

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFIEL RAMAR RIGGINS,

Defendant-Appellant.

UNPUBLISHED

February 5, 2008

No. 274093

Wayne Circuit Court

LC No. 06-006240-01

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to murder, MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. We affirm in part and remand in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves the shooting and subsequent beating of Robert Mynum. Defendant first maintains that the prosecutor presented insufficient evidence to support the conviction of assault with intent to murder. Defendant specifically argues that no evidence was presented to support the conclusion that he shot the victim. We disagree.

We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of a crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can fairly be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*,

267 Mich App 141, 147-148; 703 NW2d 230 (2005). Here, contrary to defendant's contention, the police presented circumstantial evidence to show that defendant shot the victim. The victim testified that immediately after someone began shooting into the van, defendant opened the van door. Defendant was holding a gun in his hand. He appeared angry, grabbed the victim, and pulled him out of the van. Other witnesses testified that defendant began to kick and beat the victim in the head. Defendant was also seen near the location at which the gun was found. This evidence, when combined with the testimony regarding defendant's statements during his removal of the victim from the van and during the beating, supports a finding that defendant was guilty of one continued assault on the victim that included the shooting. The prosecutor was not required to disprove defendant's theory that he innocently arrived after the shooting, happened to pick up the gun, and then attempted to slap the victim in the face in an attempt to revive him. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Defendant also ignores the fact that from the evidence presented, the jury could have decided that defendant's extensive physical assault on the victim after the shooting, even when considered alone, was designed to kill the victim. The prosecutor presented sufficient evidence to support the assault conviction.

Defendant raises three claims of sentencing error. He argues that he wrongly received 25 points for Offense Variable (OV) 13 (pattern of criminal behavior) because his previous offenses did not occur within five years of the sentencing offense. The prosecutor concedes that the trial court erred. We agree. See *People v Francisco*, 474 Mich 82, 86-87; 711 NW2d 44 (2006).

Defendant also maintains that the trial court misscored OV 3 (degree of physical injury) at 25 points for "life threatening or permanent incapacitating injury" occurring to a victim. MCL 777.33(1)(c). A sentencing court has discretion with respect to the scoring of offense variables, provided that evidence of record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Here, contrary to defendant's arguments, the evidence concerning the severity of the assault and the extensive nature of the victim's injuries support the scoring of this OV.

Defendant also maintains that the trial court misscored OV 7 (aggravated physical abuse) at 50 points after finding that defendant treated the victim with "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." See MCL 777.37(1)(a). We agree with the trial court's determination. Defendant's beating of the victim falls within any reasonable understanding of excessively brutal conduct. Moreover, these actions were not, as defendant claims, part of the elements of assault with intent to murder. The elements of that offense were complete after defendant repeatedly shot the victim.

A defendant is not entitled to resentencing where an error in scoring does not change the guidelines range. *Francisco*, *supra* at 89 n 8. Here, a reduction of defendant's OV score of 140 points by 25 points representing the trial court's OV 13 scoring error results in a corrected OV score of 110 points. This does not change defendant's OV level of VI or his sentence guidelines range. See MCL 777.62. Defendant is not entitled to resentencing here. Although the issue was not raised by defendant, in *People v Melton*, 271 Mich App 590, 593, 596; 722 NW2d 698 (2006), this Court recognized that because "a scoring error may still affect a defendant through such things as its effect on the calculation of parole eligibility," remand for correction of defendant's sentencing guidelines score is appropriate even where resentencing is not required.

Thus, we affirm defendant's convictions and sentence but remand for the ministerial task of correcting OV 13 from 25 points to 0.

Affirmed in part and remanded in part for further proceedings consistent with this opinion.
We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood