

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS ERIC WALKER,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 265366

Wayne Circuit Court

LC No. 05-004232-01

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two terms of 30 to 60 years' imprisonment for the assault with intent to murder and assault with intent to rob while armed convictions, 40 to 60 months' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm but remand for correction of the Sentencing Information Report (SIR). This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that the trial court incorrectly scored Offense Variables (OV) 6 and 7.¹ We disagree. We review a preserved challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). A sentencing court has discretion in determining the number of points to be scored, and "[s]coring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (internal citations omitted).

Under OV 6, fifty points must be assessed if the court finds that "[t]he offender had premeditated intent to kill" MCL 777.36(1)(a);² *People v Wilson*, 252 Mich App 390, 392;

¹ Defendant also contends that the trial court incorrectly assessed him 15 points under OV 8, Victim Asportation or Captivity. However, defendant received zero points for OV 8; therefore, we do not address this argument.

² MCL 777.36(1)(a) provides:

(continued...)

652 NW2d 488 (2002). Fifty points must be assessed under OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a); *Hornsby, supra* at 468.

Defendant argues there was insufficient evidence presented at trial to support a scoring of 50 points under OV 6 because the shooting of Aoun Jaber was not premeditated, but rather was done in the heat of an attempted robbery. We disagree. Premeditation and deliberation, for purposes of a first-degree murder conviction, require “sufficient time to take a second look.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Also, “[t]he elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing.” *Id.*

Here, there was sufficient evidence of premeditation. Defendant used multiple methods in his attempt to kill Jaber. He shot Jaber twice, then pointed the gun at his head and then choked him. In between each assault, defendant had an opportunity to reflect on his actions. Furthermore, the trial court could infer premeditation from the circumstances surrounding the assault. Jaber had just left a cigarette wholesaler and had \$10,000 worth of cigarettes in his van before being attacked by defendant. The trial court did not abuse its discretion in assessing defendant 50 points under OV 6.

Defendant next argues that there was insufficient evidence to score 50 points for OV 7 because he did not intend to be excessively brutal, but rather, his actions were necessary responses to circumstances that occurred during the commission of his crimes. However, evidence was presented that defendant shot Jaber twice, sat on Jaber while attempting to steal the van, pointed the gun at Jaber’s head and choked him. Defendant’s conduct was excessive and went beyond what was necessary to commit assault with intent to murder and assault with intent to rob. The trial court did not abuse its discretion in assessing defendant 50 points under OV 7.

Lastly, we note that defendant’s OV 6 and OV 7 scores and guidelines minimum sentence range were not updated on the SIR. Accordingly, we remand for the ministerial purpose of correcting the SIR to reflect 50 points each for OV 6 and OV 7 and 225 to 375 months for the guidelines minimum sentence range.

(...continued)

The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer.

Affirmed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly