

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL COUNTS,

Defendant-Appellant.

UNPUBLISHED

May 20, 2004

No. 246717

Wayne Circuit Court

LC No. 02-001170

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion. MCL 750.110. He was sentenced as a fourth-felony offender to serve a term of fifteen to twenty-five years in prison. He now appeals and we remand for resentencing.

Defendant's sole argument on appeal is that the trial court misscored the sentencing guidelines. We agree. Defendant challenges the scoring of Offense Variables 7, 8, 9, and 10. In total, defendant was assessed 90 points for the Offense Variables, placing him at the highest OV level, Level VI. The trial court has discretion in the scoring of the sentencing guidelines and we review to determine if the record contains evidence to support the trial court's scoring. *People v Houston*, ___ Mich App ___, ___ NW2d ___ (No. 245889, issued 4/1/04), *slip op* at 5. The trial court's factual findings at sentencing are reviewed for clear error. *Id.* But the construction of the guidelines presents a question of law to be reviewed de novo. *Id.*

We first consider his challenge to OV 7, for which he was assessed fifty points. OV 7 is entitled "Aggravated Physical Abuse" and is scored at either zero or fifty points. Fifty points are appropriate where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." The instructions further define "terrorism" to mean "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." Plaintiff lists a number events occurring during the crime which support a scoring of fifty points for OV 7, including forcing the victims to leave the home at gunpoint, forcing them to drive defendant across town, threatening to kill one of the victims, and forcibly undressing one of the victims, followed by forcing the other victim to perform cunnilingus on her and then sexually assaulting the first victim.

While these factors may well support such a scoring, they are not the basis relied upon by the trial court. Rather, the trial court relied on one factor in support of the scoring:

The way that the home invasion occurred, according to the evidence, was the defendant kicked down the door, broke down the door and entered. That in and of itself is enough to cause someone to be fearful. That amounts to terrorism and that is properly scored.

The problem with the trial court's rationale is that fifty points are not appropriate merely because the victim was fearful. Rather, the defendant must have engaged in conduct that was designed to substantially increase the fear and anxiety suffered by the victim. We cannot say that breaking down a door and entering the house does this. Rather, breaking down a door and entering is how a home invasion is accomplished. Accordingly, we are not persuaded that the mere act of breaking and entering supports the scoring of fifty points for OV 7.

Next, defendant challenges the scoring of fifteen points for OV 8. This variable is scored at either zero points or fifteen points. Fifteen points are appropriate where "[t]he victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Defendant argues that the asportation was not forcible and was merely incidental to the home invasion. Plaintiff argues that the scoring was appropriate because it caused the victim to be held captive beyond the time necessary to commit the offense. The trial court justified the scoring as follows:

There was substantial evidence on this record, including the testimony of Mr. (inaudible) regarding the taking from the location of the original breaking into the house, going to the other side of town, coming back. I am going to leave it at 15.

Once again, while we do not necessarily disagree with the prosecutor's logic, that is not the basis for the trial court's scoring. The trial court justified the scoring on the basis that asportation occurred. Clearly, however, more than just the fact that asportation occurred is required. It requires that the asportation either placed the victim in greater danger or extended the period of captivity beyond that necessary to commit the offense. The trial court did not find that either of these occurred. Accordingly, we are not persuaded that the trial court justified the scoring of OV 8 at fifteen points.

Defendant also challenges the scoring of OV 9. The ten points assessed defendant is appropriate where there are two to nine victims. The instructions provided that "each person who was placed in danger of injury or loss of life as a victim" should be counted. Clearly, there were two victims placed in danger during this crime. Accordingly, this variable was properly scored.

Finally, defendant argues that the trial court erred in assessing ten points for OV 10. Ten points is appropriate where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." The trial court scored the ten points on the basis that there was a domestic relationship between defendant and one of the victims, while defendant argues that no such relationship exists because there is no evidence that they have ever shared a domicile. The guidelines do not define "domestic" or "domestic relationship." Accordingly, it is appropriate to consult a dictionary to determine the meaning, *The Title Office, Inc v Van Buren Co Treasurer*, ___ Mich ___; ___ NW2d ___ (Nos. 121077 & 121078, issued 3/9/04), *slip op* at 7, and we turn

to Random House Webster's College Dictionary. Random House defines "domestic" in part as follows: "1. of or pertaining to the home, family, or household affairs. 2. devoted to home life." We do not believe it sufficient that there be any type of relationship to meet the requirements of OV 10. If this were the case, the Legislature would merely have said "relationship" rather than "domestic relationship." Rather, to qualify as a "domestic relationship," there must be a familial or cohabitating relationship. The prosecutor argues that such a relationship did exist, pointing out that at some point in the past defendant had keys to the victim's house and was allowed to keep some of his clothes there. First, merely having keys and being permitted to keep *some* of one's belongings at the house does not establish a cohabitating relationship. Second, OV 10 does not merely require that a domestic relationship exist, but that the relationship is exploited. If the relationship is over, which the prosecutor appears to concede, that relationship can no longer be exploited. Accordingly, it was inappropriate to score ten points for OV 10.

For the above reasons, we conclude that only fifteen points under the offense variables were justified at sentencing (ten points for OV 9 and five points for OV 13, which defendant did not challenge). With OV Level II, instead of OV Level VI, the guidelines recommendation is reduced to 72 to 240 months. Accordingly, we remand the matter to the trial court for resentencing. On remand, the trial court shall either resentence defendant under the rescored guidelines or provide an adequate justification for restoring the original scoring on one or more of the offense variables we concluded should be scored at zero, in which case the trial court shall resentence defendant on the adjusted guidelines.

Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood