

Syllabus

Chief Justice:
Stephen J. Markman

Justices:
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

PEOPLE v WHITE

Docket No. 149490. Decided December 26, 2017.

Anthony T. White pleaded guilty in the Berrien Circuit Court to charges of armed robbery, MCL 750.529, and breaking and entering, MCL 750.110, in connection with the robbery of a gas station during which he held a gun to the cashier's head. The court, Dennis M. Wiley, J., sentenced defendant to 108 to 480 months in prison for armed robbery and 23 to 120 months in prison for breaking and entering. The court had assessed defendant 10 points for Offense Variable (OV) 4, MCL 777.34, to reflect its finding that serious psychological injury requiring professional treatment occurred to a victim. This finding was based solely on the facts that defendant had held a gun to the cashier's head and that she heard a trigger being pulled, which the court concluded was sufficient to support its scoring of OV 4 despite the lack of evidence that the cashier had suffered psychological distress as a result. The Court of Appeals denied defendant's delayed application for leave to appeal, and defendant sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without holding oral argument, *held*:

Points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a serious psychological injury would normally occur as a result of the crime perpetrated against the victim, and evidence of fear while a crime is being committed, by itself, is insufficient to assess points for OV 4. Accordingly, the trial court erred by assessing 10 points for OV 4. Because the subtraction of 10 points lowered defendant's guidelines range for his guilty plea to armed robbery from a minimum of 81 to 135 months in prison to a minimum of 51 to 85 months in prison, the judgment of sentence was vacated and the case was remanded for resentencing. To the extent that *People v Apgar*, 264 Mich App 321 (2004), held that a victim's fear during a crime was sufficient to assess 10 points for OV 4 without any other showing of psychological harm, it was overruled.

1. MCL 777.34(1)(a) provides that OV 4 is correctly scored at 10 points when a serious psychological injury requiring professional treatment occurred to a victim. The trial court here assessed 10 points on the sole basis of its conclusion that a person would typically suffer a psychological injury when confronted with the instant crime. However, to support a score of 10 points, MCL 777.34 requires that serious psychological injury occurred to a victim, not that a

reasonable person in that situation would have suffered a serious psychological injury. Accordingly, the trial court erred in scoring OV 4.

2. Defendant's admission during his plea that the victim was afraid that he was going to shoot her could have supported scoring OV 4 at 10 points under *Apgar*, which was often cited for the proposition that a victim's expression of fearfulness during a crime was sufficient to assess 10 points for OV 4. However, the fact that a victim is afraid at the time of the incident, by itself, does not give rise to a serious psychological injury requiring professional treatment. Therefore, to the extent that *Apgar* held that a victim's fear during a crime, by itself and without any other showing of psychological harm, was sufficient to assess 10 points for OV 4, it was overruled, and defendant's admission was insufficient to sustain the trial court's scoring.

Judgment of sentence vacated; case remanded to the circuit court for further proceedings.

Justice CLEMENT took no part in the decision of this case.

OPINION

Chief Justice:
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FILED December 26, 2017

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 149490

ANTHONY TYJUS WHITE,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH (except CLEMENT, J.)

PER CURIAM.

The issue in this case is whether the trial court erred by assessing 10 points for Offense Variable (OV) 4 (“serious psychological injury” to a victim occurred) when the only evidence to support this scoring was the victim’s fear while the crime was being committed. We conclude that (a) points for OV 4 may not be assessed solely on the basis of a trial court’s conclusion that a “serious psychological injury” would normally occur as a result of the crime perpetrated against the victim and (b) evidence of fear while a

crime is being committed, *by itself*, is insufficient to assess points for OV 4. Accordingly, the trial court erred by assessing 10 points for OV 4. Because the subtraction of 10 points lowers defendant's guidelines range for his guilty plea to armed robbery, MCL 750.529, from a minimum of 81 to 135 months in prison to a minimum of 51 to 85 months in prison, we vacate the sentence of the trial court and remand for resentencing. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).¹

Defendant and an accomplice entered a gas station in Berrien County with guns drawn. Defendant held a gun to the cashier's head and demanded money while his accomplice searched the store. The cashier gave them money, and they ordered her to lie down until they left. The victim told police that she thought she heard a trigger being pulled, but neither of the guns went off. During his plea colloquy, defendant agreed that the victim "was afraid that [defendant] was going to shoot her." At sentencing, the trial court rejected defendant's challenge to the scoring of OV 4 at 10 points, reasoning:

Clearly, any person who has been held at gunpoint has some psychological distress, and, clearly, in a situation where they believe their life may be ending. I would suggest when they hear what they believe to be a trigger pulled, that that would heighten their psychological distress to somewhat a greater—much greater degree. While there's nothing, per se, indicating this—that there—that she actually suffered psychological distress, there's nothing to indicate that she was fine, either. And, the Court believes it is reasonable to draw a conclusion that as a result of being held at gunpoint with a trigger being pulled, that she suffered some type of psychological injury that might require some type of psychological counseling at some time in the—in the future.

¹ Defendant also pleaded guilty to one count of breaking and entering, MCL 750.110, and the trial court sentenced defendant to 23 to 120 months in prison on that charge.

There was no victim impact statement, preliminary examination, or victim statement in evidence at sentencing. As calculated by the court, defendant's minimum sentence guidelines range was 81 to 135 months, and the trial court sentenced him to 108 to 480 months in prison. The Court of Appeals denied defendant's delayed application for leave to appeal.

OV 4 is correctly scored at 10 points when a "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The trial court here assessed 10 points on the sole basis of its conclusion that people would *typically* suffer a psychological injury when confronted with the instant crime. However, a trial court "may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury 'occurred to a victim,' " not that a *reasonable* person in that situation would have suffered a "serious psychological injury." *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). Accordingly, the trial court erred in scoring OV 4.

However, our review of the trial court's scoring of OV 4 is not limited to the reasoning provided by the trial court. *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). Defendant's admission during his plea that the victim "was afraid that [defendant] was going to shoot her" may alternatively support scoring OV 4 at 10 points on the basis of *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004). In *Apgar*, the Court of Appeals held that "[b]ecause the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points." *Id.* at 329. *Apgar* is often cited for the proposition that a victim's "expression of fearfulness" during a crime is

sufficient to assess 10 points for OV 4. See, e.g., *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). However, a recent Court of Appeals decision rejected that reasoning, concluding that “the fact that [the victim] was afraid at the time of the incident, by itself, does not give rise to a serious psychological injury requiring professional treatment.” *People v Beach*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2017 (Docket No. 330140), p 6. We agree with the *Beach* panel and overrule *Apgar* to the extent it held that a victim’s fear during a crime, *by itself and without any other showing of psychological harm*, is sufficient to assess 10 points for OV 4.² While crime victims are often obviously, and understandably, frightened when a crime is being perpetrated, this fear does not necessarily result in a “serious psychological injury” and, as addressed earlier, a court cannot merely assume that a victim has suffered a “serious psychological injury” solely because of the characteristics of the crime. Accordingly, defendant’s admission is insufficient to sustain the trial court’s scoring.³

On remand, the trial court shall consider defendant’s issue regarding the assessment of court costs and shall not impose a fine for the defendant’s conviction of

² See also *Davenport*, 286 Mich App at 200; *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012); *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

³ Of course, a victim’s fear while a crime is being committed may be highly relevant to determining whether he or she suffered a “serious psychological injury [that] may require professional treatment” and thus may be considered together with other facts in determining how to score OV 4. We merely hold that, *absent other evidence of psychological harm*, fear felt during the crime is insufficient to assess points for this variable.

armed robbery. Because the statute under which the sentence was imposed, MCL 750.529, does not specifically provide for the imposition of a fine, one may not be imposed. See *People v Cunningham*, 496 Mich 145, 157; 852 NW2d 118 (2014); MCL 769.1k(1)(b)(i).

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CLEMENT, J., took no part in the decision of this case.