

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORIBIO YUNIOR BRITO,

Defendant-Appellant.

UNPUBLISHED

June 11, 2020

No. 349054

Ottawa Circuit Court

LC No. 18-042225-FC

Before: GADOLA, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Toribio Yunior Brito, pleaded guilty to armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 168 to 360 months’ imprisonment for armed robbery to be served consecutively to two years’ imprisonment for felony-firearm. Defendant appeals his sentence by delayed leave granted, arguing that he is entitled to resentencing because the trial court improperly scored offense variable (OV) 4. We reverse and remand for further proceedings.

I. FACTS

On February 14, 2018, defendant, acting in concert with another individual, approached two men outside a home in Polkton Township, Michigan for the purpose of robbing them.¹ Defendant pointed a gun at one of the men, Hugo Hernandez-Santiz, and demanded “anything that they had.” The second victim with Hernandez-Santiz was Mauricio Gasca-Moreno.

Defendant stood two to three feet away from Hernandez-Santiz, who gave defendant a cell phone and cash. Defendant also admitted to law enforcement that he witnessed Moise, his

¹ Defendant identified to law enforcement a third individual allegedly involved in the incident, but did not specify the role of this individual. There is no other reference to this individual in the trial court record. Further, a photo line-up involving witnesses resulted in the identification of defendant and Auston Moise as suspects.

codefendant, shoot Gasca-Moreno in the leg. After being shot, Gasca-Moreno was taken to his room inside the home, where he and another man, Maximo Cruz-Ponce, were held at gunpoint by one of the perpetrators while another searched the room. Gasca-Moreno suffered no property loss; Cruz-Ponce's money, cell phone, gold necklace, and tablet were taken. Defendant admitted to law enforcement that he took a cell phone from the residence. As a result of this incident, defendant was charged with armed robbery and felony-firearm. Defendant pled guilty to each count.

II. ANALYSIS

On appeal, defendant argues that the trial court improperly scored OV 4. Specifically, defendant contends that the record lacks sufficient evidence showing psychological harm to the victim due to his conduct.²

“Under the sentencing guidelines, the trial court’s findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). “Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.” *Id.* (quotation marks and citation omitted). “‘Preponderance of the evidence’ means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). “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.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 4 addresses a victim’s psychological injury. MCL 777.34(1).³ OV 4 is assessed 10 points when “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). Likewise, 10 points is assessed “if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.34(2). “The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated.” *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014).

² Defendant contends that the victim of his conduct was Gasca-Moreno. As legal support for his contention that Gasca-Moreno did not suffer serious psychological injury requiring professional treatment, defendant relies on *People v White*, 501 Mich 160; 905 NW2d 228 (2017), and *People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003). In *White*, our Supreme Court held that a victim’s fear during the commission of a crime alone is an insufficient basis to assess 10 points for OV 4. *White*, 501 Mich at 164-165. Similarly, in *Hicks*, this Court found that the record did “not reflect any evidence of serious psychological harm to the victim or give any indication that she needed psychological treatment.” *Hicks*, 259 Mich App at 534-535.

³ MCL 777.34 does not define “victim” as it relates to the scoring of OV 4. Generally, a victim is “[a] person harmed by a crime, tort, or other wrong.” *Black’s Law Dictionary* (11th ed).

Moreover, “[w]hen calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination.” *McChester*, 310 Mich App at 358. “The sentencing offense is the crime of which the defendant has been convicted and for which he or she is being sentenced.” *People v McGraw*, 484 Mich 120, 122 n 3; 771 NW2d 655 (2009). “[O]nly conduct that relates to the offense being scored may be considered.” *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). In addition, “the scoring of OV 4 cannot be based on the assumption that people typically suffer psychological injury when they are victims of the type of crime in question.” *People v Lampe*, 327 Mich App 104, 114; 933 NW2d 314 (2019). Further, although relevant, a crime victim’s fear during the crime alone fails to meet the threshold for scoring under OV 4. *Id.*

Here, defendant’s criminal actions on February 14, 2018, began when he demanded “anything” from Hernandez-Santiz and Gasca-Moreno, while pointing a gun at Hernandez-Santiz. Gasca-Moreno refused, leading Moise to shoot him in the leg. Defendant’s criminal conduct, to which he pled guilty, involved the armed robbery of Hernandez-Santiz and Gasca-Moreno. Likewise, defendant also participated in the armed robbery of Cruz-Ponce.

Hernandez-Santiz did not submit a victim impact statement. Gasca-Moreno did submit a victim impact statement, which was partially read at defendant’s sentencing. Gasca-Moreno suffered a gunshot wound to his inner thigh that resulted in a broken bone. Because of this, Gasca-Moreno underwent surgery to repair the bone and insert a plate. Gasca-Moreno stated that following the incident, he did not work for two months, suffered stress due to monetary concerns, and became depressed. Further, the inability of Gasca-Moreno’s boss to help him through this period contributed to these difficulties.

However, the victim impact statement provided by Gasca-Moreno addressed injuries resulting solely from the gunshot wound, an act committed by Moise and not the defendant. Defendant was charged with, and pled guilty to, armed robbery and felony-firearm, both of which were factually independent of Moise’s act of shooting Gasca-Moreno in the leg. However, after Moise shot Gasca-Moreno, Cruz-Ponce’s money, cell phone, gold necklace, and tablet were taken while he was inside the residence. Cruz-Ponce was also held at gunpoint with Gasca-Moreno.

The trial court record provides that defendant admitted taking a cell phone from the residence. It is therefore reasonable to infer that Cruz-Ponce was a victim of defendant’s conduct of armed robbery. Moreover, Cruz-Ponce provided a victim impact statement that indicated a continuing fear that defendant and Moise would return. Similarly, Cruz-Ponce stated that noises caused him to think that defendant and Moise did in fact come back, or might come back in the future. However, the trial court neither addressed nor referenced Cruz-Ponce at defendant’s sentencing. While Cruz-Ponce’s victim impact statement might support the scoring of OV 4, this Court “should avoid supplementing or otherwise justifying the trial court’s otherwise insufficient reasoning with reasoning of its own.” *People v Dixon-Bey*, 321 Mich App 490, 531 n 11; 909 NW2d 458 (2017).

The trial court erred when it assessed 10 points for OV 4 based on the victim impact statement provided by Gasca-Moreno, as the psychological injuries of which he complained in his victim impact statement related solely to the shooting committed by Moise, not the armed robbery committed by defendant. However, defendant’s participation in the armed robbery of Cruz-Ponce

might reasonably support the scoring of OV 4 against defendant. A person is guilty of robbery who, in the course of committing a larceny, “uses force or violence *against any person who is present*, or . . . puts the person in fear” MCL 750.530(1) (emphasis added).

Accordingly, we reverse the trial court’s scoring of OV 4 and remand this matter for the trial court to consider whether Cruz-Ponce’s victim impact statement might support the scoring of OV 4 against defendant. We do not retain jurisdiction.

/s/ Michael F. Gadola

/s/ Mark J. Cavanagh

/s/ Michael J. Kelly