

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID ROBERTSON,

Defendant-Appellant.

UNPUBLISHED

November 15, 2005

No. 255233

Allegan Circuit Court

LC No. 03-013379-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID ROBERTSON,

Defendant-Appellant.

No. 257583

Allegan Circuit Court

LC No. 03-013379-FH

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In these consolidated cases defendant appeals as of right his sentences of 115 months to twenty years, and nineteen months to five years, respectively imposed on his convictions of first-degree home invasion, MCL 750.110a(2), and attempted first-degree home invasion, MCL 750.110a(2), MCL 750.92. We affirm.

A jury convicted defendant of first-degree home invasion and attempted first-degree home invasion based on evidence that he entered and took various items from the home of Debra and James Smalla, and that he attempted unsuccessfully to enter the home of Brian Sutton. The statutory sentencing guidelines recommended minimum term ranges of seventy-two to 240 months' imprisonment for first-degree home invasion, and ten to forty-six months for attempted first-degree home invasion. Defendant objected to the trial court's scoring of Offense Variable (OV) 4, MCL 777.34, psychological injury to victim, at ten points on the ground that Debra Smalla suffered psychological injury as a result of the incident, and to the scoring of OV 9, MCL 777.39, number of victims, at ten points on the ground that two to nine victims were placed in danger as a result of defendant's conduct. The trial court rejected defendant's scoring challenges

and sentenced him as a fourth habitual offender, MCL 769.12, to concurrent terms of twenty years to life for first-degree home invasion, and to two years to life for attempted first-degree home invasion.

Upon being informed by the Department of Corrections that an indeterminate sentence with a maximum of life was invalid, the trial court set the matters for resentencing. Defendant asserted that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), required that any fact relied on by a court for purposes of sentencing must be found by a jury beyond a reasonable doubt. The trial court rejected defendant's argument, declined to change its scoring of OVs 4 and 9, and sentenced him to concurrent terms of 115 months to twenty years for first-degree home invasion and nineteen months to five years for attempted first-degree home invasion. The minimum terms were within the guidelines as scored by the trial court.¹

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in the record. *Id.* Moreover, under the sentencing guidelines act, if a minimum sentence is within the appropriate guidelines range, we must affirm that sentence and may not remand for resentencing absent an error in the scoring of the guidelines, or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

We affirm. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court opined that *Blakely*, *supra*, does not apply to Michigan's system of indeterminate sentencing because under that system the maximum term is not set by the sentencing court, but rather is determined by statute. See MCL 769.8(1). We are bound by *Claypool*, *supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), *lv gtd* in part 472 Mich 881 (2005).

Moreover, Debra Smalla indicated that she suffered extreme psychological distress as a result of the invasion of her home. A victim need not have sought professional psychological treatment in order to justify the scoring of OV 4 at ten points. MCL 777.34(2). Moreover, the fact that the Smallas and Sutton were in their homes when the incidents occurred at night or in the early morning hours supported the trial court's finding that the victims were placed in danger by defendant's actions. Evidence in the record supported the trial court's scoring of OVs 4 and 9 at ten points each. *Hornsby*, *supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

¹ Defendant filed a claim of appeal from the judgment of sentence entered on resentencing. We docketed the appeal as No. 257583, and consolidated it with Docket No. 255233, defendant's appeal from the original judgment of sentence.