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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMAR GERALD FOUNTAIN,

Defendant-Appellant.

UNPUBLISHED
October 22, 2020

No. 349361
Wayne Circuit Court
LC No. 16-004046-01-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ADAMS, JR.,

Defendant-Appellant.

No. 349489
Wayne Circuit Court
LC No. 15-010388-02-FC

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

These consolidated appeals return to us after remand for resentencing. Defendants, Amar Gerald Fountain and Anthony Adams, Jr., were tried together before separate juries. Fountain was convicted of assault with intent to murder (AWIM), MCL 750.83, carjacking, MCL 750.529a, carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, fourth-degree arson, MCL 750.75(1), and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Adams was convicted of armed robbery, MCL 750.529, carjacking, assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and felony-firearm. Both defendants appealed, and we affirmed their convictions, but remanded for resentencing. See *People v Fountain*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2018 (Docket Nos. 335034 and 335072).

Fountain was resentenced as a fourth-offense habitual offender, MCL 769.12, to 30 to 50 years' imprisonment for the AWIM and carjacking convictions, one to five years' imprisonment for the CCW, felon-in-possession, and fourth-degree arson convictions, and five years' imprisonment for the felony-firearm conviction. Adams was resentenced as a fourth-offense habitual offender to 18 to 30 years' imprisonment for the armed robbery and carjacking convictions, 2 to 10 years' imprisonment for the AWIGBH conviction, and two years' imprisonment for the felony-firearm conviction. Defendants appeal as of right, challenging their sentences. We affirm.

I. FACTUAL HISTORY

In the early morning of December 5, 2015, Fountain and Adams committed a carjacking and robbery at a gas station in the city of Detroit. Fountain drove into the gas station parking lot and woke up a sleeping Adams to point out an SUV. The two approached the SUV while the driver, Michael Thomas, was putting air into a tire. Fountain brandished a weapon, demanded Thomas's glasses, and shot Thomas in the leg twice. Meanwhile, Adams entered the driver side of the SUV and appeared to try to start the vehicle. A passenger in the backseat shot Adams in the neck. Adams staggered out of the SUV, and both he and Fountain returned to the sedan they had arrived in. Fountain drove the sedan away.

Thomas ran into the gas station, where his cousin, who had been another passenger in the SUV, joined him and wrapped Thomas's leg with his undershirt. EMS was called. Police arrived within minutes, and an ambulance arrived to take Thomas to the hospital. Thomas was treated for four gunshot wounds (each shot went completely through the leg) and was discharged the same morning. Meanwhile, Fountain dropped Adams off at a different hospital. Adams was bleeding from his throat and was unresponsive. He continued to be treated for several days and had difficulty speaking because of his wound.

A few hours after Fountain left Adams at the hospital, the sedan that defendants had used was found in the backyard of a vacant house, intentionally set on fire. This sedan had been reported stolen several weeks before. On December 11, 2015, police questioned Fountain, who had burns on his face and hands. Fountain denied any involvement in the crime, claimed that his burns resulted from an accident, and stated that the jacket that had been seen on the shooter in a surveillance video had been stolen from him a month before. Police later recovered this jacket during a search of the house of Fountain's girlfriend.

Fountain and Adams appealed their convictions and sentences. We affirmed their convictions but remanded for resentencing before a different judge because of the trial court's policy of sentencing defendants who proceeded to trial at the top of the minimum sentencing guidelines range. *Fountain*, unpub op at 7-10. At resentencing, Fountain and Adams both objected to the scoring of offense variable (OV) 3, arguing that Thomas's injuries were not life-threatening. Fountain also objected to the scoring of OV 14, arguing that he was not the leader in this criminal transaction, and OV 19, arguing that he did not interfere or attempt to interfere with the administration of justice. The resentencing court overruled these objections, and Adams and Fountain renew their challenges on appeal.

II. SENTENCING

We review the trial court's factual determinations used for sentencing under the sentencing guidelines for clear error, and these factual determinations must be supported by a preponderance of the evidence. *People v Dickinson*, 321 Mich App 1, 20-21; 909 NW2d 24 (2017). The trial court's factual findings are clearly erroneous only if, after having reviewed the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Id.* at 21. We review de novo the trial court's interpretation and application of the sentencing guidelines. *Id.* When calculating a score under the sentencing guidelines, a trial court may consider all record evidence before it. *Id.*

A. OV 3

Fountain and Adams argue that they are entitled to resentencing because the trial court incorrectly scored OV 3, resulting in an incorrect minimum guidelines range under the sentencing guidelines. We disagree.

