

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN GREGORIO LARIO-MUNOZ,

Defendant-Appellant.

UNPUBLISHED

June 30, 2011

No. 295811

Kent Circuit Court

LC No. 05-012474-FC

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

GLEICHER, P.J. (*concurring in part and dissenting in part*).

I concur with the majority that *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005), governs defendant's challenge to the scoring of offense variable (OV) 3, and that *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005), controls the analysis of defendant's challenge to the scoring of OV 13. However, I respectfully disagree with the majority's resolution of defendant's challenge to the scoring of OV 7.

The trial court scored 50 points under OV 7, MCL 777.37, on the ground that the "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). The majority concludes that the trial court correctly assessed 50 points, reasoning:

[D]uring the two to five minutes that the pregnant mother was being strangled, she suffered a fractured pharynx and hemorrhaging in her deep neck muscles Such evidence demonstrated excessive brutality in commission of the assault and murder of a six-and-a-half month pregnant woman, which also caused the death of her unborn child. [*Ante* at 8.]

"A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The record evidence here shows that defendant manually strangled the victim. The medical examiner testified that "manual strangulation will typically involve a squeezing of the neck or a forceful compression of the neck, and this results in internal injuries in the neck." The internal injuries here consisted of "hemorrhages in the deep structures of the neck, including the muscle, as well as a fracture of a portion of the thyroid cartilage, deep hemorrhages in the pharynx, as well as petechial hemorrhages in the eyes." The medical examiner opined, "All those findings are consistent with a manual strangulation."

In MCL 777.37, the Legislature delineated the scoring method applicable when a victim experienced “aggravated physical abuse.” The applicable language reads:

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) 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.

When construing the language of an offense variable, this Court must ascertain and give effect to the Legislature’s intent. *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009). “The first step in that determination is to review the language of the statute itself.” *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002) (quotation marks and citation omitted). When the statutory language is plain and unambiguous, “we enforce the statute as written and follow its plain meaning, giving effect to the words used by the Legislature.” *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). In enacting MCL 777.37, the Legislature plainly selected for sentence enhancement crimes involving “aggravated physical abuse.” The Legislature used three specific terms to describe what it meant by “aggravated physical abuse”: “torture,” “sadism,” and “excessive brutality.” Additionally, the Legislature designated “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense” as worthy of sentence augmentation. MCL 777.37(1)(a).

The majority finds that defendant employed excessive brutality to commit the strangulation murder, explaining that “excessive brutality, in this context, is brutal conduct that exceeds the norm for committing the crime.” *Ante* at 8. Defendant undisputedly committed a heinous crime. But no evidence reasonably supports that this strangulation exceeded the “norm” for strangulation deaths, or that defendant behaved in manner intended to “substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). In enacting sentencing guidelines, the Legislature sought “to ensure a degree of consistency in sentencing defendants with comparable histories who have committed comparable crimes, while also affording the sentencing court a degree of discretion to account for the specific circumstances of the case.” *People v Horn*, 279 Mich App 31, 42; 755 NW2d 212 (2008). Especially cruel crimes deserve enhanced punishment. However, no record evidence distinguishes the brutality of the victim’s strangulation death from the brutality of every strangulation death, and no evidence suggests that defendant’s conduct “exceed[ed] the norm” for committing this crime. *Ante* at 8. I believe that the Legislature intended that OV 7 apply to vicious or gratuitously brutal behavior going beyond the violence necessary to commit the criminal act. Although defendant committed a despicable crime, the evidence simply does not support that his actions aggravated the physical abuse attendant to the strangulation.

I would hold that because the record contains no evidence of “torture,” “sadism,” or “excessive brutality,” the trial court incorrectly scored OV 7 at 50 points.

/s/ Elizabeth L. Gleicher