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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No.

MARTEEZ DONOVAN LAIDLER,
Defendant-Appellant.

Wm. CRT P. Presand
Third Circuit Court No. 09-12575 *-fid*
Court of Appeals Nos. 294147 & 295111

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PLAINTIFF-APPELLEE'S
APPLICATION FOR LEAVE TO APPEAL

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STATUTE

MCL 777.33 5

Counterstatement of Jurisdiction

The People request leave to appeal the published decision of the Michigan Court of Appeals dated December 28, 2010. The Michigan Supreme Court has jurisdiction over this application pursuant to MCR 7.301(A)(2) and MCL 770.12(2)(c).

Counterstatement of Issues Presented

I.

OV 3 requires that 100 points be scored when a death results from the commission of the sentencing offense. Here, defendant and Holmes broke into a house and, as a direct result of that crime, Holmes was shot and killed. Did the sentencing court properly score 100 points for OV 3 because a death resulted from the commission of the sentencing offense?

The People answer: "Yes."

The trial court answered, "Yes."

Defendant answers: "No."

The Court of Appeals answered, "No."

Statement of Facts

In the early morning hours of May 5, 2009, Matthew Richmond and Dekea Kyles were sleeping in the living room of Mr. Richmon's home located at 11327 Whitehall in the City of Detroit when they heard glass breaking in the rear bedroom of the home.¹ Believing that the intruders were the same people who had broken into the home several days earlier and stolen his furniture, Mr. Richmond went to the bedroom and could see the silhouettes of three people outside the home. He told Ms. Kyles to go into the basement and to call the police.² He then retrieved his weapon, pointed it at the window, and pulled the trigger. When nothing happened, he then went into the kitchen, racked the gun, and took off the safety.³ As he saw the window shades moving and a black hand inside the window, he fired two shots. The evidence technician testified that the window was twenty-seven inches wide by fifty-two inches high, and that the window sill was six-feet from the ground.

Officer Roths responded to a call about a shooting near the Whitehall address and found a man on the ground suffering from a gunshot wound – later identified as Dante Holmes – wearing all black with a black glove on. Defendant was standing next to him. Both Holmes and defendant lived in the neighborhood. The officer-in-charge, Officer Gordon Hampton, took a statement from defendant, where defendant admitted that he was with Dante Holmes when Holmes decided to break into the house on Whitehill. He stated that Holmes punched in the glass with his right hand and then, upon hearing the shots, the two started running. When they reached the alley, Holmes said he

¹References to the trial record are cited by the date of the hearing followed by the page number; 8/11/09, 65-66.

²Id. at 67-68, 72-73.

³Id. at 74, 77, 99.

was shot and that he could not make it back to his house.⁴ Holmes died that day as a result of the gunshot wound. The People argued at trial that Holmes, who was only 5'7", needed assistance reaching the window, and that defendant provided that needed assistance.⁵

Following a jury trial before the Honorable Patricia P. Fresard in the Wayne Circuit Court on August 11-12, 2009, defendant was convicted of first-degree home invasion.⁶ Defendant was ultimately sentenced within the guidelines to 40 months to 20 years.⁷ Defendant filed a motion to remand for resentencing with the Court of Appeals. The Court of Appeals denied the motion. Defendant also filed a brief on appeal, raising the following two issues: (1) defendant argued that OV 3 was improperly scored at 100 points because Holmes, the co-felon, was not a "victim" for purposes of scoring the guidelines, and (2) that the prosecutor erred by making improper comments to the jury.

In a published opinion, the Court of Appeals affirmed the conviction, holding that the arguments made by the prosecutor were not improper. But the Court of Appeals concurred with defendant that OV 3 was incorrectly scored, and therefore vacated defendant's sentence and remanded the case for resentencing. The People now file this timely application for leave to appeal, arguing that the Court of Appeals erred in its interpretation of OV 3 and that resentencing is not required.

⁴8/12/09, 96-99.

⁵Id. at 124-125.

⁶Id. at 155.

⁷At defendant's original sentencing, the court mistakenly used the sentencing grid for Class A offenses and sentenced defendant to a minimum of 110 months. Upon recognizing the error, defendant was properly sentenced using the grid for Class B offenses to a minimum of 40 months. 9/2, 13; 10/7, 3, 6.

Argument

I.

OV 3 requires that 100 points be scored when a death results from the commission of the sentencing offense. Here, defendant and Holmes broke into a house and, as a direct result of that crime, Holmes was shot and killed. The sentencing court properly scored 100 points for OV 3 because a death resulted from the commission of the sentencing offense.

Standard of Review

A trial court's scoring of a sentencing guidelines variable is reviewed for clear error.⁸ Scoring decisions under the sentencing guidelines are not clearly erroneous if there is "any evidence" to support the decision.⁹ Where a question of statutory interpretation is involved, however, it is a question of law and must be reviewed de novo.¹⁰

Discussion

The sentencing court properly scored 100 points for OV 3 because a death resulted from the commission of the sentencing offense, first-degree home invasion. OV 3, degree of physical injury to a victim, requires that 100 points be scored where a victim was killed. A victim is defined as any person harmed by the criminal actions of the charged party. Here, Dante Holmes – the other man committing the home invasion along with defendant – was killed during the commission of the sentencing offense.

⁸*People v Hicks*, 259 Mich App 518, 522 (2003).

⁹*People v Witherspoon (After Remand)*, 257 Mich App 329, 335 (2003).

¹⁰*People v Cook*, 254 Mich App 635, 639 (2003).

The Court of Appeals' decision that OV 3 was incorrectly scored ignores the plain language of the statute, which requires 100 points to be scored if death results from the commission of the offense. Under OV 3, 100 points are to be scored where a victim was killed.¹¹ The instructions clarify this further, stating explicitly: "Score 100 points if death results from the commission of the offense and homicide is not the sentencing offense."¹² While the statute does not define "victim," our Court of Appeals interpreted the term in *People v Albers* to mean – for the purposes of OV 3 – "any persons harmed by the criminal actions of the charged party."¹³ In this case, defendant and Holmes were attempting to break into a home when the homeowner, Mr. Richmond, shot and killed Holmes. The sentencing court was, therefore, correct in scoring 100 points for OV 3 because Holmes was killed as a consequence of defendant's criminal actions.

In ordering resentencing, the Court of Appeals majority reasoned that "Holmes simply was not a 'victim' because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes." But – as Judge O'Connell correctly noted in the dissent – a "victim" includes *any person harmed* by the criminal actions of the charged party. Holmes was shot as a direct result of the home invasion committed by defendant; the two decided to break into a house and, as a result of that joint criminal activity, Holmes was shot and killed. The fact that Holmes was not the intended victim of defendant's criminal activity is of no consequence,

¹¹MCL 777.33(1)(a).

¹²MCL 777.33(2)(b).

¹³*People v Albers*, 258 Mich App 578, 591-593 (2003)(emphasis added)(holding that defendant could be assessed 25 points for the life-threatening injury sustained by a person who was not the primary "victim" of defendant's sentencing offense of involuntary manslaughter).

as OV 3 plainly states that defendant is to be held accountable when death results from the commission of the sentencing offense.

Ultimately, defendant participated in the home invasion, and Holmes died as a result of that home invasion. Accordingly, it makes sense to include Holmes as a victim, as the *Albers* court clearly defined “victim” as “any persons harmed by the criminal actions of the charged party.” Holmes was clearly a person harmed by defendant’s criminal activity. OV 3 was properly scored, and the Court of Appeals therefore erred in vacating defendant’s sentence.

Relief

WHEREFORE, the People respectfully request that this Court grant leave or, in lieu of granting leave, reverse the Court of Appeals decision for the reasons stated in the dissent.

Respectfully submitted,

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County of Wayne

TIMOTHY A. BAUGHMAN

Chief of Research, Training, and Appeals

A handwritten signature in cursive script, reading "Toni Odette", is written over a horizontal line.

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January 13, 2011

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTEEZ DONOVAN LAIDLER,

Defendant-Appellant.

FOR PUBLICATION

December 28, 2010

9:10 a.m.

Nos. 294147; 295111

Wayne Circuit Court

LC No. 09-012575-FH

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

BANDSTRA, J.

In Docket No. 294147, defendant appeals as of right his conviction, following a jury trial, of first-degree home invasion. MCL 750.110a(2). Defendant was originally sentenced to a prison term of 110 months to 20 years. After the trial court discovered that it had utilized an incorrect sentencing guidelines grid at defendant's original sentencing, defendant was resentenced to a lesser prison term of 48 months to 20 years. Defendant appeals that sentence as of right in Docket No. 295111. Defendant's appeals have been consolidated for this Court's consideration. We affirm defendant's conviction, but remand for resentencing. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in which he and Dante Holmes broke into a house that they apparently believed was unoccupied. The homeowner was present and fatally shot Holmes as he reached inside a broken window to unlock it. Defendant admitted that he was with Holmes at the house. The prosecutor's theory at trial was that defendant assisted Holmes by helping him up to the window, which was six feet off the ground.

Defendant argues that he is entitled to a new trial because of the prosecutor's improper conduct during closing argument. Because defendant did not object to the prosecutor's comments at trial, relief is precluded unless defendant establishes plain error that affected his substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Defendant also contends that trial counsel was ineffective for failing to object to the prosecutor's conduct. Because defendant did not raise this issue below, review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may the prosecutor express a personal belief in the defendant's guilt. *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). Contrary to defendant's assertion, however, the record does not support defendant's claim that these rules were violated by the prosecutor during her closing argument. Rather, the prosecutor's addressed the evidence presented at trial and the conclusions that reasonably could be drawn from it. *Bahoda*, 448 Mich at 282. Although the prosecutor noted that the jury had the option to find defendant not guilty, she argued that doing so would be contrary to what the facts showed and what the law required. There was nothing improper in arguing that the jury should convict defendant because the evidence showed that he was guilty. And, because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object. Counsel is not ineffective for failing to raise a meritless objection. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

Defendant also argues that he is entitled to resentencing because the trial court erroneously scored 100 points for offense variable 3. The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Offense variable 3 (OV 3) considers "physical injury to a victim," MCL 777.33(1), and it assesses points depending on the degree of injury suffered by "a victim," MCL 777.33(1)(a)-(f). In relevant part here, it requires that 100 points be assessed when "[a] victim was killed." MCL 777.33(1)(a), (b). For purposes of OV 3, the term "victim" means "any person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003).

MCL 777.33(2)(b) instructs further that 100 points are to be scored "if death results from the commission of a crime and homicide is not the sentencing offense." In this non-homicide sentencing offense case, the trial court determined that the death of defendant's co-felon, Holmes, justified a 100-point score for OV 3. It reasoned that "it doesn't have to be the victim" that was killed to warrant such a score, and that 100 points could be assessed whenever "someone died as a result of the commission of [the] crime," because subsection (2)(b) does not specifically refer to a victim. We disagree.

As already noted, MCL 777.33(1) authorizes the assessment of points only where a "victim" of the sentencing offense is killed or injured. Contrary to the reasoning of the trial court, subsection (2)(b) does not expand the applicability of this offense variable. Instead, it limits the offenses for which 100 points can be assessed. A 100-point score can only be imposed for non-homicide sentencing offenses where the death results from the commission of a crime. Neither of those limiting conditions can enlarge OV 3 so that it would authorize the imposition of points where there is no physical injury to a "victim" as required by subsection (1).

Here, Holmes simply was not a "victim" because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes. *Albers*,

258 Mich App at 593. Rather, the “victim” of the crime here was the homeowner, and he was not injured.¹ So, there being no “physical injury to a victim,” here, OV 3 is simply inapplicable. MCL 777.33(1).²

Because the scoring error affects the appropriate guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). Defendant’s conviction is affirmed but his sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Christopher M. Murray

¹ In *Albers*, 258 Mich App at 580, defendant was convicted of involuntary manslaughter after her young son set fire to their apartment, resulting in the death of a child residing in another apartment in the same complex. The defendant challenged the assessment of 25 points under OV 3, for life-threatening or permanent injury to a second child resulting from that same fire. Our Court upheld the scoring, concluding that the other child was also a “victim” of the sentencing offense, and explaining, as noted above, that a “‘victim’ includes any person harmed by the criminal actions of the charged party.” *Id.* at 591-593. Nothing in *Albers* supports the prosecutor’s assertion here, adopted by the trial court, that under the circumstances presented in this case, defendant’s co-felon is a “victim” within the meaning of OV 3. Nor has the prosecutor offered, or this Court found, any authority for such a proposition.

² We further note that the requirement of MCL 777.33(2)(b), that a death result from the commission of a crime, was not satisfied here. Even if Holmes might properly be considered a “victim,” his death resulted from the actions of the homeowner, not from the commission of a crime.

STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTEEZ DONOVAN LAIDLER,

Defendant-Appellant.

FOR PUBLICATION

December 28, 2010

Nos. 294147; 295111

Wayne Circuit Court

LC No. 09-012575-FH

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

O'CONNELL, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's decision to affirm defendant's conviction. I respectfully dissent, however, from the majority's decision to vacate defendant's sentence. In my view, the trial court properly assessed points under Offense Variable 3, MCL 777.33.¹ I would affirm defendant's sentence.

As the majority explains, defendant and Dante Holmes were breaking into a home when Holmes was shot and killed. Defendant was convicted of first-degree home invasion, MCL 750.110a(2). At sentencing, the trial court assigned 100 points against defendant under OV 3, MCL 777.33(1)(a). Defendant now argues that the OV 3 score was erroneous.

As the majority recognizes, subsection 1(a) of OV 3 requires trial courts to assess 100 points if "a victim was killed." MCL 777.33(1)(a). Subsection 2 (b) defines the parameters of the 100 point assessment: "[s]core 100 points if death results from the commission of a crime and homicide is not the sentencing offense." The majority bases its holding on the term "victim" in subsection 1(a), and concludes that subsection 2(b) merely identifies the offenses that are

¹ The majority assumes that a co-perpetrator cannot be a crime victim under Offense Variable 3 (OV 3). I disagree. OV 3 plainly requires that perpetrators be accountable in sentencing when a death results from the commission of a crime. MCL 777.33(2)(b). If a perpetrator starts an action in motion and, as a result of the action, a co-perpetrator is killed, the co-perpetrator can be a "victim" within the meaning of OV 3.

subject to the 100 point assessment. This interpretation improperly curtails the terms of subsection 2(b).

In *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), this Court held that for purposes of OV 3, the term "victim" means "any person harmed by the criminal actions of the charged party." In the present case, defendant's criminal action was a home invasion; the home invasion resulted in Holmes's death. Because Holmes was harmed by defendant's criminal action, Holmes was a "victim" within the meaning of OV 3. By parsing out responsibility for the home invasion and then parsing out responsibility for the resulting shooting, the majority identifies the homeowner as the sole "victim" of the home invasion and relegates Holmes to be the "victim" of the shooting. I disagree with this parsed logic. In my opinion, both the homeowner and Holmes are victims under OV 3.²

I would affirm both the conviction and the sentence of defendant.

/s/ Peter D. O'Connell

² The majority asserts, "Holmes simply was not a 'victim' because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes." This statement would certainly be a revelation to Holmes's survivors. Moreover, there are other offenses in which a perpetrator could be a victim, such as a bank robbery in which a defendant or co-defendant was shot and killed, or an arson in which a defendant or co-defendant "got caught up in the heat of the moment" and was burned.