STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012
v	No. 303870 Wayne Circuit Court
GLYNN MILLS, Defendant-Appellant.	LC No. 10-009305-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and assault with intent to commit great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent sentences of 30 to 50 years' imprisonment for the second-degree murder conviction and 4 ½ to 10 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction. He appeals as of right. We affirm.

I. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erred in the scoring of Offense Variable (OV) 5 and OV 10. We disagree.

A trial court's scoring of offense variables is reviewed under an abuse of discretion standard. *People v Earl*, ___Mich App ___; ___ NW2d___ (2012), WL 2330198, slip op p 3. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). The trial court's findings of fact are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799, cert den 555 US 1015; 129 S Ct 574; 172 L Ed 2d 435 (2008). A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). Offense variables are determined by reference to the record, using the standard of the preponderance of the evidence. *Osantowski*, 481 Mich at 111. The court may rely on reasonable inferences from the record. *Earl*, slip op p 3.

OV 5 addresses "psychological injury to a member of a victim's family." MCL 777.35(1). MCL 777.35(2) provides for an OV 5 score of 15 points "if the serious psychological

injury to the victim's family may require professional treatment." At sentencing, the court scored OV 5 at 15 points. We find no error in this scoring. At sentencing, the prosecutor told the court that the victim's daughters would require psychological treatment as a result of their father's death. The record reflects that the victim's daughters were present in the courtroom, that the prosecutor had spoken to them "at some length," that they were so "incredibly distraught" that they "[did] not wish to address" the court, and that they instead had "asked [the prosecutor] to address [the court] on their behalf." The prosecutor did so, stating (in response to a defense challenge to the requested scoring of OV 5) that the brutal slaying of Mr. Tucker by someone who had been his long-time friend was "just horrible" and "just unforgivable," and "has been an event which really has damaged the survivors incredibly." It was under those circumstances that the prosecutor indicated that he was "entirely comfortable asking the Court for fifteen points on the psychological issues . . . ."

This evidence is sufficient to support the scoring of OV 5 relative to the victim's daughters' serious psychological injury. OV 5 does not require testimony from the victim's family.[1] Furthermore, the facts presented at trial support a finding that there was serious psychological injury. The victim knew defendant for many years, and was his close friend. It requires little inference from the factual record to conclude that it was traumatic for the victim's daughters to hear of his brutal death by the hand of a close friend. That conclusion also is supported by the statements of the prosecutor, speaking at the request of the daughters, at sentencing. The record contains evidence to support scoring OV 5 at 15 points, and we therefore affirm the trial court's score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), see also *Lockett*, 295 Mich App at 182.

Under OV 10, a court must assess 15 points if predatory conduct was involved, 10 points if the defendant exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or abused his authority status, and five points if the defendant exploited a victim by his difference in size or strength, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1). At sentencing, the court scored OV 10 at 10 points. On appeal, defendant and the prosecutor agree that the court erred in scoring OV

[1] We have previously held that such a statement by the prosecutor at sentencing is sufficient to support a scoring of 15 points for OV 5. *People v Royster*, unpublished opinion of the Court of Appeals, issued January 8, 2009 (Docket No. 280676) (unpublished op at 3-4) ("At defendant's sentencing, the prosecutor advised the trial court that the victim's aunt requires psychological treatment as a result of the victim's death. This evidence was sufficient to allow the trial court to assign fifteen points under OV 5 because it was evidence of serious psychological injury to the victim's family.") Pursuant to MCR 7.215(C)(1), an unpublished opinion has no precedential value. However, we may follow an unpublished opinion if we find its reasoning persuasive. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 42 n 10; 761 NW2d 151 (2008). We find the reasoning of *Royster* persuasive here, and note that our Supreme Court denied leave to appeal in *Royster*, stating that the Court was "not persuaded that the questions presented should be reviewed by this Court." *People v Royster*, 483 Mich 1111; 766 NW2d 839 (2009).

10, and that OV 10 should have been scored at five points because the victim was asleep at the time defendant attacked. However, reducing OV 10 to five points does not result in a different sentence range. A defendant is entitled to resentencing on the basis of a guidelines scoring error only if the error altered the recommended minimum sentence range. *People v Phelps***,** 288 Mich App 123, 136; 791 NW2d 732 (2010). Because defendant's minimum sentence range would not change if the error was corrected, defendant is not entitled to resentencing.[2]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant, in his *pro se* brief, argues that his trial counsel was ineffective because he failed to obtain DNA testing on the alleged murder weapon, failed to investigate the lack of DNA testing, and failed to introduce at trial the fact that police did not perform DNA testing. We disagree.

A claim of ineffective assistance of counsel is preserved for appeal by a timely motion for a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). In this case, there was no motion for a new trial or an evidentiary hearing. Therefore, this issue is not preserved and our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Johnson*, 293 Mich App at 90 (internal quotation marks and citation omitted). A trial court's factual findings are reviewed for clear error, and constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *Id*. at 290.

Defendant's trial counsel was not ineffective for failing to investigate the lack of DNA testing on the alleged murder weapon. A police officer discovered a bat in the trunk of defendant's car after defendant's arrest. The officer testified at trial that there was blood spattering on the bat and dried blood in the trunk of defendant's car. At trial, two eyewitnesses identified the bat found by the officer as the bat that defendant used to commit the murder and assault. Defendant argues that the blood should have been tested for DNA evidence. The police did not owe defendant a duty to perform DNA testing on the blood found on the bat or in the trunk. See *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006) ("[P]olice have no constitutional duty to assist a defendant in developing potentially exculpatory evidence.").

[2] Given our resolution of this issue, we also conclude that counsel was not ineffective for failing to challenge the scoring of OV 10, as the result of the proceedings would not have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Because police did not owe defendant a duty to conduct DNA testing, defendant's trial counsel did not need to make a futile request that DNA testing be completed. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Therefore, defendant's trial counsel's performance did not fall below an objective standard of reasonableness.

Defendant's trial counsel was also not ineffective for failing to obtain independent DNA testing on the bat or trunk. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo***,** 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one which might have made a difference in the outcome of the trial." *Id*. (citation omitted). DNA evidence from the bat and the trunk would not have made a difference in the outcome of trial because there was other evidence that linked defendant to the crime. Two eyewitnesses testified that defendant frequently carried a bat in the trunk of his car, and that they saw defendant retrieve the bat from his trunk and attack two individuals with the bat. Even if the blood on the bat or in the trunk was not that of the victims, a jury could still have found defendant guilty based on the testimony from the eyewitnesses. Defendant cannot demonstrate that his counsel's failure to obtain DNA testing on the bat or trunk was outcome determinative. *Armstrong*, 490 Mich at 289-290.

Additionally, defendant claims that his trial counsel was ineffective for failing to introduce to the jury the fact that no DNA testing was completed. Defendant's counsel in fact raised the issue during cross-examination of the officer who discovered the bat and during closing argument. During cross-examination, defendant's trial counsel asked the officer that found the bat if DNA testing was ever done, but the officer did not know. During closing argument, defendant's trial counsel argued that defendant's guilt was not proven beyond a reasonable doubt, and cited the lack of DNA testing to support his contention. Defendant's allegation is thus simply erroneous.

In sum, defendant cannot show that his trial counsel's performance fell below an objective standard of reasonableness, or that, but for counsel's error, the result of the proceedings would have been different. DNA evidence in this case, even if exculpatory, would not have been outcome determinative in light of the other evidence that linked defendant to the crime.

Affirmed.

/s/ Donald S. Owens
/s/ Mark T. Boonstra

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GLEICHER, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that defense counsel's performance did not qualify as ineffective. But I cannot agree that the trial court correctly scored offense variable (OV) 5. When defendant challenged the scoring of OV 5, the prosecutor vouched for facts rather than proving them. Because the prosecutor's comments cannot substitute for evidence, I respectfully dissent.

OV 5 addresses "psychological injury sustained by a member of a victim's family." MCL 777.35. Pursuant to MCL 777.35(1)(a), the sentencing court may assign a defendant 15 points when the crime causes the victim's family to suffer "serious psychological injury requiring professional treatment." "[T]he fact that treatment has not been sought is not conclusive." MCL 777.35(2). OV 5 is an all-or-nothing variable; if the crime does not cause "serious psychological injury" to the victim's family, the court must not assign any points. MCL 777.35(1)(b).

No evidence supported that the victim's family members sustained serious psychological injury requiring professional treatment. The presentence information report (PSIR) makes no mention of psychological injuries sustained by either of the victim's daughters. The victim's impact statement contains no reference to any psychological problems. Rather than referencing psychological injuries, the victim's impact statement details the costs of the victim's funeral and burial. Indisputably, the probation agent who prepared the PSIR attempted to gather information relevant to OV 5. He interviewed one of the victim's daughters and unsuccessfully attempted to speak with the other daughter, whose "telephone was disconnected during the conversation on two different occasions." Based on his investigation, the agent scored OV 5 at zero.

At defendant's sentencing hearing, the trial court referred to the probation department's proposed scoring while conducting the following colloquy with counsel:

The Court: . . . In regard to the offense variables, OV-1, is scored at ten points.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes.

The Court: OV-2 is scored at one point.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes, Your Honor.

The Court: OV-3 is scored at fifty points.

Is that an accurate scoring?

The Prosecutor: It is.

Defense Counsel: Yes.

The Court: OV-6 is scored at ten points.

Is that an accurate scoring?

The Prosecutor: Can we go to five, please?

The Court: Oh, sure.

The Prosecutor: Your Honor, OV-5 is psychological injuries sustained by member of victims families [sic].

Both daughters are incredibly distraught, and they are, I think without question, gonna need some significant psychological counseling.

They have been just chewed up by this.

So, I –

The Court: Are they present in the courtrrom?

The Prosecutor: They are. They're right behind me.

The Court: Okay.

Defense Counsel: And Your Honor, without any proof, I mean, I would object.

The Court: I'll tell you what, let's take the victim's impact statement first, before we score that then.

The Prosecutor: Very well.

I'm gonna shift gears here.

With the Court's permission?

The Court: Yes.

The Prosecutor: Your Honor, the victim's impact statement only speaks to the financials in here.

We have – the daughters do not wish to address. They are, again, incredibly distraught.

So, I will say that, that I am entirely comfortable asking the Court for fifteen points on the psychological issues . . . .[1]

Defense Counsel: Your Honor, again, same objections.

The Court: Uhm, well, I, I can understand the emotional upheaval about this, in regard to Mr. Tucker's death, and the manner in which he died, being brutally beaten by the defendant, and his brother.

Uhm, I'll change OV-5 from zero to fifteen.

At the conclusion of the hearing the court again offered the victim's daughters an opportunity to address the court, but the prosecutor reiterated, "We have spoken at some length . . . [a]nd they have asked me to address on their behalf."

The majority opines, "The evidence is sufficient to support the scoring of OV 5 relative the victim's daughters' serious psychological injury." But no *evidence* was presented to the court. A prosecutor's statement does not qualify as evidence, and construing it as such disregards that the sentencing court's fact-finding process must satisfy due process requirements. See *Gardner v Florida*, 430 US 349, 358; 97 S Ct 1197; 51 L Ed 2d 393 (1977); *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). While a court may consider relevant information without regard to its admissibility under the Rules of Evidence, this relaxed standard does not permit fact-finding in the absence of evidence.

[1] I have omitted the names of the victim's daughters.

In *People v Walker*, 428 Mich 261, 267; 407 NW2d 367 (1987), the Supreme Court adopted Standard 18-6.4(c) of the American Bar Association Standards for Criminal Justice (2d ed), which provides:

> In reaching its findings on all controverted issues [of fact which are relevant to the sentencing decision], the sentencing court should employ the preponderance of the evidence standard and may treat the contents of a verified presentence report as presumptively accurate, provided, however, that material factual allegations made in the presentence report and effectively challenged by the defendant should not be deemed to satisfy the government's burden of persuasion unless reasonable verification of such information can be shown to have been made [by the person who prepared the presentence report] or adequate factual corroboration otherwise exists in the sentencing or trial record.

The *Walker* Court explained that when a defendant challenges a factual assertion, "the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts." *Id.* at 268. The Supreme Court has repeatedly emphasized that judicially ascertained facts impacting a defendant's sentence must derive from an evidentiary preponderance: "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Ostantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Accordingly, this Court reviews a scoring decision "to determine whether the trial court properly exercised its discretion and whether the record *evidence* adequately supports a particular score." *People v Johnson***,** 293 Mich App 79, 84; 808 NW2d 815 (2011) (emphasis added). "'Scoring decisions for which there is any *evidence* in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (emphasis added), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

In the sentencing context, "evidence" refers to facts of record. While admissible evidence is not required to score an offense variable, some *evidence* is essential. A prosecutor's statement is simply not evidence. Every jury in a criminal case is instructed in this elementary premise: "The lawyers' statements and arguments are not evidence." See CJI2d 3.5(5). 1 Wigmore, Evidence (Tillers rev), § 1, p 11, describes "evidence" as "any matter of fact that is furnished to a legal tribunal *otherwise than by* reasoning or *a reference to what is noticed without proof* . . . ." (Emphasis added.) Here, no facts of record support the prosecutor's non-evidentiary observation that the daughters were "incredibly distraught" or his subsequent speculation that they would need counseling. The PSIR contains no information concerning the daughters' psychological states or the necessity of professional treatment, and the balance of the record similarly lacks any factual foundation for the prosecutor's vouching on behalf of this offense variable. Absent any evidence to support the OV 5 score, the circuit court clearly abused its discretion.

