

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 26, 2013

v

BRETT CHARLES CAYLOR,

Defendant-Appellant.

No. 312239
Wayne Circuit Court
LC No. 11-010627-FC

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant, Brett Charles Caylor, appeals as of right his jury-trial convictions of attempted unlawful driving away of a motor vehicle, MCL 750.413 and MCL 750.92; possession of burglary tools, MCL 750.116; and breaking and entering a vehicle causing damage to the vehicle, MCL 750.356a(3). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of 3 to 15 years' imprisonment for his conviction of attempted unlawful driving away of a motor vehicle and 6 to 10 years' imprisonment for both his convictions of possession of burglary tools and breaking and entering a vehicle causing damage to the vehicle. We affirm.

I. BASIC FACTS

This case arises from an attempted automobile theft. The victim, Sherron Sparks, testified that on August 9, 2011, she and her brother, Douglas Sparks, were walking back to her car after attending a festival when she noticed a stranger, later identified as defendant, inside the car. Defendant was sitting in the driver's seat leaning forward with his head under the dashboard. Sherron saw that the lock from the driver's door had been removed and was lying on the ground. Sherron opened the door and asked defendant what he was doing in her car. Defendant came up from under the dashboard holding a 14- to 16-inch screwdriver in his hand, which he proceeded to swing at Sherron in what was described as a chopping motion, with the blade end pointed at her. Sherron testified that she was "terrified." Douglas testified that when his sister opened the door, defendant popped up from under the dashboard and was clenching the screwdriver in his hand with the blade pointed toward his sister. Fearing for his sister's safety, Douglas pushed Sherron out of the way, grabbed defendant, pulled him out of the car, and ultimately detained him on the ground while Sherron ran for help. Douglas noticed a bag on defendant's shoulder as he pulled defendant out of the car, which turned out to be Douglas's

computer bag. Defendant also had in his pocket Douglas's extra pair of glasses and the glass case. Sherron testified that the ignition in the steering column was torn apart and that the car was running, even though her keys were in her purse. Douglas also testified that the engine was slowly running during the incident.

Defendant testified on his own behalf and admitted that he was attempting to steal Sherron's car on his way home from drug treatment on the day in question. Defendant admitted to being a habitual heroin user for roughly seven years and that his intent was to steal Sherron's car to sell it for drug money. He testified that he had been attempting to break open the ignition with the screwdriver when Sherron returned to her vehicle. Defendant only realized Sherron was approaching the car when she opened the door and started "hollering" at him. He stated that he never attempted to use the screwdriver as a weapon against her; rather, he was startled and merely turned toward her with the screwdriver in his hand when she started yelling at him. He agreed that he was holding the screwdriver the way someone would hold a knife but insisted that he was using it as a tool to break the ignition. Defendant stated that while he has stolen cars numerous times in the past, he has never been violent in his life; his intent was only to steal the car. Defendant denied possessing any of Sherron's or Douglas's personal items. He also denied that the car was running at the time of the incident. Defendant admitted on cross-examination to having been convicted in the past of using fraud to obtain drugs, home invasion, fleeing from the police, and twice stealing cars. He also admitted to having given the police fake identification once in the past in an attempt to avoid arrest.

The jury acquitted defendant of two counts of armed robbery—one against Sherron and one against Douglas—and convicted him of all other charged counts, as described above.

II. ANALYSIS

Defendant argues on appeal that the trial court erred by scoring 10 points for both Offense Variable (OV) 4 and OV 9. We disagree.

When this Court reviews the scoring of the sentencing guidelines, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation," which we review *de novo*. *Id.*

A. OV 4

Defendant first argues that the trial court clearly erred by finding that the Sherron suffered serious psychological injury and, thus, that the trial court erred by scoring 10 points for OV 4. We disagree.

Under MCL 777.34(1)(a), a court must assess 10 points for OV 4 if the victim of the crime suffers from "[s]erious psychological injury requiring professional treatment" and zero points if the victim suffers "[n]o serious psychological injury requiring professional treatment."

In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2)¹; *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). However, there must be some evidence on the record of psychological injury to justify the assessment of points. *Lockett*, 295 Mich App at 183.

Here, the trial court did not clearly err because there was sufficient evidence that Sherron suffered from a serious psychological injury that may require professional treatment. At trial, Sherron testified that she was terrified when she saw defendant, in her car, turning toward her and wielding a screwdriver in a chopping motion. In such situation, she would have no ability to discern whether defendant's intentions were deadly or defensive. Douglas also testified that the events at the scene of the crime were so startling that he feared for his sister's well-being, which caused him to push her out of the way and physically accost and detain defendant. Further, at defendant's sentencing hearing, Sherron testified that the incident, combined with other events in her life, caused her to become depressed:

[I]t was really a good day you know we were going to the festival. And it you know it was kind of bitter sweet because I just lost my job.

I could no longer afford the full coverage insurance so I changed to no fault and then to walk up on somebody stealing my car and wanting me to have sympathy on him because he was going to visit his grandmother.

* * *

And then afterwards my dog died and then you know other depressions other things came in and really caused depression and all of this just keeps going back to what next.

We have found both expressions of fear and expressions of depression because an individual was the victim of a crime to suffice for scoring 10 points under OV 4. See *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012); *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010). We have also found testimony that a victim was scared during a criminal offense to warrant scoring 10 points under OV 4. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, the evidence shows both that Sherron has experienced depression as a result of the crime and that she was sufficiently fearful, i.e., "terrified," during the crime. Therefore, scoring 10 points under OV 4 was proper.

B. OV 9

Defendant next argues that the trial court clearly erred by finding that there were two to nine victims and, thus, that the court erred by scoring 10 points for OV 9. We disagree.

¹ The trial court is merely required to find, by a preponderance of the evidence, that the "serious psychological injury *may* require professional treatment." MCL 777.34(2) (emphasis added).

Under MCL 777.39(1)(c), a court must assess 10 points for OV 9 if “[t]here were 2 to 9 victims who were placed in danger of physical injury or death.” Each person placed in danger of physical injury or loss of life must be counted as a victim, MCL 777.39(2)(a), but the victims must be direct victims, not merely a member of the community that is indirectly affected by a crime, *People v Carrigan*, 297 Mich App 513, 515-516; 824 NW2d 283 (2012). Further, first responders, *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012), and intervening civilians, *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004), can be “victims” for the purposes of scoring OV 9.

Based on our review of the record, we conclude that the trial court did not clearly err by finding that Sherron and Douglas were placed in danger of physical injury or death at the time of the incident. Although defendant was acquitted of armed robbery against Douglas and Sherron, a preponderance of the record evidence shows that when Sherron and Douglas approached the car and confronted defendant, he was wielding a 14- to 16-inch screwdriver in his hand. Had Douglas not reacted so quickly to accost defendant and pin him to the ground, defendant could have used the screwdriver to injure either Douglas or Sherron, whether to complete his attempt to steal the car or simply to escape.² Furthermore, the trial court found noteworthy both Sherron’s and Douglas’s testimony that the car was running at the time of the incident, which involved defendant undertaking to steal and drive away with the car. At that point, according to the trial court’s rationale, the car became a potential weapon given its proximity to Sherron and Douglas. Given that the facts support a finding that two victims were placed in danger of physical injury or death, the trial court did not err by scoring OV 9 at 10 points. See MCL 777.39(1)(c).

Because both OV 4 and OV 9 were properly scored, defendant is not entitled to resentencing.

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering

² Defendant also admitted to having a hammer on his person at the time of the offense, which the police corroborated.