STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	No. 309407 Wayne Circuit Court
KAHRI WORTHY SMITH, Defendant-Appellant.	LC No. 11-000477-FC

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals by leave granted his jury conviction of second-degree murder, MCL 750.317. He was sentenced to 240 to 480 months' imprisonment. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

On August 4, 2010, defendant beat his uncle, Eric Smith, to death. Smith had locked defendant out of his house and defendant was attempting to break in to Smith's house. While Smith was telephoning people requesting help, defendant kicked in a basement window, and then he kicked in a door, entered Smith's house, and beat him in the head and face. When Smith's son and daughter arrived minutes later, they found Smith bleeding from his face and unconscious near an open side door to the house. When Smith's son asked defendant what happened to his dad, defendant answered: "I killed that motherfucker." Smith was taken to the hospital where he died.

The medical examiner testified that Smith died from several blunt-force head wounds. Smith had two black eyes, abrasions on his forehead, and both ears were bruised and had extensive swelling. He also had bruises on the top of both shoulders and on the backs of both wrists. The mucous membranes in Smith's mouth had multiple tears. An internal examination revealed that Smith had extensive hemorrhagic infiltration of the soft tissues of the scalp, his brain was extensively swollen, and he had a subdural hemorrhage, as well as multiple patches of hemorrhage scattered throughout the surface of his brain. The medical examiner testified that Smith's injuries were consistent with being struck by fists and that Smith "suffered extensive blows throughout the left side of his head." Defendant's defense to the charge was legal insanity, which the jury rejected. Defendant had requested a self-defense jury instruction, which the trial court denied.

On appeal, defendant first argues that he was denied his constitutional right to present a defense because the trial court refused to allow him to present evidence, and refused to instruct the jury, on a self-defense theory. We disagree.

This Court reviews de novo whether a defendant was denied the constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A claim of instructional error involving a question of law is reviewed de novo, but the trial court's determination whether a jury instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citations omitted). The jury instructions must include all of the elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

A defendant's right to present a defense is a fundamental component of due process. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). However, this right is not absolute, and a defendant must conform to the rules of procedure and evidence in presenting his defense. *Id*. Michigan's self-defense law is set forth at MCL 780.972, which provides in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

The defendant bears the burden of producing some evidence to establish a prima facie case of self-defense. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010).

In this case, the undisputed evidence included that defendant did not have the legal right to be in Smith's house, Smith did not want defendant in his house, and defendant kicked in a door in order to enter Smith's house at which time he beat Smith, inflicting fatal injuries. Further, there was no evidence to support a claim that defendant honestly and reasonably believed that the use of deadly force against Smith was necessary to prevent defendant's imminent death or imminent great bodily harm. Smith had defensive injuries on the backs of his wrists, was 5'10" tall, and weighed 114 pounds, and was found unconscious near a side door to the house. Defendant was 5'9" tall and weighed 190 pounds. There was no evidence that Smith had any weapon or threatened defendant with a weapon. Because the evidence did not support a self-defense theory, defendant was not denied his constitutional right to present this defense and the trial court did not abuse its discretion when it precluded defendant from raising the defense and in refusing to provide a self-defense instruction to the jury. See *Gillis*, 474 Mich at 113; *Hine*, 467 Mich at 250; *Kurr*, 253 Mich App at 327. Thus, this issue is without merit.

Next, defendant argues that offense variables (OV) 1, 2, 7, and 8 were inaccurately scored; thus, he is entitled to resentencing. We agree in part, and disagree in part. Offense Variables 1, 2, and 8 were improperly scored; thus, resentencing is required.

