STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LEE HILDRETH,

Defendant-Appellant.

UNPUBLISHED
August 13, 2013

No. 310553
Grand Traverse Circuit Court
LC No. 11-011319-FH

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(concurring in part and dissenting in part)*

I concur in all respects other than the majority's reversal of the trial court's decision to score Offense Variable (OV) 4 at 10 points. I respectfully disagree with the majority's conclusion that the trial court improperly scored OV 4 and the implication that the trial court merely assumed that the victim suffered psychological harm. Although I agree that whether or not OV 4 is scored does not affect the outcome of this matter, I would affirm the trial court's score.

OV 4 should be scored at 10 points if the trial court finds that a victim suffered a "serious psychological injury" that "may require professional treatment." MCL 777.34. "The circuit court shall apply the preponderance of the evidence standard to its scoring decisions, and any review by the Court of Appeals shall be for clear error." *People v Nelson*, 491 Mich 869, 870; 809 NW2d 564 (2012). Although a victim need not have actually sought professional treatment, the trial court "may not simply assume that someone in the victim's position would have suffered psychological harm." *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). Nevertheless, clear error will not be found if the guidelines determination is supported by a preponderance of the evidence. *People v Hardy*, ___ Mich ___, ___; ___ NW2d ___ (2013) (slip op at p 6).

The impact statement given by the victim in this case did not explicitly state, in precisely so many words, that he had been "psychologically injured." Furthermore, the traumatic brain injury the victim received might not, standing alone, necessarily be *per se* also a psychological injury. However, in the brain it is difficult to impossible to neatly separate physiological harm from psychological harm, and it is established that the victim suffered memory loss and had part of his brain physically exposed due to his injuries. In contrast, it is entirely within the trial court's capabilities to determine emotional states from the manner in which a person describes

facts. The victim testified at trial, and the trial court is obviously in the superior position to evaluate the demeanor of witnesses before it; indeed, a significant amount of human communication is nonverbal and simply cannot be reflected in a cold transcript. The victim stated that the crime had "ruined [his] life." In context, this seems to me to be evidence of more than mere physical injury. This Court's review is not de novo, but rather for whether a scoring decision is supported by a preponderance of the evidence. I conclude that such evidence does exist, and the trial court therefore did not commit clear error in scoring OV 4 at 10 points.

/s/ Amy Ronayne Krause