

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN GREGORIO LARIO-MUNOZ,

Defendant-Appellant.

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UNPUBLISHED

June 30, 2011

No. 295811

Kent Circuit Court

LC No. 05-012474-FC

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant Edwin Lario-Munoz was originally tried in the Kent County Circuit Court, a jury convicted him in October 2006, and the trial court sentenced him in December 2006. The Michigan Supreme Court subsequently reversed that conviction and granted Lario-Munoz a new trial.<sup>1</sup>

Following a second jury trial in the Kent County Circuit Court, a jury convicted Lario-Munoz of second-degree murder,<sup>2</sup> assault on an individual causing miscarriage/stillbirth,<sup>3</sup> assault with intent to murder,<sup>4</sup> and assault with intent to commit armed robbery.<sup>5</sup> The trial court sentenced Lario-Munoz to prison terms of 35 to 90 years for second-degree murder, 9 to 15 years for assault on an individual causing miscarriage/stillbirth, 20 to 40 years for assault with intent to murder, and 20 to 40 years for assault with intent to commit armed robbery. Lario-Munoz now appeals several sentencing issues as of right.

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<sup>1</sup> *People v Lario-Munoz*, 483 Mich 1130; 767 NW2d 442 (2009).

<sup>2</sup> MCL 750.317.

<sup>3</sup> MCL 750.90(a).

<sup>4</sup> MCL 750.83.

<sup>5</sup> MCL 750.89.

## I. FACTS

On October 14, 2005, Leoncio Garcia-Lopez returned home from work at 4:00 p.m. Garcia-Lopez lived in the home with his wife, Sylvia Sanchez; their infant son; and Lario-Munoz, who was renting a second-floor bedroom. When Garcia-Lopez tried his key in the door, he found it locked by way of a deadbolt only accessible from the inside of the house. Locked out of his house, he knocked on the door. Lario-Munoz answered the door wearing yellow rubber cleaning gloves and holding a large knife and a barbecue fork. Lario-Munoz informed Garcia-Lopez that a gang had come to the house demanding money and that someone from the gang was still there.

Lario-Munoz then demanded Garcia-Lopez's bankcard and told Garcia-Lopez that he was going to tie him up until the gang returned. When Garcia-Lopez asked where his wife was, Lario-Munoz informed him that the gang members had tied her up in his room on the second floor. Garcia-Lopez's infant son began to cry, so Garcia-Lopez went into his first-floor bedroom to retrieve him. On his way upstairs to locate his wife, he saw Sanchez lying motionless on the kitchen floor. Lario-Munoz told Garcia-Lopez that his wife was not dead but that the gang had "poured some liquid on her face to put her to sleep." He went on to tell Garcia-Lopez that the gang "would just put some air on her . . . and that . . . she would come back to life."

The two men argued, and Garcia-Lopez gave Lario-Munoz his bankcard and told him the pin number. Garcia-Lopez and Lario-Munoz's argument became more physical, and a knife fight ensued. Exhausted and injured, Lario-Munoz gave up fighting and left the house. When Garcia-Lopez came out of the house a short time later, he was holding his infant son and was also covered in blood. Garcia-Lopez told the police that Lario-Munoz had killed Sylvia Sanchez and then attacked him. Police officers overheard Lario-Munoz tell medical personnel that he had seen Garcia-Lopez strangle his wife and then Garcia-Lopez attacked him. Each man suffered injuries from their armed fight, with Garcia-Lopez receiving several stab wounds to the abdomen. Both men were taken to the hospital, where police interviewed them.

When Grand Rapids police officers investigated the scene, they found blood on the walls and floor of the house. Police discovered Sylvia Sanchez's body on the kitchen floor. Officers did not find any vital signs and alerted medical personnel. Paramedics later pronounced Sanchez dead at the scene.

Police interviewed Lario-Munoz four times. These interviews were recorded and played for the jury at trial. Lario-Munoz repeatedly denied that he killed Sanchez. In the last interview, however, he admitted that he did not actually see Garcia-Lopez strangling Sylvia Sanchez. Lario-Munoz claimed that he found Sanchez dead when he returned home from a walk in a nearby cemetery. He told the officer that he did not call the police because he was afraid that he would be blamed for her death. He also told the officer that he fought with Garcia-Lopez after he got home and discovered that Sanchez was dead.

The medical examiner testified that the cause of Sanchez's death was manual strangulation. He further testified that Sanchez was 26 weeks pregnant and that the fetus could have survived with medical treatment. As a consequence of Sanchez's death from a lack of oxygen, her fetus also died. The medical examiner found abrasions on the front of her neck, as

well as hemorrhaging in her eyes. He testified that hemorrhaging of that type is most common in strangulation cases. An internal examination showed a large area of hemorrhaging in the deep structure of the victim's neck. The medical examiner estimated time of death as between 11:00 a.m. and 3:00 p.m. He also testified that death by manual strangulation could take up to five minutes.

At sentencing, the trial court scored offense variable (OV) 3 at 25 points, OV 7 at 50 points, and OV 13 at 25 points. Lario-Munoz now appeals as of right the scoring of these offense variables.

## II. OFFENSE VARIABLE SCORING

### A. STANDARD OF REVIEW

This Court reviews de novo the interpretation of statutory sentencing guidelines and the legal questions that an application of the guidelines presents.<sup>6</sup> And this Court reviews a trial court's ultimate sentencing decision for an abuse of discretion.<sup>7</sup> However, this Court must remain cognizant that the "sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."<sup>8</sup> Thus, in reviewing a trial court's scoring, this Court must determine whether the sentencing court "properly exercised its discretion and whether the evidence adequately support[ed] a particular score."<sup>9</sup> This Court will uphold a scoring decision if it is supported by "any evidence[.]"<sup>10</sup> This Court "must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence."<sup>11</sup>

### B. OFFENSE VARIABLE 3

OV 3 concerns physical injury to a victim during the commission of a crime.<sup>12</sup> The trial court should score OV 3 at 100 points "if death results from the commission of a crime and homicide is not the sentencing offense."<sup>13</sup> The trial court should score 25 points for OV 3 if

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<sup>6</sup> *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

<sup>7</sup> *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

<sup>8</sup> *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005), quoting *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

<sup>9</sup> *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

<sup>10</sup> *Id.* at 490; see also *Wilkens*, 267 Mich App at 740.

<sup>11</sup> *Steele*, 283 Mich App at 490; see also *Underwood*, 278 Mich App at 337.

<sup>12</sup> MCL 777.33.

<sup>13</sup> MCL 777.33(2)(b).

“[l]ife threatening or permanent incapacitating injury occurred to a victim[.]”<sup>14</sup> And the trial court should score 0 points for OV 3 if “[n]o physical injury occurred to a victim[.]”<sup>15</sup>

In *People v Houston*, the Michigan Supreme Court addressed whether a defendant in a crime involving homicide can be scored 25 points under OV 3 if the injury to the victim was fatal.<sup>16</sup> The Court reasoned that “[t]he Legislature expressly prohibited the assessment of one hundred points when, as here, the underlying offense is homicide.”<sup>17</sup> Accordingly, “one hundred points under [the statute] must be excluded as a possible assessment for OV 3.”<sup>18</sup> “It is equally clear, according to the plain language of [the statute], that zero points must be excluded as an option because zero points may be assessed under that subsection only when ‘no physical injury occurred to a victim.’”<sup>19</sup> The Court held that “[b]ecause the statute directs the trial court to award the highest number of points possible under OV 3, the trial court was required to assess twenty-five points . . . .”<sup>20</sup>

Pursuant to *People v Houston*, the trial court here correctly determined that manual strangulation is a “life threatening or permanently incapacitating injury.”<sup>21</sup> An internal examination of Sanchez showed a large area of hemorrhaging in the deep structure of her neck. A score of zero for OV 3 would indicate that there was no injury to the victim.<sup>22</sup> Hemorrhaging of this type is certainly an injury, thus precluding a score of zero. Severe damage to the neck is a life-threatening injury, as it affects the essential life functions of breathing and swallowing. Because the statute mandates the imposition of the highest score available, 25 points for OV 3 is proper.<sup>23</sup>

While Lario-Munoz agrees that *Houston* is the controlling authority here, he argues that it was wrongly decided by the Michigan Supreme Court and urges this Court to consider Justice CAVANAGH’s dissent and recommend reversal. While we see merit in the *Houston* dissent, it is

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<sup>14</sup> MCL 777.33(1)(c).

<sup>15</sup> MCL 777.33(1)(f).

<sup>16</sup> *People v Houston*, 473 Mich 399, 405; 702 NW2d 530 (2005).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; MCL 777.33(1)(a).

<sup>19</sup> *Houston*, 473 Mich at 406, quoting MCL 777.33(1)(f).

<sup>20</sup> *Id.* at 407; MCL 777.33(1)(c).

<sup>21</sup> MCL 777.33(1)(f).

<sup>22</sup> MCL 777.33(1)(f).

<sup>23</sup> MCL 777.33(1).

the Supreme Court’s obligation to overrule or modify its decisions.<sup>24</sup> Until that Court takes such action, the Supreme Court’s decision in *Houston* binds this Court and all lower courts.<sup>25</sup>

### C. OFFENSE VARIABLE 7

OV 7 concerns aggravated physical abuse during an offense.<sup>26</sup> The trial court should score 50 points for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]”<sup>27</sup> But the trial court should score 0 points for OV 7 if “[n]o victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]”<sup>28</sup>

Here, the trial court held that there was excessive brutality based on several factors: Sanchez was six-and-a-half months pregnant at the time of her death, there was a 10-month-old child in the apartment during the offense, and the fact that it takes two to five minutes for a person to die from strangulation. Additionally, trial court found it significant that the strangulation fractured Sanchez’s pharynx as well as caused hemorrhaging in her deep neck muscles—injuries that the trial court had never before heard described in the other “numerous strangulation cases” that it had been involved with over the years. The trial court explained that the nature and extent of those injuries showed excessive brutality.

The Legislature has not defined the terms used to determine the appropriate score under MCL 777.37. However, under such circumstances, we may look to dictionary definitions.<sup>29</sup> “Excessive” is defined as “going beyond the usual, necessary, or proper limit or degree; characterized by excess.”<sup>30</sup> And “brutality” is defined as “the quality of being brutal; cruelty; savagery.”<sup>31</sup> Thus, excessive brutality, in this context, is brutal conduct that exceeds the norm for committing the crime.

We need not agree with every finding on which the trial court based its score.<sup>32</sup> But we do agree that the record evidence—that during the two to five minutes that the pregnant mother

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<sup>24</sup> *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009); see also *People v Buckner*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 281384).

<sup>25</sup> *Sprague*, 284 Mich App at 242; see also *Buckner*, unpub op at 7.

<sup>26</sup> MCL 777.37.

<sup>27</sup> MCL 777.37(1)(a).

<sup>28</sup> MCL 777.37(1)(b).

<sup>29</sup> *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997).

<sup>30</sup> *Random House Webster’s College Dictionary* (1997).

<sup>31</sup> *Id.*

<sup>32</sup> *Steele*, 283 Mich App at 490 (stating that this Court will uphold a scoring decision if it is supported by “any evidence”).

was being strangled, she suffered a fractured pharynx and hemorrhaging in her deep neck muscles—was adequate evidence to support the 50-point score.<sup>33</sup> Such evidence demonstrated excessive brutality in commission of the assault and murder of a six-and-a-half month pregnant woman, which also caused the death of her unborn child. Therefore, we conclude that the trial court properly exercised its discretion<sup>34</sup> when it scored 50 points for OV 7 and we conclude that the evidence before the trial court adequately supported this particular score.

#### D. OFFENSE VARIABLE 13

A trial court scores OV 13 if there is evidence of continuing patterns of criminal behavior.<sup>35</sup> The trial court should score a defendant 25 points for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”<sup>36</sup> Conversely, the trial court should score 0 points for OV 13 if “[n]o pattern of felonious criminal activity existed.”<sup>37</sup> “For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.”<sup>38</sup>

In *People v Wilkens*, this Court considered whether crimes committed contemporaneously with the sentencing offense are properly scored under OV 13.<sup>39</sup> This Court held that because, at the time of his sentencing, the defendant had been convicted of two counts of first-degree criminal sexual conduct; one count of eavesdropping for videotaping a female tenant in the shower; and had two additional counts of first-degree criminal sexual conduct pending, there was sufficient evidence in the record of the three crimes against a person needed to support the scoring of 25 points for OV 13.<sup>40</sup>

Lario-Munoz argues that, through an overbroad application, the trial court erroneously employed *Wilkens*. He argues that *Wilkens* does not stand for the proposition that all offenses against a person occurring contemporaneously with the sentencing offense can be counted under OV 13. Lario-Munoz is correct that not all offenses contemporaneous with the sentencing offense can be scored under OV 13. Such is the case when a contemporaneous act is also scored under OVs 11 or 12.<sup>41</sup>

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<sup>33</sup> *Wilkens*, 267 Mich App at 740; *Steele*, 283 Mich App at 490.

<sup>34</sup> See *id.*

<sup>35</sup> MCL 777.43.

<sup>36</sup> MCL 777.43(1)(c).

<sup>37</sup> MCL 777.43(1)(g).

<sup>38</sup> MCL 777.43(2)(a).

<sup>39</sup> See *Wilkens*, 267 Mich App at 743-744.

<sup>40</sup> *Id.*

<sup>41</sup> MCL 777.43(2)(c).

Here, as in *Wilkins*, none of Lario-Munoz's offenses fall under the guidelines for OVs 11 or 12.<sup>42</sup> In addition to several non-contemporaneous offenses, the trial court in *Wilkins* properly considered two acts of contemporaneous criminal conduct against a person when scoring OV 13. While this Court in *Wilkins* did not specifically hold that *all offenses* against a person occurring contemporaneously with the sentencing offense could be scored under OV 13, *Wilkins* does stand for the proposition that crimes committed at the same time are properly considered for scoring under OV 13.

In this single criminal episode, Lario-Munoz committed assault on an individual causing miscarriage/stillbirth, assault with intent to murder, and assault with intent to commit armed robbery. These are three crimes against a person. This shows a definite pattern of felonious assault. Additionally, nothing in *Wilkins* or MCL 777.43 precludes scoring multiple crimes stemming from the same criminal episode. Accordingly, the trial court did not err in scoring 25 points for OV 13.

We affirm.

/s/ William C. Whitbeck  
/s/ Donald S. Owens

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<sup>42</sup> MCL 777.41; MCL 777.42.