

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

RUSTY JOE KELSEY,

Defendant-Appellant.

No. 298456
Genesee Circuit Court
LC No. 09-024764-FH

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant pleaded guilty to unarmed robbery, MCL 750.530, and was sentenced to a prison term of 29 to 180 months. He appeals by delayed leave granted, arguing that the trial court erred in scoring the sentencing guidelines. We affirm.

Defendant's sole argument is that the trial court erred in scoring 50 points for offense variable (OV) 7 of the sentencing guidelines. When scoring the sentencing guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Factual disputes are to be resolved using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The trial court's findings of fact at sentencing are reviewed for clear error. *Id.* Issues involving the interpretation or application of the legislative sentencing guidelines are reviewed de novo as questions of law. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

The instructions for OV 7 provide, in pertinent part:

(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. 50 points

(b) No 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 0 points

* * *

(3) As used in this section, “sadism” means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification. [MCL 777.37.]

The trial court held an evidentiary hearing to determine the appropriate scoring for OV 7, and we commend the trial court for providing us with an exemplary record. The testimony accepted as credible by the trial court was that during the robbery of the victim’s purse, the victim fought back by holding onto the strap of her purse while defendant tugged on the other strap; at which point defendant brandished a knife, held it within ten inches of the victim’s throat, and repeatedly threatened to kill the victim if she did not release the purse. The victim testified, not surprisingly, that once defendant brandished the weapon and made the threats on her life, she became terrified and therefore let go of her purse.

Although OV 7 is entitled “aggravated physical abuse,” it does not require the actual infliction of physical abuse. *People v Mattoon*, 271 Mich App 275, 276-279; 721 NW2d 269 (2006). Rather, 50 points should be scored if the defendant engages in conduct “designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). The *Random House Webster’s College Dictionary* (2d ed), p 1285, defines “substantial” as “of ample or considerable amount, quantity, size, etc.” It defines “design” as “to intend for a definite purpose,” and to “form or conceive in the mind; contrive; plan.” *Id.* at 357. Thus, the plain meaning of OV 7 requires conduct that is intended to increase the victim’s fear during the offense by a considerable amount. Further, as the trial court observed, OV 7 provides a sentencing court with only two choices, a score of zero points or a score of 50 points. Thus, we conclude that OV 7 was intended to apply only to conduct that is very serious, beyond the egregiousness minimally necessary to technically accomplish the charged offense.

The evidence here adequately supports the trial court’s score of 50 points for OV 7. The offense variables are scored by reference to the sentencing offense. *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009). Critically, the sentencing offense here is *unarmed* robbery. Defendant’s use of a knife, in the context of not merely credible but also repeated threats of imminently inflicted death, is far more serious conduct than minimally required to accomplish an unarmed robbery, and it was clearly intended to substantially increase the victim’s fear and anxiety during that offense. In *Hornsby*, 251 Mich App at 468-469, this Court upheld a 50-point score for OV 7 for an armed robbery conviction because defendant had brandished a gun during a robbery and had repeatedly made threats to one or more of the victims present during the

robbery. Certainly, using a weapon that is not an element of the offense and making multiple threats to kill the victim while holding that weapon to her throat is “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Amy Ronayne Krause