

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 21, 2013

v

ANDRE DAVON CHRISTIAN,
Defendant-Appellant.

No. 309981
Oakland Circuit Court
LC No. 2011-236286-FC

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Andre Davon Christian, appeals by delayed leave granted from sentences imposed on his plea-based convictions of bank robbery, MCL 750.531, and unarmed robbery, MCL 750.530. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 11 to 60 years for each conviction. We affirm.

Defendant challenges the trial court's score of 50 points for offense variable (OV) 7, MCL 777.37, of the sentencing guidelines. "This Court . . . reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Carrigan*, 297 Mich App 513, 514; 824 NW2d 283 (2012). We will uphold the trial court's scoring decision if there is any evidence to support it. *Id.*

OV 7 considers whether the defendant inflicted "aggravated physical abuse." MCL 777.37(1). However, it is not necessary that there be actual physical abuse in order to score 50 points for OV 7. *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). A score of 50 points is warranted 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." MCL 777.37(1)(a). This Court has held that "conduct designed to substantially increase" the victim's fear and anxiety must be that which is "designed to cause copious or plentiful amounts of additional fear" and anxiety beyond that "inherently present in the crime." *People v Glenn*, 295 Mich App 529, 533-535; 814 NW2d 686 (2012), lv gtd 491 Mich 934 (2012).

The sentencing offense was bank robbery. "[U]nless stated otherwise, only conduct that relates to the offense being scored may be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). A bank robbery essentially consists of "the larcenous or felonious intent to access a bank, safe, vault, or other depository of money or valuables" by any of various

means. *People v Ford*, 262 Mich App 443, 455; 687 NW2d 119 (2004). Specifically, it may be accomplished by (1) confining, maiming, injuring, or wounding a person, (2) attempting or threatening to confine, kill, maim, injure, or wound a person, or (3) putting a person in fear. MCL 750.531.

In this case, defendant admitted that on December 3, 2010, he entered a Birmingham bank and handed the teller a note demanding money. The teller gave defendant the money, and defendant left. Defendant denied threatening to kill the teller but admitted that his actions made her fearful. The presentence investigation report (PSIR) provides the following account of the incident:

On 12/3/2010, Birmingham Police Officers were dispatched to the Chase Bank branch located inside Kroger Supermarket at 685 E. Maple Road regarding a Bank Robbery.

* * *

Officers spoke with bank teller, [G.S.]. She advised that she was the teller and noticed the defendant come to her station. [G.S.] observed the defendant set down some greeting cards he was holding and passed a note to her. [G.S.] read the note and it said, "Give me all the money. I'll kill you. I'm not kidding." [G.S.] realized that she was being robbed and was told by the defendant repeatedly to give him the money, he was not kidding and to not look at his face. . . . [G.S.] began to give the defendant money by a different procedure than just opening the drawer because she could not remember how to open it. When this caused a delay, the defendant began asking if she had activated an alarm and repeated that he would kill her. The defendant told her to keep her hands up and that she kept one hand on the mouse and other [sic] in the air. . . .

[G.S.] advised officers that she made four money purchases which gave her four stacks of a thousand dollars each. [G.S.] then gave the defendant the four stacks of money and he stated to her not to call the police or he would come back and kill her. The defendant took back the note he gave to [G.S.] and left the store

During the sentencing hearing, defendant denied threatening to kill G.S., although neither he nor his attorney denied that G.S. testified at the preliminary hearing that defendant threatened to kill her several times. Although the probation department did not obtain a victim's impact statement from G.S., she appeared at the sentencing and read her statement to the court, in which she said in part:

Banks get robbed, it's a fact of life. One that I was aware of, I was trained for. They didn't however, the bank, train me to have my life threatened. He didn't know me or know anything about me, my family, my friends. I can't understand why he felt he had the right to tell me he would take me away from people I love, people who love me.

Not only did he threaten to kill me continuously throughout the time he was committing the crime, he told me he would come back, he would find me and he would kill me. And that has haunted me the past six months.¹

In his demand note, defendant threatened the teller and placed her in fear, which MCL 750.531 indicates is one of the ways in which a bank robbery can be committed. Assuming he threatened to kill her in the note, as G.S. indicated, that too can be a predicate means of accomplishing a bank robbery. MCL 750.531. However, defendant substantially added to G.S.'s fear by continuously threatening to kill her throughout the ordeal despite the fact that she was attempting to comply with his demand for money. He also substantially added to her fear by threatening to come back, find her, and kill her in the future if she called the police. Although it is a close call, there is evidence to support the trial court's finding that defendant engaged in conduct specifically designed to substantially increase the fear and anxiety G.S. suffered beyond that necessary to commit the offense; thus, the trial court did not err by scoring 50 points for OV 7. Cf. *People v McDonald*, 293 Mich App 292, 298-299; 811 NW2d 507 (2011).

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly

¹ G.S. also spoke of the ways in which the offense had affected her life at and outside of work and stated that her "biggest fear is what [defendant] will do to me when he gets out of prison." She feared that he would carry out his threat if given the opportunity, in part because "[her] unique name makes [her] too easy to find." We emphasize that points are not scored under OV 7 for conduct that is designed to substantially increase G.S.'s post-offense fear and anxiety; rather, OV 7 addresses the conduct "designed to substantially increase the fear and anxiety [G.S.] suffered *during the offense*." MCL 777.37(1)(a) (emphasis added). However, the significant post-offense impact of the repeated life-threatening statements that defendant made during the bank robbery is circumstantial evidence that defendant designed his conduct to *substantially* increase G.S.'s fear and anxiety during the offense.