The majority asserts that "[i]t requires little inference from the factual record to conclude that it was traumatic for the victim's daughters to hear of his brutal death by the hand of a close friend." This assertion is incorrect for three reasons. First, there is no factual record addressing psychological injury. Second, while it is possible to infer that a victim's family member has suffered emotional distress requiring treatment, inferences are not evidence – inferences flow *from* evidence. Third, scoring of the sentencing guidelines may not be premised on inferences

unsupported by the record. See *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) ("While the prosecutor's file notes indicated that the victim experienced rectal pain as a result of defendant's assaults, that information was not placed on the record. Despite the trial court's determination that there 'appears to be some basis to have scored' OV 3 at five points, we find that such an assessment was erroneous when there was no record evidence to support the score.").

Moreover, the majority's approval of sentencing decisions based on factually unsupported prosecutorial statements rather than an evidentiary preponderance directly contradicts well-established law. In *People v Ewing*, 435 Mich 443, 450-451; 458 NW2d 880 (1990), our Supreme Court clearly set forth the procedure that trial courts must employ when confronted with a scoring variable challenge. That procedure "requires that the prosecutor prove a disputed variable by a preponderance of the evidence once the defendant has 'effectively' challenged its accuracy." This rule "places a limit on the trial judge's discretion to consider some types of disputed information at sentencing without entertaining further proofs at the defendant's request." *Id.* at 450. At his sentencing, defendant challenged the prosecutor's statement that the victim's daughters required counseling. Rather than questioning the daughters or requiring that the prosecutor provide some evidence to support the conjectured need for counseling, the circuit court accepted at face value the prosecutor's statement of personal belief. The circuit court's failure to seek some factual foundation concerning this variable violated *Ewing* and *Walker*.[2]

To accept the majority's view that sentencing decisions may be based solely on the *ipse dixit* of counsel we must disregard *Ewing* and *Walker* and cast aside the Supreme Court's admonition that "the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information[.]" *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). Unmoored from any factual record, the accuracy of sentencing "information" cannot be tested. It is for this reason that the Supreme Court has repeatedly emphasized that scoring decisions must be rooted in *evidence*. A sentence derived from assumption rather than an evidentiary preponderance cannot stand.

When combined with the improper score assigned for OV 10, the unsupported OV 5 score requires resentencing. The prosecutor concedes on appeal that the circuit court erred in

[2] The majority attempts to support its conclusion by relying on an unpublished opinion, *People v Royster*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 280676). Contrary to the majority's assertion that we should consider persuasive the "reasoning" of *Royster*, that opinion provides no reasoning whatsoever. Instead *Royster* asserts a bald conclusion utterly devoid of analysis, reasoning, or citation to authority. Moreover, the fact that the Supreme Court denied leave to appeal in *Royster* is of no import; the denial simply signifies that the Supreme Court did not find the case to be jurisprudentially significant. A denial of leave to appeal has no precedential value. *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.); *id*. at 371 n 2, (opinion by RYAN, J.); *id*. at 380 n 18, (opinion by LEVIN, J.).

scoring 10, rather than 5, points for OV 10, exploitation of a vulnerable victim. A score of 10 points is proper when a defendant exploits "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). None of these factors applies in this case. Rather, the victim was asleep when defendant attacked him. The court may only score 5 points for OV 10 when a defendant exploits a sleeping victim. MCL 777.40(1)(c).

The subtraction of the 20 points erroneously assessed in defendant's OV score reduces the applicable legislative minimum sentencing guidelines range. Defendant's total OV score was 106 points, placing him in OV Level III. Defendant's corrected total OV score is only 86 points, placing him in OV Level II. The minimum sentencing guidelines range for second-degree murder for a defendant in OV Level II and Prior Record Variable Level C is 180 to 300 months' imprisonment. Defendant's minimum sentence of 370 months' imprisonment exceeds the corrected range. As such, I believe that we must vacate defendant's sentences and remand for resentencing based on the corrected OV scores. MCL 769.34(10).[3]

/s/ Elizabeth L. Gleicher

[3] The prosecutor challenges the circuit court's score of 10 points for OV 6 under MCL 777.36(1)(c), "[t]he offender had intent to injure or the killing was committed in an extreme emotional state . . . or there was gross negligence amounting to an unreasonable disregard for life." The circuit court was required to sentence defendant consistent with the jury verdict of second-degree murder to 25 points "unless the judge had information that was not presented to the jury." MCL 777.36(2)(a). The circuit court did not cite the information it relied upon in scoring OV 6. Accordingly, I would direct the court to correct its error on remand by supporting its new scoring decision with specific information.

