

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR LAMONT BRADLEY,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 290353

Berrien Circuit Court

LC No. 2008-402683-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of cocaine, less than 25 grams, MCL 333.7403(2)(a)(v). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 36 months to 15 years' imprisonment with credit for 224 days. We affirm.

Defendant argues that the trial court erred in scoring offense variable (OV) 1, MCL 777.31, at ten points, OV 2, MCL 777.32, at five points, and OV 12, MCL 777.42, at 25 points. A court's calculation of a sentencing guidelines range is reviewed for whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In scoring a particular offense variable, a trial court's determination need only be supported by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Issues of statutory interpretation are reviewed de novo. *McLaughlin*, 258 Mich App at 671.

MCL 777.31(1)(d) provides that OV 1 should be scored at ten points if "[t]he victim was touched by any other type of weapon." In addition, MCL 777.31(2)(a) instructs to "[c]ount each person who was placed in danger of injury or loss of life as a victim." Defendant argues that the trial court erred in scoring OV 1 at ten points because there was no victim in this case where defendant's only conviction involved a drug offense. Initially, we note that MCL 777.22(3) instructs that "[f]or all crimes involving a controlled substance, score offense variables 1, 2, 3, 12, 13, 14, 15, 19, and 20." Thus, the Legislature instructed that OV 1 must be scored for controlled substance offenses despite the fact that a basic controlled substance offense generally does not involve the use of a weapon or a victim. Hence, it is clear that the Legislature wanted courts to consider the conduct that occurred during the commission of the controlled substance

offense and not just the conduct relating to the elements of the controlled substance offense. See also *People v McGraw*, 484 Mich 120, 122, 133-134; 771 NW2d 655 (2009).

Here, the record clearly supports the conclusion that during defendant's possession of cocaine, Leslie Clouse was touched by a weapon. Clouse testified that she saw defendant weighing crack cocaine in his home. In addition, she testified that defendant subsequently put his sword to her throat and hit her with a big stick several times. Hence, Clouse was placed in danger of injury or loss of life. MCL 777.31(2)(a). Moreover, a sword and big stick were found by police in defendant's home and defendant admitted to owning them. And, crack cocaine was found by police in defendant's home and the jury convicted defendant of possession of cocaine. Thus, the trial court properly concluded, based upon a preponderance of the evidence, that during defendant's possession of cocaine, Clouse was a victim touched by a weapon, because a reasonable inference could be made that because defendant possessed the cocaine before his altercation with her began and the cocaine was still at defendant's house after his altercation with her ended, he possessed the cocaine while he touched the victim with the sword and stick. Hence, the trial court did not abuse its discretion when it scored ten points for OV 1 because the record supports such a score. *McLaughlin*, 258 Mich App at 671; *Elliott*, 215 Mich App at 260.

OV 2 allows for the assessment of five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). Michigan courts have held that the term "possession" includes both actual and constructive possession. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A person has constructive possession of a weapon if there is proximity to the article together with indicia of control. *Id.* Put another way, a defendant has constructive possession of a weapon "if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 471. Constructive possession may be proved by circumstantial evidence and drawing reasonable inferences therefrom. *Id.*; *People v Mumford*, 60 Mich App 279, 283; 230 NW2d 395 (1975).

Defendant argues that the trial court erred in scoring OV 2 at five points, because there was no evidence that a weapon played any role in defendant's conviction for simple possession of cocaine. For the same reasons why the record supports the scoring of OV 1 at ten points, the record also supports the scoring of OV 2 at five points because the record supports that defendant possessed and/or used the sword while he possessed the cocaine. Moreover, a sword could reasonably be interpreted as being a stabbing or cutting weapon. Because Clouse's testimony supports that defendant used the sword while he possessed the cocaine, the record necessarily also supports that defendant possessed the sword while he possessed the cocaine. The evidence also clearly supported that defendant had knowledge about the sword's presence and it was reasonably accessible to him. In addition, he was in proximity to the sword and had the right to exercise control over it. The cocaine and sword were both found in the bedroom and the jury convicted defendant of possessing the cocaine. The trial court did not abuse its discretion when it scored five points for OV 2 because the record supports such a score. *McLaughlin*, 258 Mich App at 671; *Elliott*, 215 Mich App at 260.

MCL 777.42(1)(a) provides that OV 12 should be scored at 25 points if "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." In addition, MCL 777.42(2)(a) provides that a felonious criminal act is contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense," and "[t]he act has not and *will not* result in a separate conviction" (emphasis added). Defendant argues that, at sentencing, the charges

had not yet been dismissed. Thus, those charges could have still resulted in a conviction. Hence, the trial court erred in scoring OV 12 at 25 points because it was required to follow the plain language of the offense variable at the time of sentencing. We conclude that the trial court's consideration of the acts of criminal sexual conduct (CSC) with intent to commit sexual penetration, first-degree CSC, and unlawful imprisonment did not violate the plain language of MCL 777.42(2)(a)(ii). Specifically, at the time of sentencing, these charges had not resulted in separate convictions because the jury did not reach a verdict on those charges. In addition, the charges would not result in separate convictions because the prosecutor clearly set forth on the record that she would not pursue a conviction on the charges in the future. Moreover, the prosecutor subsequently dismissed the charges. Hence, the trial court did not abuse its discretion when it considered the acts in scoring OV 12. *McLaughlin*, 258 Mich App at 671.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck