

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 19, 2013

v

ADAM RUSSELL WEAVER,  
Defendant-Appellant.

No. 308964  
Ingham Circuit Court  
LC No. 11-000849-FC

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Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, carrying a weapon with unlawful intent, MCL 750.226, and assaulting, resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to the following prison terms: 144 to 480 months for armed robbery, 18 to 60 months for carrying a concealed weapon, and 18 to 60 months for carrying a weapon with unlawful intent. Defendant was sentenced to 161 days in jail for assaulting, obstructing, or resisting an officer. Defendant appeals his sentences as of right. For the reasons set forth in this opinion, we affirm defendant's sentences and remand for the ministerial task of amending the judgment of sentence to eliminate the order of restitution.

Defendant's convictions arise out of the armed robbery he perpetrated on an 80-year-old woman who was alone in her home. Defendant contends that the trial court erroneously scored several of the legislative sentencing guidelines' offense variables (OVs). We review a trial court's scoring decisions to determine whether the court "properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring decision will be upheld if there is any evidence to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant first contends that the trial court erred in scoring OV 3 at 10 points. MCL 777.33(1)(d) governs the scoring of OV 3 and it directs a trial court to assess 10 points if "[b]odily injury requiring medical treatment occurred to a victim." Defendant incorrectly contends that "occurred" means "proximately caused" the victim's injury. Instead, for purposes of OV 3, bodily injury occurring to a victim "encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). Additionally, defendant ignores the

plain language of our Supreme Court’s holding in *People v Laidler*, 491 Mich 339, 341-346 n 2; 353; 817 NW2d 517 (2012), that OV 3 is subject to scoring upon a showing that the victim was harmed by the criminal actions of defendant.

In this case, there was evidence to allow the trial court to find that the victim suffered a bodily injury that required medical treatment. Here, the record shows that, immediately after defendant perpetrated the armed robbery against the elderly victim, the victim was scared, shaken, crying and felt ill. A roofer, who happened to appear at the victim’s house as defendant fled the scene, testified that the victim did not appear well. The victim was taken to the hospital the same day and learned that she had suffered a heart attack. On this record, the trial court did not abuse its discretion in scoring OV 3 at 10 points.

Defendant next argues that the trial court erred in scoring OV 7 at 50 points. MCL 777.37(1)(a) governs the scoring of OV 7 and the statute directs a trial court to score 50 points where “[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.” In this case, the trial court scored 50 points for OV 7, explaining, “I look at conduct designed to substantially increase the fear and anxiety a victim suffered . . . and I consider gun, knife, pushing, laying on bed, and duct tape, those are pretty significant when compiled together. . . .”

In *People v Glenn*, 295 Mich App 529; 533-534; 814 NW2d 686 (2012),<sup>1</sup> this Court held that for purposes of scoring OV 7, “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense,” should be construed to cover conduct that is “similarly egregious” to sadism, torture and excessive brutality. Furthermore, circumstances inherently present in the sentencing offense must be discounted for purposes of scoring OVs. *Id.* at 535; *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010). In this case, however, having reviewed the record, we cannot conclude that the trial court abused its discretion in scoring OV 7 at 50 points where there is evidence that would allow the court to conclude that defendant engaged in conduct that was designed to substantially increase the victim’s fear and anxiety and that such conduct was similarly egregious to sadism, torture, and excessive brutality. Here, after forcing the victim to produce her “stash,” and after rummaging through the victim’s purse, defendant produced a knife. Defendant locked the inside door and took the key to the door. Defendant told the victim to be quiet and go to a bedroom. He held the victim’s arm and pushed the victim into a back bedroom. Defendant pulled out some tape and some latex gloves and instructed the 80-year-old victim to lie down on a bed. Defendant unrolled some tape before abruptly leaving the home. On this record, we cannot conclude that the trial court abused its discretion in scoring OV 7 at 50 points. Defendant had robbed the victim and then he forced her into a back bedroom and instructed her to lie on a bed while he got out some tape and latex gloves. It was not an abuse of discretion to conclude that this conduct substantially increased the fear and anxiety of the 80-year-old victim beyond that caused by the armed robbery as

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<sup>1</sup> We note that our Supreme Court has granted the prosecution’s application for leave to appeal in *Glenn*, 295 Mich App at 529, and that case currently remains pending before our Supreme Court. *People v Glenn*, 481 Mich 934; 814 NW2d 294 (2012).

defendant's actions would have caused the victim to fear that defendant planned to bind and assault her and leave her for dead or sexually assault her or kill her with his knife. In sum, the trial court did not abuse its discretion in scoring OV 7 at 50 points.

Next, defendant contends that the trial court erred in scoring OV 10 at 10 points. OV 10 is properly scored at 10 points where an offender exploited a victims' vulnerability, including "agedness." MCL 777.40(1)(b). The victim in this case was an 80-year-old woman. Testimony established that defendant had first approached another home in the neighborhood but left without incident when a 56-year-old man answered the door. Evidence that defendant robbed an elderly woman who was alone in her home and did not rob a younger man shows that he sought to exploit the victim's age and vulnerability. Hence, there is record evidence to support a finding that defendant exploited the victim's vulnerability and the trial court did not abuse its discretion in scoring OV 10 at 10 points.

Finally,<sup>2</sup> defendant contends that the trial court erred in ordering him to pay \$1,357.08 in restitution. Defendant argues that everything that he took from the victim was recovered and he contends that he was entitled to a restitution hearing.

An award of restitution is mandatory where factual findings support it. MCL 780.766(3). Restitution is appropriate for losses that are a direct result of defendant's criminal conduct, and can be easily ascertained. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). In the absence of a dispute, a trial court may rely on the recommendation in the presentence report, and need not make any express factual findings regarding restitution. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997). However, "a dispute" must be resolved by the trial court, by a preponderance of the evidence. *Id.*; MCL 780.767(4).

In this case, defense counsel reserved the right to a hearing and requested an itemization with respect to the presentence investigation report's recommendation concerning restitution. However, the trial court did not make any findings or hold an evidentiary hearing before it ordered restitution contrary to MCL 780.767(4). Furthermore, the prosecutor concedes that there was no evidence to support the award of restitution and agrees that the judgment of sentence should be amended to eliminate the restitution amount. Therefore, we remand with instruction to amend the judgment of sentence accordingly.

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<sup>2</sup> At the time he filed his claim of appeal, defendant also challenged the trial court's scoring of OV 13; however, the scoring of OV 13 has been rendered moot. During the pendency of this appeal, this Court granted defendant's motion to remand to challenge the scoring of OV 13. *People v Weaver*, unpublished order of the Court of Appeals, entered September 21, 2012 (Docket No. 308964). On remand, the trial court rescored OV 13 at zero points as requested by defendant. See *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011).

Affirmed, but remanded for the ministerial task of amending the judgment of sentence.  
We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ Michael J. Kelly  
/s/ Mark T. Boonstra