STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 309327 Wayne Circuit Court
DAFONTE DUKES, Defendant-Appellant.	LC No. 11-003966-FH

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a third habitual offender, MCL 769.11, to 6 to 30 years' imprisonment for the unarmed robbery conviction and 4 to 20 years' imprisonment for the assault conviction. Defendant solely raises sentencing issues on appeal. We affirm.

The victim, a 56-year-old male, was brutally punched and kicked in the head, neck, and chest, along with being stomped on, by three men, one of whom was identified as defendant.[1] As defendant stepped on the victim's neck, the other two men rifled through his pockets and removed the victim's keys, wallet, money, and cigarettes. The victim heard one of the men yell, "kill him." When the victim pleaded for the men to stop beating him and told them that they could have everything he had, one of the assailants responded, "Shut up old motherfucker, before you catch a hot one," which the victim understood as a threat of being shot. The three men eventually ran away from the crime scene. The victim suffered bruises, scrapes, and a cut on his lip.

On appeal, defendant argues that offense variable 4 (OV 4), MCL 777.34, was improperly scored at 10 points and that prior record variable 6 (PRV 6), MCL 777.56, was improperly scored at 10 points. To the extent that trial counsel failed to properly preserve or actually waived challenges to the scoring of OV 4 and PRV 6, defendant contends that counsel

[1] We note that the victim had a pacemaker implanted in his chest.

was ineffective. Our Supreme Court in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), recently clarified the proper standards of review applicable to scoring challenges:

> As we have explained before, the abuse of discretion standard formerly predominated in sentencing review. But when the Legislature enacted the sentencing guidelines in 1998, it prescribed detailed instructions for imposing sentences, thereby reducing the circumstances under which a judge could exercise discretion during sentencing. 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. 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. [Citations omitted.]

OV 4 is properly scored at 10 points where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). MCL 777.34(2) further directs the sentencing court to "[s]core 10 points if the serious psychological injury may require professional treatment." "In making this determination, the fact that treatment has not been sought is not conclusive." *Id.*

Here, while the victim was on the stand and describing the nature of his injuries, including what he characterized as "an internal head injury," the victim broke down,[2] was told to take his time, and was offered tissues. As he broke down on the stand, the victim testified that the day after the assault was his 30th wedding anniversary, but he failed to remember it due to the assault. We note that the victim had earlier testified that, although he had been robbed in the past, he had "never had anyone put their hands on" him. At the sentencing hearing, the prosecutor, absent an argument to the contrary, alluded to the victim becoming emotional on the stand, "crying," and being saddened about forgetting his anniversary, to which the court responded, "How, quite true." Given these circumstances, the trial court scored 10 points for OV 4 because the victim "may in fact need psychological therapy in the future."

While perhaps a close call, we affirm the trial court's scoring of 10 points for OV 4. Taking into consideration the brutality of the attack, which included indications that the assailants were going to kill the victim, *in conjunction with* the victim's emotional breakdown and weeping on the stand, along with the failure to recall his 30th wedding anniversary, there was a preponderance of evidence showing that the victim suffered a serious psychological injury that may require professional treatment. Defendant's reliance on *People v Lockett*, 295 Mich App 165; 814 NW2d 295 (2012), is misplaced. In *Lockett*, this Court found the record devoid of evidence supporting the trial court's score of 10 points for OV 4, where the trial court simply assumed that "someone in the victim's position would have suffered psychological harm[.]" *Id.* at 183. Again, we do not merely rely on the nature of the assault in making our ruling, even though we see no reason not to reflect on it; rather, our decision is ultimately based on the emotional breakdown displayed by the victim at trial.

[2] The trial transcript provided, "(Witness breaks down)."

Additionally, defense counsel challenged the scoring of OV 4 at sentencing, and the score determined by the trial court was correct; therefore, there is no merit to the associated claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (to establish a claim of ineffective assistance of counsel, a defendant must show a deficient performance and prejudice).

With respect to PRV 6, defense counsel expressly agreed to the score of 10 points, so the issue was waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). However, because defendant bootstraps a claim of ineffective assistance of counsel, we must further examine the issue. PRV 6 is properly scored at 10 points when "[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." MCL 777.56(1)(c). "Under PRV 6, the trial court assesses points on the basis of the defendant's relationship to the criminal justice system *when he or she committed the sentencing offense*." *People v Johnson*, 293 Mich App 79, 85; 808 NW2d 815 (2011) (emphasis added); see also *People v Gibbs*, 299 Mich App 473, 486; 830 NW2d 821 (2013); *People v Anderson*, 298 Mich App 178, 181; 825 NW2d 678 (2012). The assault and robbery of the victim in this case took place on September 5, 2010. The presentence investigation report (PSIR) revealed that at the time of the assault and robbery, defendant was on probation for a felony drug conviction. Defendant simply argues that the PSIR reflected that he was not on probationary status on September 5, 2010, which is the full extent of his argument. The PSIR provided that defendant was sentenced to probation on January 14, 2008, for the felony drug crime, with a discharge date of May 27, 2011. The PSIR further indicated, "Status at Time of Offense: Probation." Defendant's argument finds no support in the record. There was no error in scoring PRV 6 at 10 points. Accordingly, defense counsel was not ineffective for failing to raise a futile objection and for expressly waiving the issue. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).[3]

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[3] In its appellate brief, the prosecution, aside from addressing OV 4 and PRV 6 as raised by defendant, reviews several other PRV and OV factors, concluding that the total PRV score should have been three points less, keeping it within the same PRV level as determined by the trial court, and that the total OV score should have been five points more, bumping the OV level up to the next level on the grid, thereby increasing the minimum sentence range. Accordingly, the prosecutor requests a remand for resentencing. We need not review this issue because, aside from the fact that the particular scoring arguments were entirely waived below through agreements by the prosecutor, the prosecution did not file a cross-appeal. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) ("an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal").