

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JAMES NEAL,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2005

No. 252098

Jackson Circuit Court

LC No. 03-000657-FC

Before: Murphy, P.J., and White and Smolenski, JJ.

MEMORANDUM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a third habitual offender to seven to twenty years in prison. He appeals his sentence as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted as a result of an altercation that occurred in the parking lot of a club. A number of persons, including defendant, surrounded the complainant and beat him. The minimum term was within the statutory sentencing guidelines as calculated by the trial court. In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense Variable (OV) 7, MCL 777.37, aggravated physical abuse, provides for the scoring of fifty points if the 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.” MCL 777.37(1)(a). “Sadism” is defined as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” MCL 777.37(3). The phrase “excessive brutality” is not defined.

The complainant was surrounded by several persons, including defendant, and knocked to the ground. Witnesses testified that defendant kicked the complainant in the head numerous times, and continued to do so after the complainant was no longer able to take any action to defend himself or to injure anyone else. The complainant suffered a brain injury, and was unconscious for several days as a result of the attack. Thus, there was adequate evidence to support the trial court’s finding that that the complainant was treated with excessive brutality.

*Hornsby, supra.* Defendant's assertion that the trial court's finding violated *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. *Blakely* does not apply to Michigan's system of indeterminate sentencing. *People v Claypool*, 470 Mich 715, 730-731 n 14 (opinion by Taylor, J.), 738-740 (opinion by Corrigan, C.J., concurring in part and dissenting in part), 741 (opinion by Cavanagh, J., concurring in part and dissenting in part), 744 (opinion by Weaver, J., dissenting in part and concurring in part), 744 n 1 (opinion by Young, J., concurring in part and dissenting in part); 684 NW2d 278 (2004). Defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy  
/s/ Helene N. White  
/s/ Michael R. Smolenski