

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CORY CALEB SWANIGAN,

Defendant-Appellant.

UNPUBLISHED

February 24, 2011

No. 293069

Genesee Circuit Court

LC No. 08-023490-FC

Before: SAAD, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 8 to 15 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. Defendant also pleaded guilty to carrying a concealed weapon (CCW), MCL 750.227, and possession of a financial transaction device without consent, MCL 750.157n(1). He was sentenced to time served for the CCW conviction and 1 to 48 months' imprisonment for the financial transaction device conviction.¹ For the reasons set forth below, we affirm.

At about 10:30 p.m. on July 28, 2008, the 74-year-old complainant parked in a handicapped parking space in front of a Kroger grocery store in Burton. When she returned to her vehicle, she set her groceries on her tailgate and entered her vehicle to place her purse on the passenger seat. Defendant then pointed a gun in the complainant's face and demanded her purse. A struggle ensued when she refused. The complainant managed to position the gun so that it faced toward the seat of her vehicle and not at her head. However, she did not have the strength to hold onto her purse. Defendant wrested the purse away from the complainant and escaped to a

¹ The trial court stated that the financial transaction device and armed robbery convictions would be served concurrently to each other, but consecutively to the felony-firearm conviction. Defendant raised the issue of the improper consecutive sentencing on appeal, relying on *People v Clark*, 463 Mich 459; 613 NW2d 538 (2000). The parties have filed an amended judgment of sentence showing that the sentences for the felony-firearm conviction and the possession of a financial transaction device conviction will run concurrently. Accordingly, this issue is moot and we will not address it.

nearby mobile home park in a waiting vehicle. Shortly thereafter, the police apprehended him. The police discovered the gun in the center console of the vehicle. The complainant's credit card was discovered in defendant's sock at the jail. Although defendant contended at trial that he was misidentified, a witness to the robbery corroborated that the victim accurately described her assailant.

Defendant argues that the trial court erroneously scored ten points for offense variable (OV) 10, MCL 777.40. Trial courts have discretion when scoring offense variables, if the score is supported by adequate evidence in the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, we review this issue to determine if the trial court "properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

A sentencing court should score ten points for OV 10, exploitation of a vulnerable victim, if the 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." MCL 777.40(1)(b). Although MCL 777.40(1)(b) does not refer to vulnerability directly, the Supreme Court explained in *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008) that in order to score OV 10, there must be exploitive conduct directed at a victim and it must be readily apparent the victim is vulnerable.

At sentencing, the trial court noted that defendant chose to rob an elderly woman, rather than a "bodybuilder or a young man," because of the complainant's "apparent or ostensible vulnerability." Defendant argues that the scoring of ten points for OV 10 requires *actual* victim vulnerability. Defendant contends that because the complainant resisted his attempts to steal her purse, she was not actually vulnerable to exploitation. Defendant's argument is not supported by the record. The complainant was actually vulnerable to physical restraint or injury, as evidenced by her age and the fact that she parked in a handicapped space. Moreover, despite the complainant's attempts to resist defendant, he was able to steal her purse because she had limited strength due to a stroke she suffered several years before.

Furthermore, defendant's assertion that actual victim vulnerability is necessary to score points for OV 10 is incorrect. In *Cannon*, 481 Mich at 159, the Supreme Court merely required that a victim's vulnerability be readily apparent. The trial court concluded that defendant selected his victim because of her age and apparent vulnerability. Defendant had several potential victims from which to choose in the parking lot. He waited to approach the elderly victim until her back was turned and she was preoccupied with placing her purse in her vehicle. Based on the record, the trial court did not abuse its discretion when it ruled that defendant chose the complainant to rob because she appeared to be vulnerable.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio