

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAZY OLUFEME OZOMARO, JR., a/k/a DAZY
COUFEMI OZOMARO,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 260812

Kalamazoo Circuit Court

LC No. 04-000873-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

A jury convicted defendant of second-degree fleeing and eluding a police officer, MCL 257.602a(4)(b), resisting and obstructing a police officer, MCL 750.81d(1), and operating a motor vehicle while intoxicated (“OWI”), MCL 257.6253a. The trial court sentenced him as an habitual offender, fourth offense, MCL 769.12, to 76 months to 20 years’ imprisonment for his fleeing and eluding conviction, to 34 months to 15 years’ imprisonment for his resisting and obstructing conviction, and to 90 days in jail for his OWI conviction. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that he was deprived of a fair trial because the jury advised the trial court of its numerical split when informing the court that it was deadlocked on two of the charges. During the course of their deliberations, the jurors informed the trial court in writing that they were deadlocked on the fleeing and eluding and OWI charges, but had reached a verdict on the charge of resisting a police officer. The trial court explained on the record.

. . . I have a piece of paper with writing on it. It says count one, police officer, fleeing and eluding; and then it has a reflection of the votes, which I’m not supposed to be told. But I’ve been told and the lawyers have seen it.

Count two, police officer, assaulting, resisting, obstructing. It has 12 with a verdict.

Count three, operating while intoxicated, it has a split again. And then it says no progress being made on count one and three.

The trial court accepted the jury's verdict on count II, and then gave the jury the standard deadlocked jury instruction, CJI2d 3.12,¹ without any additional comment. Neither party objected and the jury resumed deliberation. The trial court then specifically inquired of counsel whether they had anything further pertaining to the deadlocked jury instruction. Both counsel clearly indicated that they did not. Defendant did not move for a mistrial or otherwise argue that defendant was being deprived of a fair trial.

Defendant now argues on appeal that he was deprived of a fair trial by the trial court's actions in responding to the jury's disclosure of their numerical division on counts I and III. Because defense counsel expressed satisfaction with the trial court's actions in this regard, however, we conclude that defendant has waived this issue for appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Furthermore, we note that even if the issue was not waived, defendant's argument lacks merit. Defendant asserts that the trial court's instruction to the jury to continue deliberations after disclosure of the numerical division deprived him of a fair trial by coercing a verdict. In the absence of any objection thereto at trial, this Court reviews the trial court's actions for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts

¹ CJI2d 3.12 provides:

(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.

(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

(5) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(6) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

and circumstances, as well as the particular language used by the trial judge, must be considered.” *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). In *People v Lawson*, 56 Mich App 100, 105; 223 NW2d 716 (1974), this Court explained that a trial court may not inquire or attempt to discover the numerical division of a jury because

[s]uch an inquiry . . . carries the improper suggestion that the numerical division at the preliminary stage of deliberation is relevant to what the final verdict will, or should, be. By establishing one viewpoint as the “majority view,” the inquiry “has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority.” It places the trial court’s imprimatur upon what was but a tentative result. [Citations and footnote omitted.]

However, as defendant acknowledges in the instant case, the trial court did not inquire, or attempt to discover, the jury’s numerical division. Nor did the trial court affix any significance to the jury’s state of disagreement. Rather, the trial court gave the standard deadlocked jury instruction, CJI2d 3.12, without additional comment. Unlike *People v Wilson*, 390 Mich 689, 691-692; 213 NW2d 193 (1973), upon which defendant relies, there is no implication of juror coercion. Defendant has not established that any error occurred, and thus, even were this claim were not waived, reversal of defendant’s conviction would not be warranted. *Carines, supra*.

Defendant also argues on appeal that the trial court incorrectly scored offense variable (“OV”) 9, MCL 777.39, relative to his conviction for fleeing and eluding. A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence on the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the trial court’s scoring decisions “to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The sentencing court’s scoring should be upheld if there is any support in the record for it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The sentencing court’s findings of fact are reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

OV 9 is to be scored at zero points if there were fewer than two victims or at ten points if there were 2 to 9 victims. MCL 777.39(1)(c)-(d). For purposes of scoring OV 9, a court is “count each person who was placed in danger of injury or loss of life as a victim.” MCL 777.39(2)(a). Here, the trial court determined that defendant placed two persons in danger of injury while he was fleeing and eluding Officer Dreier: the officer and defendant’s son, who was in defendant’s vehicle at the time he fled from Officer Dreier. On appeal, defendant concedes that his son was a victim of this offense, but he denies that the officer was placed in danger during defendant’s commission of the fleeing and eluding offense. We disagree.

Testimony at trial established that defendant drove at speeds well in excess of the legal limit while fleeing from Officer Dreier, striking two trees and a fence, and coming to a stop only after traveling down a hill and into a ravine. At one point, defendant reversed his vehicle in an attempt to evade apprehension. Dreier was standing near the driver’s side window of defendant’s car when he engaged in this reckless act. Defendant’s vehicle then made contact with Dreier’s vehicle. Further, as this Court explained in *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003), “where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant’s conduct in

calculating the sentencing guideline range with respect to each offense.” Therefore, in scoring OV 9, the trial court could also consider defendant’s conduct while resisting arrest, after the fleeing and eluding came to an end. While resisting arrest, defendant came into direct physical contact with Dreier and picked up a shovel, potentially to be used as a weapon. Thus, we conclude that there was sufficient evidence of record to support the trial court’s conclusion that Dreier was placed in danger of injury during defendant’s fleeing and eluding offense. Therefore, the trial court did not abuse its discretion in scoring OV 9 at ten points for two victims.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens