STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC SCOTT JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 241567
Kent Circuit Court
LC No. 01-012755-FH

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to 3 to 10 years' imprisonment. In this appeal, he challenges the trial court's scoring of his sentence. We affirm.

This case arises out of a bar fight in which defendant admittedly punched the victim in the head, knocking the victim unconscious and to the floor. After the victim had hit the bar room floor, some eyewitnesses testified at trial that defendant then stomped on the victim's head. As a result of the incident, the victim sustained a base skull fracture, brain damage, bleeding in the brain, substantial hearing and sight problems, short-term memory loss, and facial nerve damage.

This Court first notes that although defendant raised the issues on appeal in his written objections to the guideline scoring and also at the sentencing hearing, he failed to perfect them by not filing a copy of the presentence report with this Court as required by MCL 769.34(8)(b). *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003). By failing to preserve these rights in accordance with the rules of this Court, we review "alleged sentencing errors that have not been preserved are reviewed for plain error affecting substantial rights." *Id.*, citing *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

An offense committed on or after January 1, 1999, is subject to the sentencing guidelines act, MCL 769.31 *et seq*. MCL 769.34(2), *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). As defendant committed the offense in this case on December 2, 2001, he was sentenced under these guidelines.

Defendant first alleges that his due process rights were violated because the trial court scored fifty points under offense variable seven (OV 7) for "excessive brutality" based on his finding that "deliberately stomping on the head of a prone, unconscious person is excessive

brutality by definition." According to defendant, the trial court erred by citing the kick to the head as evidence of excessive brutality because only two witnesses testified to seeing defendant kick the victim in the head. Defendant relies upon *People v Walker*, 428 Mich 261, 267; 407 NW2d 367 (1987), for the proposition that "[o]nce a defendant has 'effectively challenged' an adverse factual assertion, the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts." According to defendant, the prosecution failed to establish by a preponderance of the evidence that defendant kicked the victim in the head and, therefore, the score of fifty points was based on an "extensively and materially false foundation." *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948).

Defendant incorrectly cites the above cases as authority on this issue. Both *Townsend* and *Walker* dealt not with the facts of the actual crime the defendant was being sentenced for, but on information pertaining to the defendant's prior record. *Townsend* refers to a trial court's consideration at sentencing of one previous charge against the defendant that had been dismissed, and two other charges that defendant had been found not guilty of. *Townsend*, *supra*, 334 US 740. In this case, the information taken into account at sentencing consisted of factual testimony presented at trial and contemplated by the jury in reaching its decision of guilt. We therefore hold that the trial court correctly scored OV 7.

In, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), this Court reviewed a trial court's scoring of fifty points for OV 7 based on a finding of "terrorism." In upholding the scoring, this Court stated:

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). "Scoring decisions for which there is ***any evidence in support*** **will be upheld**." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). [*Hornsby*, *supra*, 468] (emphasis added).

Under MCL 777.37(1)(b), the trial court must score OV 7 as fifty points if the court finds evidence of "excessive brutality." *Hornsby*, *supra*, 468. Because MCL 777.37 does not provide a definition of "excessive brutality," we next address defendant's assertion that the trial court erred in holding that his actions equated to excessive brutality.

In arguing that his actions do not equate to excessive brutality, defendant attempts to distinguish the present case from our Supreme Court's holding in *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993). In *Hernandez*, the Court reviewed "excessive brutality" with respect to offense variable two of the judicial sentencing guidelines. *Id.* at 5-6. The plaintiff in that case pleaded guilty to a charge of assault with intent to commit murder after he attacked a victim with a baseball bat, knocking him to the ground, and then continued to hit the victim until the bat broke. *Id.* at 3-4. The Court held that "[t]here clearly [was] evidence supporting the judge's initial scoring of fifty points for excessive brutality." *Id.* at 21.

Despite defendant's attempt to distinguish this case, we believe that the facts of this case are similar to *Hernandez*, and therefore warrant a finding of excessive brutality. In this case, defendant admitted that he punched the victim, knocking him to the floor and at least three other

people, including one of defendant's friends, testified that the victim was immediately knocked out by the punch. At least three witnesses also testified that there was a great amount of blood coming out of the victim's head after the incident. Furthermore, the victim's waitress that night testified to seeing defendant stomp on the victim's head after he was knocked out, an accusation that, although denied by defendant and apparently not witnessed by his friends, was corroborated by another patron, who was within a foot of the incident and saw defendant stomp the victim on the head more than once after he was knocked out and bleeding from the head.

This case also parallels *Hernandez* in that when asked why he punched the victim, defendant stated, "I didn't know what he was gonna do, if he was gonna punch me next or if he was gonna have his friends jump me . . . ." In this case, as in *Hernandez*, "[a]lthough there is testimony to the contrary, even if defendant's claim of protecting himself were true, he may only use force reasonably necessary to protect himself. Any additional force would be considered excessive. Here, the additional force was more than excessive, it was brutal." *Hernandez*, *supra*, 18. In the present case, even without a kick, we believe that defendant, a six foot tall, 260-pound body-builder able to bench press 450 pounds, used force beyond what was reasonably necessary when he punched the victim, knocking him out instantly and causing severe injuries, simply because the victim was allegedly poking him in the chest and pushing him.

Finally, in finding excessive brutality in *Hernandez*, the Court stated that "the victim suffered serious injuries, including fifteen stitches in his head, a broken finger, and torn cartilage in his wrist." *Hernandez*, *supra*, 443 Mich 18. In this case, the victim spent six days in the hospital, five of which were in the intensive care unit. Furthermore, expert testimony at trial revealed that the victim suffered a base skull fracture causing permanent hearing impairment, fluid leakage from around the brain causing his ears and nose to bleed and emit fluids, internal bleeding of the brain, air leakage, impaired facial nerve function, temporary loss of movement of the side of his face, and impaired balance. Moreover, the victim himself testified that he now has brain damage, both his eardrums are blown out, he has severe headaches, short term memory loss, suffers from double-double vision that can only be corrected by wearing glasses, and also will have to undergo surgery and use hearing aids to correct his hearing. Accordingly, we believe that the victim's injuries were even more "serious" than the victim's in *Hernandez*. Therefore, we believe that the trial court did not commit plain error affecting defendant's substantial rights in holding that defendant's actions equated to excessive brutality under MCL 777.37(1)(b).

Finally, because *any* supporting evidence will cause a scoring decision to be upheld, even if the testimony regarding the alleged kick to the head were disregarded, we believe that the extent of the injuries alone, when compared with those in *Hernandez*, *supra*, 18, would be enough to support a finding of excessive brutality. Therefore, we hold that "evidence of record adequately supports [the] particular score," and that the trial court did not commit plain error by scoring offense variable seven as fifty points.

Defendant next challenges the trial court's scoring of ten points under offense variable four for serious psychological injury that either requires professional treatment or may require such treatment in the future. MCL 777.34(1)(a). According to defendant, there was no information in the trial record or presentence report stating that the victim suffered serious psychological injury requiring treatment, and the trial court erred by allowing the victim's wife to testify during sentencing that the victim had attended psychological therapy. As stated above,

defendant has not provided this Court with the presentence report and has therefore not preserved this issue. Therefore, this Court reviews for plain error affecting substantial rights. *Callon*, *supra*, 256 Mich App 332.

Trial courts are afforded broad discretion in the sources and types of information considered during sentencing. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). However, in support of this argument, defendant cites MCR 6.425 and its statutory counterpart, MCL 771.14. Under MCR 6.425(A)(6), the probation officer must prepare a written report before sentencing containing, among other things, information concerning psychological harm suffered by the victim. MCL 771.14 also requires a presentence report, but does not specifically address psychological harm. Moreover, the sentencing court must allow the defendant and his lawyer to review the presentence report at a reasonable time before the day of sentencing. MCL 771.14(5), MCR 6.425(B), *Hernandez*, *supra*, 13. According to defendant, because the information regarding the victim's psychological injury and treatment was not contained in the trial record or the presentence report and was presented for the first time at sentencing, defendant was denied due process and effective assistance of counsel.

In further support of his assertion, defendant cites the Michigan Supreme Court's holding in *People v Smith*, 423 Mich 427, 459; 378 NW2d 385 (1985), which states that "[u]nless all information used to sentence a defendant is included in the written presentence report, counsel has no opportunity to represent a defendant effectively." Accordingly, defendant's reliance on *Smith*, the statute, and court rule is two-prong: first, he contends that the trial court erred in allowing the victim's wife to testify because the above authorities require all information used at sentencing to be in writing and, second, that he was denied due process and effective assistance of counsel because he was not made aware of what the testimony would be before the sentencing proceeding and, therefore, could not adequately prepare a rebuttal. We believe that defendant's assertions are without merit.

With regard to defendant's contention that the trial court erred by allowing oral testimony at the sentencing hearing, we first note that defendant quotes *Smith* out of context. *Smith*, *supra*, 423 Mich 459. The Michigan Supreme Court's analysis in *Smith* is based solely a review of MCL 771.14 and ex parte communications between probation officers and judges. *Id.*, 452-460. Indeed, the Court does place a certain emphasis on the statute's statements that presentence reports must be in writing, however the Court's analysis is limited to information passed from the probation officer to the trial judge, and in no way implies that all information relied upon by the trial judge need be contained in the presentence report or in writing. *Id.*

In contrast to defendant's contention that MCR 6.425 requires all information relied upon by the trial court during sentencing to be contained in writing in the presentence report, MCR 6.425(D)(2)(c) requires that, at sentencing and on the record, the trial court may give the victim an opportunity to state circumstances he believes the court should consider in imposing the sentence. Furthermore, the Crime Victim's Rights Act allows a criminal victim to make an impact statement for sentencing purposes, MCL 780.763(1)(f), which may include an explanation of the nature and extent of any psychological harm suffered by the victim. MCL 780.763(3)(a). Moreover, the statute further provides that the victim has the right to make the impact statement *orally at sentencing, or designate another person to do so if he is physically or emotionally unable.* MCL 780.765 (emphasis added). Therefore, we believe that the trial court's allowing the victim's wife's oral testimony at sentencing did not abuse the broad discretion

afforded to trial courts in the sources and types of information considered during sentencing, *Albert*, *supra*, 74. We find no error in the manner the trial court held the sentencing hearing.

The above statute and court rule are dispositive of defendant's assertion that he was denied effective assistance of counsel and due process of law because he was not made aware of what the testimony would be before the sentencing proceeding and, therefore, could not adequately prepare a rebuttal. Defendant and his counsel were provided an opportunity to respond to the statement of the victim and his spouse during sentencing. Given the extent of injury to the victim in this case, defendant and his counsel were on notice of the possibilities of the trauma, including psychological damage that defendant had inflicted upon the victim. Given defendant's written objections to the presentence report, specifically the scoring dealing with psychological damage, defendant had adequate time and notice to prepare a defense. Therefore, defendant was not denied effective assistance of counsel or due process of law during sentencing.

Furthermore, even if this Court were persuaded that defendant did not have adequate notice to prepare rebuttal testimony, we do not believe that defendant's brief adequately shows that he could produce such testimony. In his brief, defendant asserts that he can "produce witnesses who saw [victim], jubilant, in a bar crowd in a Hooter's television commercial during the time that his wife states he was suffering from psychological injury," and also witnesses who "can testify to seeing [victim] frequently dancing at bars, during that time." Such testimony, even if true, does not rebut the statements that the victim attends therapy, sees a neurologist three times a week, and has suffered from a personality change.

Based on the foregoing conclusions, we find that plain error affecting defendant's substantial rights did not occur.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello