

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ANTONIO TONY GLOSTER

Defendant-Appellant.

Supreme Court No. 151048

Court of Appeals No. 316553

Lower Court No. 12-10845-03

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals incorrectly decide this appeal, and so should this Court grant review?
 - A. Was Mr. Gloster improperly assigned 15 points for OV 10 when there was no evidence of predatory conduct and nothing more than routine planning?
 - B. Must OV 10 only be scored based only on the individual offender's conduct when the statute contains no language instructing a trial court to score a defendant based on the conduct of Mr. Gloster's accomplices?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

I. Because the Court of Appeals incorrectly decided this appeal, the Court should grant review.

In response to the Defendant-Appellant's application for leave to appeal, this Court has directed the clerk to schedule oral argument "on whether to grant the application or take other action" pursuant to MCR 7.305(H)(1). The Court has also directed the parties to file supplemental briefs addressing "whether the defendant was properly assigned 15 points for Offense Variable (OV) 10, MCL 777.40, for predatory conduct, and in particular, whether the scoring of OV 10 was proper based on the defendant's own conduct, or alternatively, based on the conduct of the defendant's accomplices." (Order dated October 30, 2015).

A. OV 10 should only be scored 15 points when there is preoffense conduct directed at the victim for the purpose of victimization. Mr. Gloster was scored 15 points for OV 10 based on conduct that was nothing more than "routine planning." Mr. Gloster was not properly assigned 15 points for OV 10.

OV 10 is scored at 15 points when there is "predatory conduct." "Predatory conduct means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Such preoffense conduct must be more than "purely opportunistic" behavior or "routine planning." *People v Huston*, 489 Mich 451, 466; 802 NW2d 261 (2011).

This Court in *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008), explained that the central subject of OV 10 is "the assessment of points for the exploitation of vulnerable victims" and that points should only be assessed when "it is readily apparent that a victim was 'vulnerable.'" *Id.* at 157-158.

Here the complaining witness had no readily observable vulnerabilities. While the prosecution argued at sentencing that the complaining witness did not speak English, there was no evidence that Mr. Gloster or any of the co-offenders knew this before she was robbed. (S 4/19/13, pp 13-16). While the trial court found that the defendants had gone to Hamtramck to

commit a larceny, there were no findings that Mr. Gloster or the co-offenders picked this particular victim because of a vulnerability. (S 4/19/13, pp 21, 21-25)

Nor did the circumstances render the complainant a vulnerable victim. In *Huston*, this Court held that a victim “does not have to be inherently vulnerable”; a defendant’s predatory conduct can create or enhance a victim’s vulnerability. *Huston*, 489 Mich at 454. Unlike the complainant in *Huston*, the complainant here was not walking alone, it was not dark, and her assailants were not hidden from her. Of course, any person ever victimized, was in retrospect in some way vulnerable to that victimization. OV 10 asks a different question though: was it “readily apparent” that the victim was susceptible to injury, physical restraint, persuasion, or temptation. Because it was not readily apparent that the complainant was particularly susceptible to victimization, she was not vulnerable within the meaning of the statute.

The trial court improperly assessed Mr. Gloster points for predatory conduct. Points may only be assessed under the statute for predatory conduct when preoffense conduct is directed at a victim for the primary purpose of victimization. *Cannon*. 481 Mich at 159. In *Cannon*, this Court laid out three analytical questions to assist trial courts in determining whether 15 points is appropriate under OV 10:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. *Id.* at 161-162.

Here, the evidence of preoffense conduct was that the co-offenders went to Hamtramck to steal. (T III, p 148); (Defendant Interview pp 5-6). Mr. Gloster’s co-offenders saw a woman with

a readily observable necklace and went to take it. (T II, pp 69, 119). There was no evidence that their conduct was directed at someone with a readily apparent vulnerability nor evidence that the preoffense conduct was for the purpose of victimization. The conduct was nothing more than run of the mill preoffense conduct.

There is a difference between regular planning or preoffense conduct and conduct “directed at a victim.” Because the highest score for OV 10 is reserved for predatory conduct, “strongly suggests that the Legislature did not intend ‘predatory conduct’ to describe any manner of ‘preoffense conduct’ that if that was the case, OV 10 would be scored in nearly every case.” *Huston*, 489 Mich at 461.

In *Cannon*, this Court pointed to the Court of Appeals’ decision in *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), as instructive. In *Kimble*, the defendant and his accomplices were specifically looking for valuable wheel rims to steal and then sell. *Kimble*, 252 Mich App at 274. Once the defendant had spotted rims to steal, he followed the particular chosen car its destination and then shot the driver and stole her car. *Id.* at 274-275. As this Court in *Cannon* pointed out, it was the “act of following her and waiting for the opportunity to strike” that was conduct directed at the victim. *Cannon*, 481 Mich at 160; *Kimble*, 252 Mich App 275.

This Court in *Huston* provided another example of behavior that went beyond “run-of-the-mill planning” and was predatory behavior. *Huston*, 489 Mich 451. In *Huston*, the defendant and his cohort lay in wait, armed, and hidden from view, until they spotted a victim was who was alone in a dark parking lot. *Id.* 454-455, 466-467. *Huston*’s behavior made the victim more susceptible to injury or restraint and therefore more “vulnerable.” *Id.* at 465.

In contrast to the conduct in *Huston* and in *Kimble*, the defendants’ conduct in this case did not rise to the level of predatory conduct. The complaining witness was outside a market in

Hamtramck in broad daylight with multiple people around when a man ran up to her and grabbed her necklace. (T II, pp 9-10, 41 & 69). There was no evidence that Mr. Gloster or anyone of his co-offenders lay in wait, hid from view, or otherwise waited until the victim was alone or otherwise more vulnerable. Because there was no evidence of “predatory conduct” as that term was explicated by *Cannon* and *Huston*, there was no basis for a 15-point score for OV 10. The trial court erred by assessing Mr. Gloster points for predatory conduct.

B. Only OVs 1, 2, and 3 have specific language instructing the trial court to assess the same amount of points for all offenders in multi-offender situations. OV 10 contains no such language. The trial court wrongly assigned Mr. Gloster 15 points for OV 10 based on his co-offenders’ conduct.

In its opinion, the Court of Appeals appeared to rely entirely on Mr. Gloster’s co-offenders’ conduct when upholding the scoring of OV 10, as it made no reference to *Mr. Gloster’s* conduct. The court held that 15 points was appropriate when “Defendant aided and abetted the commission of an offense that involved the exact sort of predatory conduct OV 10 is designed to punish.” *People v Gloster*, unpublished opinion per curium of the Court of Appeals, issued December 30, 2014, p 3. The court referenced the conduct of Mr. Gloster’s “co-offender” who stood outside the market until he chose a person to attack, an attack that occurred while Mr. Gloster sat in the car. *Id.* The court’s opinion made no mention of how Mr. Gloster’s own conduct would support the assessment of 15 points on OV 15.

Mr. Gloster argues that it was error to assign him points conduct under OV 10 for his co-offenders’ conduct, when the statute does not authorize a trial court to assign points based on other offenders’ conduct.

MCL 777.40 provides:

- (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply

and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Predatory conduct was involved 15 points
- (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status..... 10 points
- (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious 5 points
- (d) The offender did not exploit a victim's vulnerability..... 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

- (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
- (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
- (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.
- (d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including but not limited to, a parent, physician or teacher.

MCL 777.40 contains no language directing a court to score a defendant points based on co-offenders' conduct in multiple offender situations. By comparison, OV's 1, 2, and 3 specifically direct a court to assign a defendant the same number of points that all offenders are assessed. See MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a).

As with any matter of statutory interpretation, this Court must “give effect to the Legislature's intent by focusing first on the statute's plain language” and when the statute is clear, the Court must “enforce the statute as written.” *People v Miller*, 498 Mich 13, 22-23; 869 NW2d 204 (2015). Here, the Legislature specifically added language directing trial courts to assign points in multiple offender situations in OV 1, 2, and 3 but chose not to include such language in OV 10. Reading into OV 10 a requirement to assign defendants points based on their co-offenders’ conduct in multiple offender situations would undermine the plain language of the statute and the Legislature’s clear intent.

This Court has never held that trial courts must assign points for OV 10 for co-offenders’ conduct. While in *Huston*, there were multiple offenders, and this Court upheld the scoring for predatory conduct, the defendant’s own conduct was predatory. Houston himself lay in wait before robbing the complaining witness. *Houston*, 489 Mich at 469. In *Cannon*, even though there were multiple offenders, this Court remanded to the trial court for reconsideration of whether *defendant* engaged in predatory conduct. *Cannon*, 481 Mich at 162.

The Court of Appeals in *People v Hunt*, 290 Mich App 317, 325-326; 810 NW2d 588 (2010)¹, acknowledged the validity of the same argument applied in the context of OV 7. In *Hunt*, the court held that only the defendant’s actual participation could be scored because OV 7 lacks the language contained within OVs 1, 2, and 3. *Id.* at 325-326.

The argument that OV 10 directs trial courts to score points based only on the defendant’s own conduct is even stronger than the same argument applied to OV 7. MCL 777.37 provides:

- (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by

¹ While this Court did not explicitly adopt the rule laid out in *Hunt*, it did cite to it in *People v Hardy*, 494 Mich 430, 442 n 32; 835 NW2d 340 (2013).

assigning the number of points attributable to the one that has the highest number of points:

(a) 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..... 50 points

(b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense0 points

(2) Count each person who was placed in danger of injury or loss of life as a victim.

(2) As used in this section, “sadism” means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

OV 7 is written in the passive voice, “A victim was treated with sadism....” MCL

777.37. OV 10 is written in the active voice “the offender exploited a victim’s....” MCL 777.40.

The plain language of the statute directs trial courts to score points when *the offender* exploits a victim’s vulnerability.²

C. Conclusion and Rule Sought

This Court should find that there was insufficient evidence for the scoring of OV 10 when the co-offenders’ conduct was not predatory, and nothing more than routine planning. Additionally, the Court should find that OV 10 should only be scored for an individual defendant’s conduct, and not based on the conduct of his or her co-offenders.

² The rule of lenity supports the same conclusion. In the context of sentencing, the policy of lenity means that a court will not interpret a statute “so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.” *People v Sawyer*, 410 Mich 531, 536; 302 NW2d (1981) (quoting *Ladner v United States*, 358 US 169, 178; 79 S Ct 209; 3 L Ed 2d 199 (1958)). If this Court finds that MCL 777.40 is ambiguous, the rule of lenity requires that it still be construed in favor of the Defendant.

RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to grant Defendant-Appellant's application for leave to appeal on all of the issues raised in his application for leave to appeal or alternatively remand to the trial court for a resentencing in light of the scoring of OV 10.

Respectfully submitted,
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