"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*. This Court will uphold scoring decisions for which any supporting evidence exists. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

First, the trial court scored OV 1 (aggravated use of weapon) at five points. The statutory provision for OV 1 is MCL 777.31, which provides that OV 1 is to be scored at 5 points if "[a] weapon was displayed or implied." MCL 777.31(1)(e). The instructions provide that "[e]ach person in danger of injury or loss of life is counted as a victim for purposes of scoring OV 1." In this case, there was evidence that defendant was holding a knife when Smith's son found defendant in Smith's kitchen. Smith's son testified that defendant displayed a threatening demeanor and that he felt threatened. However, defendant was not beating Smith at the time defendant was seen holding the knife, i.e., the criminal offense was complete at that time. Except where specified, only conduct that relates to the offense being scored may be considered. *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008). In *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009), our Supreme Court held that it was error to consider the entire criminal transaction and use the defendant's post-crime conduct as a basis for scoring an offense variable that did not specifically provide for consideration of conduct after completion of the offense. Offense Variable 1 does not specifically state that conduct after completion of the offense is to be considered. Because the offense against Smith was complete before defendant displayed the weapon to Smith's son, the trial court erred in scoring OV 1 at five points.

Second, the trial court also erred in scoring five points for OV 2 (lethal potential of weapon possessed or used). Offense Variable 2 is to be scored at five points where "the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). Again, MCL 777.32 does not specify that conduct after completion of the crime may be considered in scoring OV 2. There was no evidence that defendant possessed or used a knife or any other weapon during his beating of Smith. Therefore, the trial court erred in scoring OV 2 at five points.

Third, the trial court scored OV 7 (aggravated physical abuse) at 50 points. MCL 777.37(1)(a) provides that OV 7 is to be scored at 50 points if "[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." The presentence investigation report (PSIR) had scored OV 7 at zero points. At sentencing, the prosecutor objected to the score and argued that "beating someone to death with your bare hands is excessive brutality." The trial court apparently agreed and assigned 50 points to OV 7.

In *Hardy*, 494 Mich at 440, our Supreme Court considered a similar challenge to the scoring of 50 points for OV 7, but the justification for the scoring had been that the defendants

engaged in "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense," MCL 777.37(1)(a). After considering the definitions of the relevant terms, the *Hardy* Court concluded that it was "proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 441. The Court also held that, "absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables." *Id*. at 442. And the Court noted that, since this category of conduct only applied when a defendant's conduct was designed to "substantially increase" fear and anxiety, "a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue." *Id*. at 442-443. Such a determination required the sentencing court to consider the severity of the crime, the elements of the crime, and the different ways those elements can be satisfied. *Id*. at 443. Then, the sentencing court was to consider "the fear or anxiety associated with the minimum conduct necessary to commit the offense." *Id*. And, finally, the sentencing court was to examine the record evidence, including how the crime was actually committed, "to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount." *Id*.

The analysis set forth in *Hardy* is a useful guide in determining a sentencing court's proper considerations when the alleged justification for scoring OV 7 at 50 points is that the victim was treated with excessive brutality during the commission of the offense. The phrase "excessive brutality" is not defined by the statute, but we may consult dictionary definitions when terms are not expressly defined. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). *Random House Webster's College Dictionary* (1997) defines "excessive" as "going beyond the usual, necessary, or proper limit or degree; characterized by excess." That dictionary also defines "brutality" as "the quality of being brutal," and the definitions of "brutal" include "savage; cruel; inhuman" and "harsh; severe." Thus, in a second-degree murder case, the sentencing court must consider whether the defendant treated the victim with more brutality than the "usual" brutality associated with second-degree murder, i.e., "excessive brutality." Conduct inherent in the crime of second-degree murder may be considered. *Hardy*, 494 Mich at 442. Further, because this category of conduct only applies when the defendant's brutal conduct was "excessive," a sentencing court must determine a baseline for the "usual" amount of brutality a victim of second-degree murder experiences. *Id*. at 442-443. And, as in the *Hardy* case, the sentencing court should consider the elements of second-degree murder, the different ways the elements can be satisfied, and the amount of brutality usually necessary to commit second-degree murder. *Id*. at 443.

In this case, the evidence supported the trial court's conclusion that defendant's beating of Smith was excessively brutal in this second-degree murder. Second-degree murder is "[a]ll other kinds of murder," i.e., not first-degree murder. MCL 750.317. A second-degree murder is a death, caused by the defendant, with malice, and without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). A second-degree murder can be committed in a multitude of different ways, including by shooting, stabbing, choking, striking someone in the head extremely hard or with an object, and striking someone repeatedly in the

head. Some of the methods employed to cause the victim's death are quick-acting and just brutal enough to inflict death, while other methods employed to cause the victim's death are slow-acting and more savage, cruel, or inhuman than necessary to cause death.

Here, the evidence revealed that defendant struck Smith in his head and face multiple times. Both of his eyes were black and both of his ears were bruised and had extensive swelling. The mucous membranes in Smith's mouth had multiple tears. He had bruises on the tops of both shoulders. There was also extensive bleeding and swelling of Smith's brain. And Smith had bruises on the backs of both wrists, likely from trying to prevent defendant's repeated punches from making contact with his head and face. The medical examiner further explained:

> Well, I think what matters is that Mr. Smith is dead and that he was struck multiple times. And I think that although it takes considerable force from each blow to cause injuries like this, ultimately what killed him was the cumulative force and the cumulative effect of multiple blows on the head resulting in the bleeding on the surface of the brain and the swelling of the brain.

During cross-examination by defense counsel, the medical examiner also agreed that a person who is hit hard enough even one time can suffer fatal brain swelling and die. Clearly, if defendant had used a heavy object to strike Smith in the head, Smith could have suffered the fatal injuries defendant intended to inflict more quickly. There were also other means by which defendant could have accomplished his deadly objective rather than repeatedly striking Smith—a much smaller man—in the head and face with his fists. In light of the savage and prolonged nature of the beating that Smith endured from defendant's repeated blows to his head and face, some of which Smith tried to block, we conclude that the trial court properly exercised its discretion in holding that defendant's severe beating of his uncle was excessively brutal; thus, the scoring OV 7 at 50 points is affirmed.

Finally, the trial court scored OV 8 (victim asportation or captivity) at 15 points. MCL 777.38(1)(a) provides that OV 8 should be scored at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." The PSIR had scored OV 8 at zero points. At sentencing, the prosecutor objected to the score and argued that Smith was held captive in his house "for long enough to make two or three phone calls to his relatives, in which he was saying that the Defendant was trying to break in." The trial court agreed, concluding that the evidence indicated that Smith was held captive before the murder was committed, and assigned 15 points to OV 8. We do not agree. Although there was evidence that defendant had kicked in a basement window and was attempting to kick in a door to Smith's house, there was no evidence to suggest that Smith could not have escaped through another door or window during that time. That is, while defendant was attempting to kick in one door, Smith could have attempted escape out of another door or window. The evidence suggests that Smith had sufficient time to attempt escape because, during the time defendant was attempting to break into the house, Smith called his mother and made two calls to his son. Therefore, we conclude that Smith was not held "captive" within the contemplation of MCL 777.38(1)(a); thus, OV 8 was improperly scored at 15 points.

Defendant's OV score was calculated at 115 by the trial court. However, OV 1 and OV 2 were improperly scored at 5 points each, and OV 8 was improperly scored at 15 points. Thus, defendant's corrected OV score is 90 points, which is OV Level II, not OV Level III. See MCL 777.61. Because defendant's prior record variable level was B, and with his placement at OV Level II, defendant's minimum guidelines range is 162 to 270 months, rather than 180 to 300 months or life. See MCL 777.61. Because the sentencing errors affected defendant's minimum guidelines range, remand for resentencing is required. See *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006). Accordingly we vacate defendant's sentence and remand for resentencing consistent with this opinion.

Defendant's conviction is affirmed, but his sentence is vacated and this matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad