

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN KEITH KOLAR,

Defendant-Appellant.

UNPUBLISHED

May 4, 1999

No. 206800

Shiawassee Circuit Court

LC No. 97-000281-FC

Before: Kelly, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Defendant was originally charged with open murder but ultimately pleaded guilty to manslaughter, MCL 750.321; MSA 28.553. Defendant's sentencing guidelines recommendation, as scored by the trial court, was for a minimum sentence within the range of 48 to 120 months, and defendant was sentenced within that range to ten to fifteen years' imprisonment. Defendant appeals by right. We affirm.

On appeal, defendant challenges the trial court's scoring of Offense Variable (OV) 3 of the sentencing guidelines. Specifically, the trial court scored twenty-five points under OV 3 for unpremeditated intent to kill, intent to do great bodily harm or knowing creation of a very high risk of death or great bodily harm, noting defendant's own statements at the plea hearing that he continued to strike the victim in the head with a baseball bat after the victim had already begun to fall to the floor as the result of earlier blows. Defendant argues that the trial court should have only scored ten points under OV 3, pursuant to the guidelines instructions that the variable must be scored "consistent with a jury verdict unless the judge has information not presented to the jury" and to score ten points "where a killing is intentional within the definitions of murder second degree or voluntary manslaughter but the death occurred in a combative situation...." Scoring only ten points under OV 3 would have reduced defendant's guidelines sentence range to 36 to 96 months.

Because defendant does not challenge the facts upon which the trial court predicated its scoring decision, only the trial court's interpretation of how those facts should be scored, defendant's challenge to the scoring of OV 3 is not a cognizable appellate issue. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 156, 176-178; 560 NW2d 600 (1997). Although

defendant argues that the rule established in *Mitchell* and *Raby* is unconstitutional, this Court is bound to follow the decisions of the Michigan Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Affirmed.

/s/ Michael J. Kelly

/s/ Janet T. Neff

/s/ Michael R. Smolenski