

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVEZ DENIQUE WATERS,

Defendant-Appellant.

UNPUBLISHED

December 17, 2020

No. 350290

Washtenaw Circuit Court

LC No. 18-000583-FC

Before: BOONSTRA, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted¹ his bench-trial convictions of bank robbery, MCL 750.531, and armed robbery, MCL 750.529. The trial court sentenced defendant to concurrent prison terms of 4 to 10 years for the bank robbery conviction, and 10 to 20 years for the armed robbery conviction, with credit for 191 days served. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant robbed the Key Bank in Ypsilanti, Michigan on June 8, 2018, threatening the bank’s teller, Mariann Scherdt (Scherdt), with what turned out to be pellet gun and demanding that she give him money. Defendant was arrested shortly after the robbery and admitted at trial to robbing the bank. Scherdt testified at defendant’s preliminary examination that she feared for her life during and after the incident, that her fear was not relieved after learning that defendant had not been armed with a real gun, and that she had sought counseling.

At sentencing, defendant objected to the scoring of Offense Variables (OVs) 4 and 13. He argued that there was no evidence to support the assessment of 10 points for OV 4 (serious psychological injury to a victim) and that, because defendant’s convictions for bank robbery and armed robbery resulted from the same criminal act, he had not committed a “pattern of felonious

¹ *People v Waters*, unpublished order of the Court of Appeals, entered December 10, 2019 (Docket No. 350290).

criminal activity involving three or more crimes against a person” so as to warrant the assessment of 25 points under OV 13. The trial court disagreed with both objections, and sentenced defendant as described.

This appeal followed. On appeal, defendant only challenges the trial court’s scoring of OVs 4 and 13.

II. OV 4

Defendant argues that the trial court erred by assessing 10 points under OV 4. We disagree.

For preserved challenges to the scoring of sentencing variables, “the trial court’s findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence.” See *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). “Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.” *Id.* (quotation marks and citation omitted). Preponderance of the evidence means that the evidence, “when weighed with that opposed to it, has more convincing force and the greater probability of truth.” *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). Whether a sentencing court has properly interpreted and applied a sentencing statute is a question of statutory interpretation that we review de novo. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A scoring error that affects a defendant’s guidelines range generally requires resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

OV 4 concerns “psychological injury to a victim.” MCL 777.34. OV 4 is assessed at zero points when “[n]o serious psychological injury requiring professional treatment occurred to a victim,” MCL 777.34(1)(c). OV 4 is assessed at 10 points when “serious psychological injury requiring professional treatment occurred to a victim,” MCL 777.34(1)(a), or “if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.34(2). “[E]vidence of fear while a crime is being committed, *by itself*, is insufficient to assess points for OV 4.” *People v White*, 501 Mich 160, 162; 905 NW2d 228 (2017). Furthermore, MCL 777.34 requires more than the assumption that a reasonable person would have suffered psychological harm in the victim’s place. *Id.* at 163.

At the preliminary examination, Scherdt testified that, as a result of the incident, she was scared, very frightened, and afraid of being shot. Defense counsel asked her whether she had, since the time of the bank robbery, “sought any counseling of any sort,” to which Scherdt responded, “Yes.” Defendant argues that Scherdt did not explicitly testify that her counseling was related to the bank robbery. However, the trial court’s conclusion that the counseling was related to the bank robbery was a reasonable and appropriate inference in light of the context of the questioning. The trial court’s factual findings were supported by a preponderance of the evidence and were not clearly erroneous. See *Cross*, 281 Mich App at 740; *McChester*, 310 Mich App at 358. The trial court did not err by assessing 10 points for OV 4. *Hardy*, 494 Mich at 438.

III. OV 13

Defendant also argues that the trial court erred by assigning 25 points to OV 13. We disagree. This issue involves questions of statutory interpretation, which we review de novo. See

Hardy, 494 Mich at 438. Statutory language is to be construed according to its plain and ordinary meaning. *People v Noble*, 238 Mich App 647, 658-659; 608 NW2d 123 (1999). If the meaning of a statute is clear and unambiguous, further construction is neither required nor permitted. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

OV 13 is scored for a “continuing pattern of criminal behavior.” MCL 777.43(1). Under MCL 777.43(1)(c), 25 points are to be assessed for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” Ten points are to be assessed if the “offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property[.]” MCL 777.43(1)(d). “For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a).

Defendant argues that, because his convictions for armed robbery and bank robbery arose from a single criminal act, and because his only other felonious criminal activity against a person in the previous 5 years was one count of unarmed robbery, the trial court erred by determining that 25 points could be assessed under MCL 777.43(1)(c). Defendant is mistaken. The language of MCL 777.43(1)(c) requires that the pattern of felonious criminal activity involve “3 or more crimes against a person”; it does not require that each of those crimes against a person arise from a separate criminal act.

This Court’s holding in *People v Carll*, 322 Mich App 690, 693; 915 NW2d 387 (2018), does not support defendant’s contention. In *Carll*, the defendant’s four convictions arose from one incident, which occurred when the defendant drove through a stop sign. *Id.* at 693-694. On appeal, the defendant argued that the trial court erred by assessing 25 points for OV 13 because all four convictions arose from a single act and he did not have any prior convictions. *Id.* at 704. This Court agreed, holding that the “continuing pattern of criminal behavior” language used in OV 13 meant that “the statute contemplates that there must be more than one felonious event.” *Id.* at 704-705. However, *Carll* did not hold that *three* separate criminal acts underlying three felony crimes against a person were required to justify a score of 25 points for OV 13; rather, this Court merely held that a pattern of felonious criminal activity must involve more than one underlying criminal act. *Id.*; see also *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001) (holding that the trial court “appropriately scored OV 13 at twenty-five points because of defendant’s four concurrent convictions” when the defendant committed separate criminal acts in a single episode.).

In this case, the sentencing offenses were armed robbery and bank robbery. Both felonies are crimes against a person. MCL 777.16y. Defendant was convicted in 2016 of felony receiving and concealing stolen property, MCL 750.535, a crime against property, MCL 777.16z. He was

also charged with unarmed robbery, a crime against a person, MCL 750.530, for an offense occurring on March 8, 2018.²

Defendant undisputedly committed “more than one felonious act” during the 5 year-period that encompasses the sentencing offense, having committed a total of four felonies in three separate felonious acts: one felony for the act in 2016, one felony for the act in March 2018,³ and two felonies for the act in June 2019. *Carll*, 322 Mich App at 705. This pattern of felonious activity involved three crimes against a person: one unarmed robbery, one armed robbery, and one bank robbery. See MCL 777.43(1)(c). The plain language of MCL 777.43(1)(c) requires no more; we decline defendant’s invitation to read into the statute a requirement that a defendant have committed three or more *separate criminal acts* in addition to three or more crimes against a person. See *Noble*, 238 Mich App at 658-659. Such a judicial gloss on statutory language is neither required nor permitted. See *Davis*, 468 Mich at 79.⁴

We find no error in the trial court’s assessment of 25 points for OV 13. Because neither OV 4 nor OV 13 was scored in error, defendant is not entitled to resentencing. *Francisco*, 474 Mich at 92.

Affirmed.

/s/ Mark T. Boonstra
/s/ Michael F. Gadola
/s/ Jonathan Tukel

² Defendant committed the bank robbery and armed robbery at issue in this case while released from jail under a bond for the unarmed robbery charge. The prosecution dismissed the unarmed robbery charge after defendant was sentenced for his convictions in this case.

³ Although defendant now disputes that a preponderance of the evidence establishes that defendant committed the unarmed robbery, defendant does not dispute that he did not contest the accuracy of the allegation before the trial court and that the unarmed robbery offense is properly scorable, using a preponderance of the evidence standard, for purposes of OV 13.

⁴ The prosecution argues that the act of robbing a bank and robbing a person are separate and distinct and should be treated as such for the purposes of OV 13. And, certainly, the elements of the two offenses are different, and a person can commit a bank robbery without committing an armed robbery. We need not decide in this case, however, whether the armed robbery and bank robbery were predicated on separate acts for purposes of OV 13. As noted, even if both felonies were predicated on a single act, defendant had still committed more than one felonious act within the relevant five-year period, and was properly assessed 25 points under OV 13 for three felony crimes against a person.