

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHALISE MELINA GRAY,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 279773

Oakland Circuit Court

LC No. 2007-213661-FH

Before: Jansen, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

Defendant¹ appeals by right her jury-trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and driving while license suspended (DWLS), MCL 257.904(3)(a). She was sentenced as a second habitual offender to 3 to 15 years in prison for the assault conviction and to time served for the DWLS conviction. She was also ordered to repay costs and attorney fees in the amount of \$1,370.00. We affirm in part, vacate in part, and remand for resentencing.

We agree with defendant’s contention that the trial court erred by scoring ten points for offense variable (OV) 10. A trial court’s findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A sentencing factor must be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Ten points may be assessed for OV 10 if the defendant “exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). The primary purpose of OV 10 is to assess points for the exploitation of vulnerable victims. *People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008). “The statute applies when exploitive conduct, including predatory conduct, is at issue.” *Id.* The trial court may only score ten points for OV 10 if the defendant has “manipulate[d] a victim for selfish or unethical purposes.” MCL 777.40(3)(b).

¹ Defendant first name is variously spelled as “Chalise”, “Charlise”, and “Chelisse” throughout the lower court record. It appears as “Chalise” on this Court’s docket sheet.

While it is true that defendant was in a relationship with the victim, the “mere existence of 1 or more factors described in [MCL 777.40(1)] does not automatically equate with victim vulnerability.” MCL 777.40(2). Moreover, there was no evidence that defendant manipulated the victim for her own selfish or unethical purpose. See MCL 777.40(3)(b). It is true that defendant purposefully ran into the victim with an automobile after the victim had broken up with her. But running into someone with an automobile can hardly be considered “exploitation” or “manipulat[ion].” Furthermore, even if defendant’s act of having sex with the victim hours before the assault could be considered “exploitation,” we cannot conclude that this exploitation was proximately enough related to the sentencing offense to permit the scoring of OV 10. See *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). The trial court clearly erred by determining that defendant exploited or manipulated the victim during her commission of the sentencing offense. We vacate the score of ten points for OV 10 and remand for resentencing.²

Defendant’s argument that the trial court failed to comply with this Court’s directives in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), is without merit. The trial court considered defendant’s financial position and the costs of defendant’s appointed counsel, and concluded that defendant had the ability to repay. Indeed, the trial court specifically observed that it had been “provided with a lot of information, both by the defendant and her family . . . about her modeling career and about her abilities.” After considering this information, the court found that defendant was “able bodied” and able to repay the costs. The trial court indicated on the record that it had considered defendant’s foreseeable ability to pay and that it believed that defendant, with job experience and future career aspirations, would be able to repay the \$1,370 in costs and attorney fees. This is all that is required under *Dunbar*.

In sum, we affirm defendant’s convictions and the order requiring defendant to repay \$1,370 in costs and attorney fees. We vacate the trial court’s score of ten points for OV 10 and remand for resentencing.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O’Connell
/s/ Donald S. Owens

² The prosecution argues that any error in the scoring of OV 10 was harmless in light of the fact that the trial court could have scored additional points for other offense variables. But the fact remains that the trial court *did not* score additional points for the other offense variables. We decline the invitation to recalculate defendant’s OV score on appeal. The prosecution’s argument in this regard must be addressed in the first instance by the trial court.