

COA Opinion: Offense Variable 10 may only be scored if the victim's personal characteristics render him or her vulnerable, the circumstances of the offense may not be considered

14. May 2010 By Madelaine Lane

On Thursday, May 13, 2010, the Michigan Court of Appeals issued a unanimous per curiam opinion in the case of *People v. Huston*, Case No. 288843. The court determined that the defendant was improperly assessed a score of 15 points for Offense Variable (“OV”) 10, where there was no evidence that the defendant engaged in predatory conduct or that the victim was inherently vulnerable. For that reason, the trial court’s sentencing decision was reversed and the case was remanded to the Berrien County Circuit Court for resentencing.

This case arises out of an armed robbery in February 2005. Specifically, the defendant was accused of approaching a woman, Ms. Flanagan, in a shopping mall parking lot, pointing a bb gun at her, demanding her purse and other various items, pushing the woman to the ground, and ultimately stealing her purse and vehicle.

In August 2005, the defendant was convicted of armed robbery, in violation of MCL 750.529, pursuant to a guilty plea. In calculating the defendant’s sentencing guideline range, the probation officer assigned the defendant an OV 10 score of 15. To score a 15 in this category, the court must find that predatory conduct was involved and that defendant’s conduct constituted the exploitation of a vulnerable victim. At the sentencing hearing, defense counsel objected to the OV 10 score and argued that defendant drove out to the parking lot and robbed the first person he saw. There was nothing predatory about the defendant’s conduct and the victim was not vulnerable. The trial court disagreed and held that predatory conduct could also constitute lying-in-wait in the dark parking lot. Accordingly, the trial court sentenced the defendant to 180 to 600 months in prison.

The defendant filed a delayed application for leave to appeal to the Michigan Court of Appeals. The Court of Appeals denied that application on December 9, 2008. Thereafter, in lieu of granting leave to appeal, the Michigan Supreme Court remanded this matter to the Court of Appeals for consideration as on leave granted. *People v. Huston*, 485 Mich. 885; 722 N.W.2d 418 (2009).

On appeal, the defendant asserted that OV 10 was improperly scored, and therefore the sentencing guideline range was incorrect, because his actions did not amount to predatory conduct and because he did not exploit a vulnerable victim. The Court of Appeals agreed and focused mainly on the second argument. In reaching this conclusion, the court noted that under the standard articulated in *People v. Cannon*, 481 Mich. 152; 749 N.W.2d 257 (2008), OV 10 can only be scored when it is readily apparent that the victim was vulnerable, meaning susceptible to injury, physical restraining, persuasion, or temptation. The focus is on inherent personal

characteristics of the victim which makes him or her inherently vulnerable, not on circumstances of the particular crime. The *Cannon* opinion goes on to list eight factors a court may consider in reaching this decision.

Here, the trial court correctly determined that the defendant was lying-in-wait in the shopping mall parking lot and that Ms. Flanagan was the specific victim. The defendant chose a lone and isolated victim. However, this is not enough to score OV 10. There is nothing in the record to indicate that Ms. Flanagan was inherently vulnerable. The timing and location of the attack are not inherent characteristics of the defendant that render her vulnerable for purposes of OV 10, they are merely circumstances of the particular offense. Rather, the trial court could only score OV 10 if it found that Ms. Flanagan's personal characteristics render her vulnerable.

Ultimately, the court concluded that, pursuant to MCL 777.40(1)(d), the defendant should have been scored 0 points for OV 10. This would have reduced the defendant's recommended guideline range to 108 to 180 months. As such, resentencing is required. The court did, however, note that its decision did not preclude the trial court from evaluating the evidence and making findings of fact at the resentencing regarding the characteristics particular to this victim, consistent with *Cannon*.

A copy of the opinion is [here](#).