

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHLEY NICHOL DAVENPORT,

Defendant-Appellant.

UNPUBLISHED

June 24, 2021

No. 353417

St. Clair Circuit Court

LC No. 19-002594-FH

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of felonious assault, MCL 750.82(1), and assault or assault and battery, MCL 750.81(1). Defendant was sentenced to 120 days in jail and two years’ probation for her felonious assault conviction and three days in jail, time served, for her assault or assault and battery conviction. Defendant argues that the trial court erred by assessing 10 points for Offense Variable (OV) 9. We affirm.

I. FACTUAL BACKGROUND

At defendant’s trial, several witnesses testified that they saw defendant engage in an altercation with Donald Essenmacher, the victim, outside of Essenmacher’s home, during which defendant held a tire iron and swung a scissor jack multiple times. Three individuals—Ronald Stebbins, Robert Moran, and Ashley Goudreau—watched the altercation from the driveway of Stebbins’s home across the street. Multiple witnesses further testified that, at some point, defendant crossed the street and approached Stebbins. Essenmacher’s cousin, Adam Stein, was also present during defendant’s altercation with Essenmacher.

Following defendant’s jury trial convictions, the trial court held a sentencing hearing. At the outset of the hearing, defense counsel challenged the proposed scoring of OV 9 at 10 points, arguing that there was no evidence that more than one person was placed in danger of injury or death by defendant’s actions. After briefly hearing arguments on the issue, the trial court concluded that OV 9 was properly assessed 10 points. Specifically, the court stated that trial testimony supported a finding that, after the confrontation with Essenmacher, defendant, while holding the tire iron and jack in her hands, confronted two other individuals across the street from

Essenmacher's home. Considering the "nature" of the confrontation, the trial court believed "that those persons would be reasonably considered victims of concern that they might be assaulted themselves."

II. ANALYSIS

Defendant argues that the trial court erred by assessing 10 points for OV 9 because fewer than two victims were placed in danger of physical injury or death during the sentencing offense. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* "A trial court's findings of fact are clearly erroneous if, after reviewing the entire record, [this Court is] definitely and firmly convinced that the trial court made a mistake." *People v Carlson*, 332 Mich App 663, 666; 958 NW2d 278 (2020). "A trial court may consider all record evidence when calculating the sentencing-guidelines range." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019).

"OV 9 is governed by MCL 777.39, and addresses the number of victims." *People v Fawaz*, 299 Mich App 55, 62; 829 NW2d 259 (2012). Ten points must be assessed for OV 9 if there were 2 to 9 victims who were "placed in danger of physical injury or death." MCL 777.39(1)(c). "Each person placed in danger of injury or death during the commission of the sentencing offense is considered a 'victim' for the purposes of scoring OV 9." *People v Baskerville*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345403); slip op at 8. "A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *Id.* (cleaned up). "Points assessed under OV 9 must be based solely on the defendant's conduct during the sentencing offense." *People v Rodriguez*, 327 Mich App 573, 581-582; 935 NW2d 51 (2019). "The sentencing offense is defined as the crime of which the defendant has been convicted and for which he or she is being sentenced." *People v Carpenter*, 322 Mich App 523, 529; 912 NW2d 579 (2018) (cleaned up).

Here, the sentencing offense was felonious assault of Essenmacher. Therefore, Essenmacher constitutes one victim for purposes of OV 9. Although the trial court did not provide great elaboration regarding its decision to assess 10 points for OV 9, it did note that, in addition to approaching Essenmacher and Stein, defendant also approached two individuals across the street. As an initial matter, it is worth noting that the testimony at trial actually indicated that there were three people across the street when defendant approached. However, the trial court did not clearly err by finding that any two of the three people across the street—Stebbins, Moran, and Goudreau—constituted victims for purposes of scoring OV 9.

First, Stebbins could properly be considered a victim for purposes of OV 9. Testimony at trial indicated that Stebbins stood across the street from Essenmacher's house while the altercation between Essenmacher and defendant occurred. Testimony further indicated that defendant walked across the street, confronted Stebbins, and swung one of the objects while interacting with Stebbins. Defendant was approximately 4 to 10 feet away from Stebbins when this occurred.

Therefore, Stebbins was in close enough proximity to the “physically threatening situation” resulting from defendant’s felonious assault of Essenmacher to be considered a victim for purposes of OV 9. *Baskerville*, ___ Mich App at ___; slip op at 8. See also *People v Sargent*, 481 Mich 346, 350-351 n 2; 750 NW2d 161 (2008) (stating that “in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life.”).

Moran could also properly be considered a victim for purposes of OV 9. Testimony at trial indicated that Moran also stood across the street from Essenmacher’s home and watched as the altercation between defendant and Essenmacher occurred. Moran described defendant as being “pretty close” to him, Goudreau, and Stebbins at a certain point during the incident. At some point, defendant crossed the street, thereby getting closer to where the group stood. Testimony indicated that defendant held a tire iron and a scissor jack during the altercation with Essenmacher, and that she was holding at least the scissor jack when she crossed the street and approached the group. Although the evidence at trial did not indicate that defendant directly interacted with Moran, Moran was in close enough proximity to the physically threatening situation resulting from defendant’s felonious assault of Essenmacher to be considered a victim for purposes of OV 9. *Id.* See also *Rodriguez*, 327 Mich App at 582 (concluding that the trial court properly counted an individual as a victim for purposes of OV 9 because he was outside of his apartment and in close proximity to the robbery committed by the defendant.).

Finally, Goudreau could properly be considered a victim for purposes of OV 9. Testimony at trial indicated that Goudreau stood across the street with Moran and Stebbins and watched the altercation between defendant and Essenmacher. The three were “pretty close” to defendant at a certain point during the altercation. Again, defendant was holding a tire iron and a scissor jack during the altercation with Essenmacher. Defendant crossed the street toward where Goudreau stood, and she was holding at least the scissor jack when she did so. Goudreau testified that defendant was “swinging things at everybody there.” Therefore, Goudreau was also in close enough proximity to be considered a victim for purposes of OV 9. Further, at least two other witnesses testified that they stood in between defendant and Essenmacher during the altercation in front of Essenmacher’s home.

Considering all of the trial testimony, we are not left with a definite and firm conviction that the trial court mistakenly assessed 10 points for OV 9, where the trial court concluded that two of the individuals across the street were victims for purposes of scoring OV 9. *Carlson*, 332 Mich App at 666. Because the trial court did not err by assessing 10 points for OV 9, defendant is not entitled to resentencing. *People v Walden*, 319 Mich App 344, 350; 901 NW2d 142 (2017).

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Michelle M. Rick