The resentencing court assigned 25 points to OV 3, which concerns physical injury to a victim, because a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Defendants contend that the court should have assessed 10 points, indicating that "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Defendants argue that Thomas's injury was not actually life-threatening or permanently incapacitating.

A score of 25 points for OV 3, as opposed to 10 points, requires more than just significant medical treatment. *People v Chaney*, 327 Mich App 586, 590-591; 935 NW2d 66 (2019). Some evidence of the potential for loss of life is required:

> [W]e must give effect to the ordinary meaning of "life-threatening" by requiring some evidence indicating that the injuries were, in normal course, potentially fatal. In the absence of evidence suggesting that [the victim's] life was placed at risk or more general evidence establishing that the injury suffered was by nature life-threatening, the trial court's finding was clearly erroneous . . . . [*Id.* at 590-591 (footnote omitted).]

"Certainly there are many conditions that if not treated can become life-threatening. Our review must take into account the effect of medical treatment." *Id.* at 591 n 4. This Court has previously discussed the medical treatment of a serious injury that was not life-threatening:

> The medical records do not indicate that [the victim's] injuries were potentially fatal. Nor did [the victim's surgeon] testify to that effect. While [the victim] suffered a serious injury requiring a lengthy hospitalization, no heroic measures were needed, and there is no suggestion in the records that [the victim's] life was ever in danger. Her burn wounds required multiple procedures, but the medical records show that there were no complications and that she was in stable condition throughout her hospital stay. [*Id.* at 590.]

Here, the resentencing court assessed 25 points without specifying further which victim's injury supported the scoring of OV 3. "[F]or purposes of OV 3, the term 'victim' includes any

person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003). The Michigan Supreme Court has made clear that this definition of "victim" can include coperpetrators, and indeed even offenders themselves. *People v Laidler*, 491 Mich 339, 347-353; 817 NW2d 517 (2012). This is because "[t]he state has a generalized interest in minimizing physical harms to all persons," and "the commission of a crime that results in physical harm, even when the harm is to the perpetrator himself, might be deemed more serious than the commission of the same crime that does not result in such harm." *Id*. at 352-353. Here, both Thomas and Adams were injured as a result of the carjacking and robbery. Therefore, both Thomas and Adams are considered "victims" when scoring OV 3 for both Fountain and Adams. See *id*.

Defendants argue that Thomas's injuries were not life-threatening or permanently incapacitating. We agree. There does not appear to be any evidence in the record of long-term effects of Thomas's injuries that would support a finding of a permanent incapacitating injury. See *People v McFarlane*, 325 Mich App 507, 532-533; 926 NW2d 339 (2018). His injuries were also not life-threatening. While Thomas did suffer four gunshot wounds and a tibial plateau fracture, it appears that the medical care he received was able to treat the injury with no deformity. See *Chaney*, 327 Mich App at 591 n 4. Although Thomas suffered serious injuries and received medical treatment, there were no "heroic measures" needed, and a hospitalization of several hours was all that was required. See *id*. at 590.

However, Adams's injury did qualify as life-threatening. Adams sustained a gunshot wound to the neck, rendering him unresponsive by the time he was dropped off at the hospital. He was bleeding from his oropharynx and sustained a right mandibular fracture and left interior carotid artery occlusion. Adams's treatment involved complications. Twelve days after his injury, he was still in the hospital being medicated and had difficulty speaking. At his first sentencing, Adams's counsel asked the court to "take into account the fact that [Adams] was shot in the face and the neck and he almost died." Adams himself also spoke to the severity of his injury, telling the sentencing court that he almost lost his life and that the injury caused him to go into a coma that left him with no knowledge of what had happened at the gas station. This injury was life-threatening, supporting the resentencing court's assessment of 25 points for both Fountain and Adams.

B. OV 14

Fountain also contends that the trial court erred by concluding that he was the leader in a multiple offender situation and by assessing 10 points for OV 14. Fountain asserts that Adams was working in concert with him, with neither acting as a leader. We disagree.

MCL 777.44(1)(a) instructs the trial court to assign 10 points to OV 14 when "[t]he offender was a leader in a multiple offender situation." When scoring OV 14, "[t]he entire criminal transaction should be considered." MCL 777.44(2)(a). "[A] 'leader' is defined in relevant part as 'a person or thing that leads' or 'a guiding or directing head, as of an army or political group.' To 'lead' is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting." *People v Rhodes (On Remand)*, 305 Mich App 85, 90; 849 NW2d 417 (2014). The "exclusive possession of a gun during the criminal transaction is *some* evidence of leadership,"

though it does not support a score of 10 points without any other evidence of leadership. *Id.* at 90-91. In *Rhodes* we indicated other factors that could establish leadership:

> [T]hat defendant acted first, gave any directions or orders to [his co-offender], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [his co-offender's] participation in the criminal transaction, or was otherwise a primary causal or coordinating agent. [*Id.* at 90]

Actions that support a score of 10 points include owning and driving the van in which the crime occurred, *People v Lockett*, 295 Mich App 165, 184-185; 814 NW2d 295 (2012), doing the majority of the talking, *People v Gibbs*, 299 Mich App 473, 494; 830 NW2d 821 (2013), and being the first participant to suggest a robbery and select the target, *People v Ackah-Essien*, 311 Mich App 13, 39; 874 NW2d 172 (2015).

The record supports the resentencing court's determination that Fountain was the leader in this multiple offender situation. There was evidence indicating that Fountain was the only criminal participant who possessed a gun and that he was the only participant who discharged a gun. But this was not the only evidence of his leadership. Fountain had been using a stolen sedan for at least several weeks, and was the driver of this sedan at all times during this crime. He initiated the crime by pointing out the vehicle and victims that would be targeted, and declaring that he was going to rob Thomas. He actually woke up an intoxicated Adams to do this; without Fountain's actions, it does not appear Adams would have ever noticed or known about the victims. And after Adams was shot, Fountain took sole control of the operation, as he alone drove the sedan away from the crime scene, dropped an unconscious Adams off at the hospital, and attempted to destroy evidence of the crime. Fountain's initiation of the crime, sole possession and use of a gun, control of the getaway car, and destruction of evidence were sufficient to show that he was the leader in the criminal transaction. Therefore, the trial court did not err by assessing 10 points for OV 14.

C. OV 19

Fountain also argues that he did not interfere, or attempt to interfere, with the administration of justice and, therefore, the resentencing court improperly scored OV 19. We disagree.

The trial court is required to assess 10 points for OV 19 when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . . ." MCL 777.49(c). A trial court may consider conduct that occurred after the defendant completed the sentencing offense when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

"[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Interference or attempted interference with the administration of justice is not merely limited to conduct that would constitute a chargeable offense, such as obstruction of justice. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught

and held accountable for the sentencing offense." *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016). "Providing a false name to the police constitutes interference with the administration of justice" under OV 19. *Barbee*, 470 Mich at 288. Interference with the administration of justice also includes conduct such as "fleeing from police contrary to an order to freeze" or "attempting to deceive the police during an investigation." *Hershey*, 303 Mich App at 344. Disposing of the weapon that was used and the clothing that the defendant was seen wearing can also support the assessment of 10 points under OV 19. *People v McKewen*, 326 Mich App 342, 358; 926 NW2d 888 (2018).

We have also held that "a multifaceted attempt to create a false alibi and mislead the police" will support an assessment of 10 points for OV 19. *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). In *Ericksen*, the defendant wiped down his weapon, asked a companion to dispose of it, and asked others to lie about where he was on the night of the crime. *Id*. at 203. We held that because "[h]is actions ultimately constituted fabrications that were self-serving attempts at deception obviously aimed at leading police investigators astray or even diverting suspicion onto others and away from him," a score of 10 points was not error. *Id*. at 204. We held that a score of 10 points was also not error where the defendant disposed of the weapon he used and the clothing he was observed in, even though the case did "not involve the combination of factors that was found to constitute interference with the administration of justice in *Ericksen*." *McKewen*, 326 Mich App at 358.

Fountain first argues that OV 19 does not apply to conduct that occurs before the police begin to investigate a crime. Yet the Michigan Supreme Court has held that "[t]he 'administration of justice' process, including the 'actual judicial process,' is not commenced until an underlying crime has occurred, which invokes the process." *Smith*, 488 Mich at 202. Actions that are taken after the crime is committed, but before police are in pursuit, can interfere with the administration of justice. See *Ericksen*, 288 Mich App at 203-204. Therefore, any conduct following Fountain's fleeing of the gas station could be considered for the purposes of OV 19. Given that police responded to the gas station minutes after the crime, all of the actions at issue did take place after police investigation had begun.

The record supports a finding that Fountain interfered, or attempted to interfere, with the administration of justice. He was convicted of arson for setting the getaway car, which was a key piece of evidence, on fire. He also lied to police investigators about whether he was involved in the crime, where he was when the crime was being committed, whether he possessed the clothing he had worn during the crime, and how he received his burns. Fountain did not, as he argues, merely fail to help the police capture him; he took several affirmative actions in an attempt to mislead the police. The trial court did not err by assessing 10 points for OV 19.

Affirmed.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan