MCL 769.34(2). Defendant asserts the trial court improperly scored five offense variables in determining the minimum guidelines sentence range: offense variable (OV) 1 (aggravated use of a weapon), MCL 777.31; OV 3 (physical injury to a victim), MCL 777.33; OV 4 (psychological injury to a victim), MCL 777.34; OV 7 (aggravated physical abuse), MCL 777.37; and OV 8 (victim asportation or captivity), MCL 777.38. Defendant concedes, however, that even if we found that the trial court erred in scoring these variables and adopted defendant's proposed scores, defendant's minimum sentences for the unarmed robbery convictions still would fall within the statutory guidelines range.³ Accordingly, we are statutorily required to affirm his sentence. MCL 769.34(10). Moreover, our review of the record reveals evidence supporting enough of the trial court's offense variable scoring decisions to render correct the court's original guidelines range calculations.

Affirmed in part, vacated in part and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

³ We note that defendant raises no argument specifically addressing the guidelines range applicable to his assault conviction.