

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 3, 2014

v

JOHN COLE MILLER,

Defendant-Appellant.

No. 313272
Kalkaska Circuit Court
LC No. 12-003465-FH

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant pleaded guilty of possession of a controlled substance less than 25 grams MCL 333.7403(2)(a)(v). The trial court sentenced him as an habitual offender, third offense, MCL 769.11, to a prison term of 20 to 96 months. Defendant appeals by leave granted.¹ We affirm.

On the night of November 11, 2011, defendant and Derek Dalton each injected heroin while in Dalton's camper. The camper was parked behind a bar. After Dalton was reported missing by his parents, the police investigated Dalton's camper and found Dalton dead inside. An autopsy revealed the cause of death was "acute morphine and ethanol toxicity." Defendant admitted to using heroin with Dalton and that he had panicked, cleaned up the needles, and fled when Dalton began moaning and slurring his words. The police asked defendant if Dalton had his own "rig" for injecting heroin and defendant stated that he did not. After the police reviewed video surveillance from the bar, defendant was charged with possession of a controlled substance as an habitual offender, fourth offense. He later pleaded guilty of possession of less than 25 grams of a controlled substance as an habitual offender, third offense.

Defendant challenges the scoring of offense variables (OV) 3 and 13. The trial court scored 100 points for OV 3 and 5 points for OV 13. "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).

¹ *People v Miller*, unpublished order of the Court of Appeals entered October 29, 2013 (Docket No. 313272).

Nevertheless, clear error will not be found if the guidelines determination is supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

A score of 100 points is appropriate for OV 3 if a victim was killed. MCL 777.33(1)(a). The death must have resulted from the commission of a crime, and homicide cannot be the sentencing offense. MCL 777.33(2)(b). A victim is “*any person* harmed by the criminal actions of the defendant.” *People v Laidler*, 491 Mich 339, 349 n 6; 817 NW2d 517 (2012) (emphasis in original). Thus, a co-perpetrator could be considered a “victim” for the purpose of scoring OV 3. *Id.* at 347. The defendant’s criminal actions must constitute the factual cause of death, but need not be the only cause of death. Use of the word “results” rather than “causes” indicates that the Legislature only intended to require “but-for” causation rather than proximate causation. *Id.* at 345. In other words, “In determining whether a defendant’s conduct is a factual cause of the result, one must ask, ‘but for’ the defendant’s conduct, would the result have occurred?” *Id.*

Here, the evidence on the record supports a finding that that defendant’s possession of heroin was a cause-in-fact of Dalton’s death. The video footage strongly suggests that defendant gave heroin to Dalton after purchasing the heroin from a third individual. Defendant stated that he brought two packs of heroin for his own use. One pack of heroin was found under the cushions in the camper. Given defendant’s statement that Dalton did not have his own “rig” for injecting heroin, that he used his own rig and then handed it to Dalton, and that Dalton fell to the ground shortly thereafter, as well as the lack of evidence that any other person was present when the heroin was injected, we conclude that the evidence supports the trial court’s finding that defendant supplied Dalton with heroin and with the means to inject the heroin on the night he died. The trial court did not clearly err by scoring 100 points for OV 3.

A score of five points is appropriate for OV 13 when the crime was part of a pattern of felonious activity involving three or more crimes against property. MCL 777.43(1)(f). All crimes within a five-year period, including the sentencing offense, must be counted, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). The sentencing offense must be of the same class of offenses as the other offenses considered to properly be considered a pattern of felonious activity. *Nelson*, 491 Mich 869. Defendant acknowledges that he was convicted of three property crimes within a five-year period of the sentencing offense, but contends that since his sentencing offense is a crime involving a controlled substance, not a crime against property, the sentencing offense is not part of a pattern of felonious activity under the meaning of the statute. We agree. The sentencing offense was a crime involving a controlled substance and this offense is not considered as part of a pattern of felonious activity involving crimes against property. See, e.g., *Nelson*, 491 Mich at 869-870.² Defendant’s offense

² In *Nelson*, our Supreme Court reversed this Court’s opinion on the scoring of OV 13 for the reasons stated in this Court’s dissenting opinion. *Nelson*, 491 Mich at 869. This Court’s majority held that a score of 25 points for OV 13 was appropriate when the defendant had three convictions for crimes against a person during the five year period and the sentencing offense was intent to deliver 50 grams of cocaine. *People v Nelson*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2011 (Docket No. 296932), slip op at 2. The dissent, however, argued that a score of 25 points for OV 13 was inappropriate because the sentencing

also does not fit into any of the other categories eligible for scoring under OV 13. Even adjusting defendant's total OV score to account for the error in scoring OV 13, defendant's total OV score is still well within offense variable level III, the highest OV category for a class G felony. MCL 777.68. Because adjustment to defendant's score will not change the recommended minimum sentencing range under the legislative guidelines, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

offense was a crime involving a controlled substance and this offense could not be considered as part of a pattern of felonious activity involving crimes against persons. *Nelson*, unpub op at 1-2 (Shapiro, J., concurring in part and dissenting in part).