

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 18, 2012

v

ERIC MONTANEZ,

No. 305358
Oakland Circuit Court
LC No. 2010-234988-FC

Defendant-Appellant.

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur fully with the majority’s analysis and decision to affirm defendant’s convictions. However, I cannot join the majority’s decision to affirm the trial court’s application of the sentencing guidelines. The trial court clearly erred when it found that Alex Cartagena sustained a life threatening injury and, for that reason, erred as a matter of law when it scored offense variable (OV) 3 at 25 points. Further, because this error altered the applicable sentencing range, I conclude that it warrants resentencing. Because I would remand for resentencing, I must respectfully dissent in part.

This Court reviews de novo whether a trial court properly interpreted and applied the sentencing guidelines when scoring offense variables. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). Our Supreme Court has held that the factual findings underlying a scoring decision must be proved by a preponderance of the evidence and appellate courts must review the findings for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

On appeal and before the trial court, defendant’s lawyer argued that OV 3 should have been scored at 10 points rather than 25, because Cartagena’s injury was not life threatening. In reply, the prosecutor conceded that the injury was a “grazing” wound, but argued that because it was a grazing wound to Cartagena’s head—as opposed to his ankle—it was life threatening. The trial court agreed and, without any additional evidence, found that the injury was life threatening for purposes of scoring OV 3.

The Legislature provided that a trial court must score OV 3 on the basis of physical injury to a victim. See MCL 777.33(1). The trial court had to find whether and to what extent any victim was injured and then score OV 3 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.” *Id.*

Here, there is no reasonable dispute that a bodily injury “occurred” to Cartagena. As such, the trial court had to score the highest level of points attributable given the nature of the injury. *Id.*

The trial court had to score 25 points under OV 3 if a “life threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). However, if the injury was not life threatening, but was still a “bodily injury requiring medical treatment”, the trial court had to score OV 3 at 10 points. MCL 777.33(1)(d). There is no dispute that Cartagena did not suffer a “permanent incapacitating injury.” The very narrow question is whether a “life threatening” injury “occurred.” MCL 777.33(1)(c) (emphasis added). I do not believe that Cartagena’s injury constituted a life threatening injury.

Neither party admitted Cartagena’s medical records at trial or at sentencing. Instead, the only evidence concerning the nature and extent of his injuries involved his testimony and that of other witnesses. Noticeably absent was testimony from any medical care providers. All the testimony described Cartagena as having been “grazed” by a bullet, resulting in a “gash.” Cartagena’s uncle, who was present to see the injury at its worst, testified that he was unable to tell how bad the injury was, but saw a gush of blood. He also stated that, as he drove Cartagena to the hospital, Cartagena had the presence of mind to lean his head so that he would not get the car interior dirty. Cartagena himself testified that he first noticed the injury because he felt something hot on the back of his head. After he realized that he had some sort of injury, Cartagena drove to his uncle’s home. He stated that he was “just, you know, kind of, in pain”, but was “doing alright.” Cartagena’s brother testified that he checked the wound and saw a “real big gash.”

As with most injuries to the head, the testimony suggested that Cartagena bled quite a bit. However, he never lost consciousness and was able to describe the incident to a police officer while he was being treated at the hospital. Although he did go to the emergency room, he was treated and released in about three hours. Accordingly, I conclude that this evidence does not support a finding by a preponderance of the evidence that the injury was life threatening. *Osantowski*, 481 Mich at 111.

I believe the trial court and the majority have conflated the life threatening *act* (firing a loaded gun at the victim) with a life threatening *injury* (a graze to the head). Firing a gun at a person is always a potentially life-threatening act and that is why defendant was charged and convicted of assault with intent to commit murder. See MCL 750.83. But our focus in this appeal is not on that act. Nor is it on the injury that *might* have “occurred”; it is on the injury that *did* occur. See MCL 777.33(1)(c) and (d). And, while that injury unquestionably required medical attention, the actual testimony and evidence shows that it was not life threatening.

I conclude that the trial court clearly erred when it found that Cartagena suffered a life threatening injury—solely on the basis of anecdotal evidence that a grazing wound to the head is somehow more life threatening than one to the ankle. Because the facts only supported a finding that Cartagena suffered an injury that required medical treatment, the trial court had to score OV 3 at 10 points rather than 25. MCL 777.33(1)(d). Because the change in score alters the recommended minimum sentence range, I would vacate defendant’s sentence and remand for resentencing. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

For these reasons, I must respectfully dissent in part.

/s/ Michael J. Kelly