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BOONSTRA, J. (*concurring*).

I fully concur in the majority opinion. I write separately to briefly respond to the arguments raised by partial dissent.

The dissent characterizes the prosecutor's statements as "factually unsupported" "non-evidentiary observation" merely describing his "personal belief," based on "assumption," "speculation," and "conjecture." I find the record to be otherwise. As reflected in the majority opinion, the record reflects that the prosecutor had spoken to the victim's daughters "at some length," and that while they were present in the courtroom, they were so "incredibly distraught" that they "[did] not wish to address" the court. Instead, they "asked [the prosecutor] to address [the court] on their behalf." The prosecutor did as they requested, noting that the brutal slaying of their father "has been an event which really has damaged the survivors incredibly." I concur in the majority view that, under these circumstances, this was a sufficient evidentiary basis for the OV 5 scoring.

The dissent disavows any effort to create a rule requiring that only admissible evidence be allowed support an OV score. Nor could it appropriately do so. The statutory scheme relating to OV scoring does not so provide. MCL 777.1 *et seq*. The rules of evidence "do not apply" to sentencing proceedings. MRE 1101(b)(3). Nor is a PSIR typically introduced as admissible evidence, yet it is commonly and appropriately considered in scoring OVs.[1] Hearsay

[1] The dissent finds it noteworthy that the PSIR in this case "contains no information concerning the daughters' psychological states or the necessity of professional treatment." I find it noteworthy that several of the OVs (and prior record variables (PRVs) were changed from their original scoring (by the probation agent in the PSIR) by the trial court at sentencing. I also find it noteworthy that the effect of those changes, notwithstanding the increase of the OV 5 score (to

information may be considered. *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). Importantly here, information relating to OV 5 (psychological injury to a member of a victim's family) also is not by its very nature likely to be admitted as evidence in a trial of the underlying crime. I would not create, as a hurdle to the consideration of psychological injury, a requirement, even a *de facto* one, that it be supported by admissible evidence.

MCL 769.34(10) provides in part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and *shall not remand* for resentencing *absent an error in scoring* the sentencing guidelines *or inaccurate information relied upon in determining the defendant's sentence*. [*Id*. (emphasis added); see also *People v. Kimble*, 470 Mich 305; 684 NW2d 669 (2004) (same).]

I find no basis for concluding that the trial court relied on "inaccurate information," or otherwise erred in scoring OV 5. Under the circumstances, and consistent with *People v Royster*, 483 Mich 1111; 766 NW2d 839 (2009),[2] I find the prosecutor's statements at the sentencing to be a sufficient basis in the record (including appropriate inferences therefrom) for the OV 5 score of 15. I find no clear error or abuse of discretion with respect to that scoring. Because the trial court's scoring decision was within the range of principled outcomes, it should be granted the deference it is due. *Carnicom*, 272 Mich App at 616.

Finally, notwithstanding that the arguably errant OV 6 scoring was not supported by any known "evidence," the dissent "would direct the [circuit] court to correct its error on remand by supporting its new scoring decision with specific information." For reasons left unexplained, the dissent would not afford that same option to the circuit court, on remand, relative to OV 5. It instead would simply reverse the OV 5 scoring, require the subtraction of 15 points in the scoring of OV 5, and order resentencing in accordance with its view of the "evidence." In my view, the dissent's approach is thus additionally wrong in that it fails to exercise a consistency of equal treatment, and instead would allow the circuit court to further consider, articulate, and support its rationale with respect to the scoring of OV 6, but not OV 5.

/s/ Mark T. Boonstra

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15 from zero) was to reduce defendant's total OV score to 106 (from (176) and total PRV score to 10 (from 20). The record supports the conclusion that the trial court conducted a thorough, detailed review of the sentencing variables and was willing to reduce and adjust defendant's scores where appropriate.

[2] I find the dissent's dismissive characterization of *Royster* unfortunate. I note also that our Supreme Court denied leave to appeal in *Royster*, stating that the Court was "not persuaded that the questions presented should be reviewed by this Court." 483 Mich 1111. While the dissent minimizes the import of that action by our Supreme Court, I infer that the Court did not find *Royster*'s affirmance of a sentencing decision based on information provided by the prosecutor to "directly contradict[] well-established law governing sentencing challenges," as the dissent claims the instant case does.