

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNY BRYANT McCOWAN,

Defendant-Appellant.

UNPUBLISHED

July 17, 2008

No. 278794

Oakland Circuit Court

LC No. 2007-213494-FC

Before: Saad, C.J., and Fort Hood and Borrello

PER CURIAM.

Defendant appeals as of right his sentences of 50 to 90 years in prison for his jury convictions of two counts of assault with intent to rob while armed, MCL 750.89, and 40 to 60 years in prison for his conviction of one count of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On November 10, 2006, at 3:00 a.m., bartender Shannon McNeilly and customer James Warner were cleaning up at a bar after it had closed for the evening. McNeilly heard a knock at the side door. She looked on a monitor but did not recognize the person at the door. She attempted to tell Warner to not open the door, but he had already done so. Defendant came in, armed with a gun. McNeilly ducked behind the bar. According to Warner, defendant stuck the gun in his face and told him to move out of the way. As defendant entered, Warner grabbed for the gun. The gun discharged as defendant's hand rose toward the ceiling. Defendant then struck Warner in the head with the barrel of the gun, and knocked him to the floor. Defendant bent down and put the gun by Warner's head. He shot the gun again, while threatening Warner. The second shot did not hit Warner; however, he felt fragments of something strike the side of his face. Defendant turned toward the bar, and Warner crawled under a pool table. Defendant came around the bar, found McNeilly, and yelled that she was dead if she was calling the police. He pointed the gun at her head and demanded money. McNeilly told defendant that the money was in a safe in the basement. She and defendant began to walk to the basement. Defendant stopped, became excited, and stated that he did not see Warner. He threatened to kill McNeilly if Warner was calling the police. Defendant returned to the bar, while McNeilly went into the basement. Defendant left the bar looking for Warner, who closed and locked the door behind defendant.

Defendant argues that he is entitled to be resentenced because the trial court erred when it scored 50 points for offense variable (OV) 7 (aggravated physical abuse) and 15 points for OV

10 (predatory conduct). We review a trial court's scoring of a sentencing variable for an abuse of discretion and to determine whether the evidence of record supports the assigned score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (citation omitted).

Fifty points are to be scored under OV 7 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). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Defendant repeatedly threatened to kill McNeilly if she or Warner called the police. He discharged his weapon near Warner's head in an attempt to intimidate him and stop him from resisting the robbery attempt. This conduct was specifically designed to substantially increase the victims' fear and anxiety. See *Hornsby*, *supra* at 468-469. The trial court did not err when it scored 50 points for OV 7.

MCL 777.40(1) provides that OV 10 is to measure the exploitation of a vulnerable victim. Fifteen points are to be scored for this variable if predatory conduct, defined as "preoffense conduct directed at a victim for the primary purpose of victimization", is involved. MCL 777.40(1)(a) and (3)(a).

McNeilly testified that defendant was in the bar twice during the evening prior to his attempt to rob her. During one visit, he sat approximately three feet from where McNeilly was counting the cash receipts. In addition, according to testimony from one of defendant's acquaintances, defendant left the bar with her and another person at approximately 2:30 a.m. However, they had driven only 20 feet when another car pulled up, and defendant made her stop the car. He left her car, and entered the other car.

This testimony, when coupled with the time of the robbery, supports a finding that defendant "cased" the bar and decided to rob it after he determined that he could obtain the bar's receipts from the lone female employee. This provides some evidence that defendant engaged in preoffense conduct for the primary purpose of McNeilly's victimization, and justifies the trial court's scoring decision. See *People v Davis*, 277 Mich App 676, 680-681; 747 NW 2d 555 (2008); *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002). We find no error in the trial court's scoring decision.

Defendant also argues that he is entitled to be resentenced on his assault with intent to do great bodily harm less than murder conviction because no guidelines were scored for this offense, and the sentence imposed was outside the appropriate sentencing guidelines range for that offense. However, because defendant received multiple concurrent convictions, a presentence report was prepared only for his convictions of assault with intent to rob while armed, which were defendant's most severe offenses and his highest crime class felony convictions. MCL 771.14; MCL 777.16d; *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005). The trial court was required to score only this most severe offense. *Id.* at 127-129. Moreover, as noted in *Mack*, whether defendant's class D felony sentence is proportional is not at issue because that sentence did not exceed the concurrent sentence imposed for defendant's class A felony convictions. *Id.* at 128-129.

Affirmed.

/s/ Henry William Saad

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello