

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RANDOLPH BUSBY,

Defendant-Appellant.

UNPUBLISHED
December 27, 2012

No. 305055
Oakland Circuit Court
LC No. 2010-232628-FC

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences for carjacking, MCL 750.529a; first-degree home invasion, MCL 750.110a(2); unarmed robbery, MCL 750.530; unlawful imprisonment, MCL 750.349b; and stealing a financial transaction device, MCL 750.157n. He was sentenced as a fourth offender under MCL 769.12, to 30 to 60 years' imprisonment for carjacking, 10 to 30 years' imprisonment for first-degree home invasion, 10 to 30 years' imprisonment for unarmed robbery, 10 to 30 years' imprisonment for unlawful imprisonment, and 2 to 15 years' imprisonment for stealing a financial transaction device. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the evidence seized from his cellular telephone. We review a trial court's findings of fact in a suppression hearing for clear error, but review de novo the trial court's ultimate decision. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). A finding of fact is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005).

The right against unreasonable searches is guaranteed by the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. "The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution." *People v Jones*, 279 Mich App 86, 91; 755 NW2d 224 (2008). Generally, searches or seizures conducted without a warrant are unreasonable per se, and

evidence thereby seized must be excluded from trial.¹ *Dagwan*, 269 Mich App at 342. Two exceptions to the warrant requirement are searches pursuant to consent, *id.*, and searches incident to lawful arrests, *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008).

Defendant first claims that because Lieutenant Marlin Benson lacked probable cause to arrest him, Benson's search of the cellular telephone could not have been incident to a valid arrest. We disagree. [T]here must be a lawful arrest in order to establish the authority to search." *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). A facially valid arrest warrant provides law enforcement officers the authority to arrest the subject named in the warrant. *People v Rowe*, 95 Mich App 204, 208-209; 289 NW2d 915 (1980). Further, a law enforcement officer may arrest a suspect if the officer has probable cause that an offense has occurred and that the defendant committed the offense. *Reese*, 281 Mich App at 294-295. Where, as here, a search is conducted immediately before an arrest, the search "may be justified as incident to arrest if the police have probable cause to arrest the suspect before conducting the search." *People v Champion*, 452 Mich 92, 115-116; 549 NW2d 849 (1996). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.* at 115.

At the time the search was conducted, an officer had discovered there was a warrant for defendant's arrest after a search of the Michigan Law Enforcement Information Network (LEIN) system. A LEIN check that reveals an outstanding warrant, without more, provides the legal authority to arrest a defendant. MCL 764.15(e); *People v Davis*, 250 Mich App 357, 365; 649 NW2d 94 (2002). Moreover, Benson also had probable cause to arrest defendant. Defendant was found in the vicinity of the victim's stolen car, which may support an inference that the suspect stole the car. *People v Mosley*, 107 Mich App 393, 396-397; 309 NW2d 569 (1981). Defendant also exhibited actions consistent with flight from which consciousness of guilt may be inferred. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Defendant's statements to the police contained questionable statements that also may indicate a consciousness of guilt. *Id.* at 225-226. And, defendant possessed items consistent with the items stolen from the victim. See *Mosley*, 107 Mich App at 396-397. Accordingly, the evidence would warrant a man of reasonable caution to believe that defendant had committed a crime. *Champion*, 452 Mich at 115. Because Benson had probable cause to arrest defendant at the time of the search, he had the authority to search defendant incident to a lawful arrest. *Id.* at 115-116.

The search was also proper pursuant to the consent exception. To validate search or seizure without a warrant, "the consent must be unequivocal, specific, and freely and intelligently given." *Dagwan*, 269 Mich App at 342. Defendant does not dispute that he initially consented to be searched by an officer who was going to place defendant in her vehicle. However, consent to a search may be limited in scope and may be revoked. *Id.* at 343. The object of a search limits its scope. *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728

¹ The exclusionary rule is intended to deter police misconduct that has resulted in a violation of constitutional rights. *People v Frazier*, 478 Mich 231, 247-251; 733 NW2d 713 (2007).

(2005). The constitutional standard for determining the scope of consent to search is objective reasonableness: “what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Dagwan*, 269 Mich App at 343, quoting *Florida v Jimeno*, 500 US 248, 251; 111 S Ct 1801; 114 L Ed 2d 297 (1991).

After defendant’s initial consent to search, Benson asked him about the large sum of money and the Visa cards the police had found. When asked if his father could confirm information that defendant provided, defendant told Benson that “I don’t have my father’s number but you can call my father and that’s who gave me the money card.” Benson was in control of a cellular telephone that defendant had possessed and thus, as a typical reasonable person he would have understood defendant’s instruction to call his father as including the permission to search through the contact numbers on the telephone. Defendant’s consent thus appears to have included his cellular telephone, and specifically the telephone numbers stored on the telephone, which were the object of Benson’s search and the subject of the suppression motion. *Wilkins*, 267 Mich App at 733. In performing a search of the recently called numbers saved on defendant’s cellular telephone, Benson saw two telephone numbers that defendant had dialed after midnight. Benson subsequently called those numbers and discovered that defendant had called both of the victim’s banks. Thus, Benson saw the bank numbers in the course of a search within the scope of defendant’s consent. *Dagwan*, 269 Mich App at 343. After reviewing the entire record, we are not left with a definite and firm conviction that the trial court was mistaken in its findings of fact. *Id.* at 342. On de novo review, we conclude that the trial court properly denied defendant’s motion to suppress because the search was within the scope of defendant’s consent. *Hyde*, 285 Mich App at 438.

Moreover, we conclude that, even if constitutional error occurred and the challenged evidence should have been suppressed, the error was harmless beyond a reasonable doubt. Defendant’s fingerprints were found on a chair propped up against an open window on the outside of the victim’s house, defendant was stopped near the victim’s stolen car, defendant made incredible statements to the police, and defendant was wearing clothing that was consistent with the clothing worn by the suspect captured on an automated teller machine surveillance recording withdrawing funds from the victim’s bank account. Any constitutional error here was harmless because it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty without the error. *Hyde*, 285 Mich App at 447.

Defendant also argues that the trial court erred in scoring offense variable (OV) 7, MCL 777.37 (aggravated physical abuse) at 50 points. We disagree. A trial court’s guidelines scoring decision is reviewed to “determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Whether under the label of “clear error”² or an “abuse of discretion,”³ we uphold the trial court’s sentencing decision if there is any evidence to

² *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003); *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

³ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

support it. *People v Elliott*, 215 Mich App 259, 260; 554 NW2d 748 (1996); *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). MCL 777.37(1)(a) permits a score of 50 points for OV 7 when “[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.” The focus of this variable is on the defendant’s intent and conduct toward the victim, not the experience of the victim. See *People v Kegler*, 268 Mich App 187, 191-192; 706 NW2d 744 (2005) (upholding a score of 50 points where the defendant abused an unconscious or dead victim).

Here, the trial court scored OV 7 at 50 points based on its finding that defendant engaged in conduct designed to substantially increase the fear and anxiety the victim suffered during the offense. Specifically, the court found that defendant’s conduct in entering the home of an elderly woman dependent on oxygen intubation, blindfolding her, tying her up and threatening harm to extract his demands, was intended to substantially increase the victim’s fear and anxiety. A panel of this Court in *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012), discussed the meaning of “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense” as used in MCL 777.37(1)(a). The *Glenn* Court opined that a defendant’s conduct would come within the meaning of that phrase “only if the conduct was designed to cause copious or plentiful amounts of additional fear.” *Glenn*, 295 Mich App at 533-534. The *Glenn* Court further noted that scoring OV 7 should be limited to egregious cases, and, citing *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010), found the circumstances inherently present in the underlying crime or crimes must be discounted.⁴ *Glenn*, 295 Mich App at 535.

Here, defendant broke into the victim’s home, grabbed the victim from behind, placed her on the floor, tied her hands and feet, and blindfolded her. A police officer testified that when he interviewed the victim after the incident, the victim told him that defendant told her as he robbed her that “if she did not follow directions that she would be harmed.” Approximately 20 minutes after defendant left her home, the victim was able to free herself. Because of her bonds, the victim had big red marks on her wrists. Defendant was convicted of unlawful imprisonment, which requires the restraint of the victim, defined as to “forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority.” MCL 750.349b(3)(a). But being blindfolded and threatened while restrained are not necessary elements of this offense. The trial court found that defendant’s conduct, in fact, substantially increased the victim’s fear and anxiety. Although the focus of OV 7 is on the defendant’s conduct and intent, *Kegler*, 268 Mich App at 191-192, the victim’s reaction is evidence that defendant intended to achieve the result of his conduct. We also note that defendant concedes in his brief on appeal that the instant offense “was admittedly an egregious crime,” i.e., that defendant’s conduct was “egregious.” See *Glenn*, 295 Mich App

⁴ We are not convinced the plain language of MCL 777.37 supports this limitation on scoring OV 7 but principles of stare decisis require us to apply it to our analysis of this case. MCR 7.215(C)(2). We also note that the proper scoring of OV 7 is currently pending before our Supreme Court. *People v Glenn*, 491 Mich 934 (2012).

at 534. We conclude that the record evidence is sufficient to support the trial court's finding that defendant's "conduct [was] designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a); *Kegler*, 268 Mich App at 190. Consequently, the trial court did not err in scoring OV 7 at 50 points. *McLaughlin*, 258 Mich App at 671.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck