

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN VINCENT HUNTER,

Defendant-Appellant.

UNPUBLISHED

July 24, 2012

No. 305475

Oakland Circuit Court

LC No. 2011-235533-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Jonathan Vincent Hunter appeals as of right his jury trial conviction of armed robbery.¹ We affirm.

On January 13, 2011, at approximately 1:30 p.m., Hunter was with Dajuan Martell George, and Chase Huss near the intersection of Lincoln and Thorpe in the city of Pontiac. Justin Burton, who had not met Hunter, George, or Huss before, was walking alone when Hunter or George called him over. Burton spoke with Hunter and George and understood that they were attempting to sell him drugs. Burton had one \$20 bill and two \$5 bills at the time. Burton told Hunter and George that he had \$30 and he wanted \$30 of “blow,” meaning heroin. Burton, however, changed his mind and began to leave. When he did, Hunter pulled out a gun and pointed it at Burton, and held it a few inches from Burton’s face. Hunter and George both demanded Burton’s money. Burton tried to turn away and run, but he was “pistol whipped” twice on the back of the head. These were hard hits and he was bleeding severely. Burton still attempted to run away, and both Hunter and George chased him. George punched Burton and there was evidence that George struck Burton with an unknown object that he was holding. Hunter and George took Burton’s money and then stopped beating him.

Thereafter Burton called 911 and followed Hunter and George from a distance. Burton lost sight of the men briefly when they went behind a garage. Huss believed that Hunter went into a house and left the gun there. While Burton was on the telephone with 911, Hunter and George began coming toward Burton. Police then arrived and arrested Hunter and George. A

¹ MCL 750.529.

gun was not found on Hunter or in the area. George had a \$20 bill and Hunter had two \$5 bills. There was blood on George's coat and there was a belt in the coat pocket. The blood on George's coat matched Burton's DNA sample. There was also blood on Hunter's sock and the two \$5 bills. This blood, however, did not belong to Burton.

When Huss testified, he was asked about the time period when he was with Hunter and George before meeting Burton. Huss testified that they walked by a bank and:

They [Hunter and George] - - I heard them over talking about trying to take this guy's money out of a truck, or he was - - he was at the pull in thing where you dispense the money from the tubes and they said they'd mentioned, you know, they wanted to do it, and then I just said that's probably not a good idea.

Hunter objected to this testimony² and moved for a mistrial. The trial court denied the motion and admitted the evidence.

On appeal, Hunter argues that the trial court abused its discretion when it admitted Huss's aforementioned testimony.³ We disagree. Hunter preserved this issue for appellate review by objecting on the same grounds in the trial court.⁴ The trial court's decision to admit or exclude evidence will be reviewed by this Court for an abuse of discretion.⁵

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."⁶ "[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act."⁷ In this case, Huss's testimony did not refer to any act and only described that Hunter and George "mentioned" that they wanted to take the bank customer's money. This testimony, because it is not evidence of prior "crimes, wrongs, or acts" and because it is evidence of a prior statement, does not implicate MRE 404(b).⁸ Thus, the trial court did not abuse its discretion when it admitted the evidence over Hunter's objection.⁹ In reaching our conclusion, this Court notes that the evidence was otherwise relevant and admissible as evidence of Hunter's

² MRE 404(b).

³ *Id.*

⁴ *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

⁵ *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

⁶ MRE 404(b)(1).

⁷ *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989).

⁸ *Id.*

⁹ *Bauder*, 269 Mich App at 179.

intent to rob someone on the day of the armed robbery against Burton,¹⁰ and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.¹¹

Next, Hunter argues that OV 7 should not have been scored at 50 points. We disagree. This Court reviews the interpretation and application of the statutory sentencing guidelines de novo.¹² A scoring decision should be upheld if any evidence exists supporting the challenged score.¹³

OV 7 must be scored at 50 points 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.”¹⁴ This Court recently considered scoring OV 7.¹⁵ The *Glenn* decision determined “excessive brutality means savagery or cruelty beyond even the ‘usual’ brutality of a crime.”¹⁶ The decision also determined that the “defendant’s conduct would have substantially increased the victims’ fear only if the conduct was designed to cause copious or plentiful amounts of additional fear.”¹⁷

When scoring OV 7, “circumstances inherently present in the crime must be discounted”¹⁸ A person commits armed robbery when, while committing a larceny that person “uses force or violence against any person who is present, or who assaults or puts the person in fear” and “in the course of engaging in that conduct, possesses a dangerous weapon.”¹⁹ Thus, using “force or violence against any person” or an assault are “inherently present in the crime and must be discounted for purposes of scoring” OV 7.²⁰ “OV 7 is designed to respond to particularly heinous instances, in which the criminal acted to increase that fear by a substantial or considerable amount.”²¹

¹⁰ MRE 401; MRE 402.

¹¹ MRE 403.

¹² *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

¹³ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁴ MCL 777.37(1)(a).

¹⁵ *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012).

¹⁶ *Id.* at 533.

¹⁷ *Id.* at 533-534.

¹⁸ *Id.* at 535.

¹⁹ *People v Williams*, 288 Mich App 67, 72; 792 NW2d 384 (2010).

²⁰ *Glenn*, 295 Mich App at 535.

²¹ *Id.* at 536.

When scoring OV 7, “only the defendant’s actual participation should be scored.”²² In this case, the record supports that when Burton tried to leave, Hunter pointed a previously hidden gun at Burton and held it only a few inches away from his face. When Burton turned to flee, Hunter pistol whipped him twice, causing two wounds requiring four staples each. Burton described the hits as “extremely hard” and painful. His injuries began bleeding profusely. Burton continued to try and get away but Hunter, with George, chased Burton demanding his money. While they stopped assaulting Burton after obtaining his money, Hunter and George came back toward Burton when he was calling 911. Hunter’s conduct supports scoring OV 7 at 50 points, as it was “designed to substantially increase the fear and anxiety a victim suffered during the offense,”²³ and went beyond any force or violence or assault inherently present in the crime.²⁴ A trial court’s decision should be upheld if any evidence exists supporting the challenged score.²⁵ Scoring OV 7 is supported by Hunter’s conduct. As such, the trial court did not err in scoring OV 7 at 50 points.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

²² *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010).

²³ MCL 777.37(1)(a).

²⁴ *Glenn*, 295 Mich App at 535.

²⁵ *Hornsby*, 251 Mich App at 468.