

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDRA ARLETTE JONES,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 290295

Muskegon Circuit Court

LC No. 08-056451-FH

Before: SERVITTO, P.J., AND FITZGERALD AND BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of malicious destruction of police property, MCL 750.377b, fleeing and eluding, MCL 750.479a(2), and resisting and obstructing, MCL 750.81d(1). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 20 months to six years for the MDOP conviction, and to jail terms of 12 months each for the fleeing and eluding and resisting and obstructing convictions. Defendant appeals as of right, challenging the scoring of offense variable (OV) 12. We affirm.

Muskegon Heights Police Officer John Waldo testified that he received a dispatch to respond to a dispute between two females, one of whom was allegedly armed with a knife. The dispatch stated that the armed female was driving a red Pontiac, and provided a license plate number. Waldo saw a car matching the description and traveling at a high rate of speed. He pursued the vehicle, which was being driven by defendant.¹ He activated his overhead lights and siren, and eventually sounded his air horn, but the vehicle did not stop. Waldo managed to maneuver defendant onto the shoulder, and got her to stop. Waldo left his vehicle, drew his gun, pointed it at defendant, and ordered her to leave the car, but she did not comply. He approached the door and told her again to leave the car, but she did not do so. Waldo holstered his gun, opened the door, and physically removed defendant from the car. Eventually, he was able to handcuff defendant, and then placed her in the back seat of his police car. Muskegon Heights Police Sergeant Scott Sinclair arrived. As Waldo searched defendant's car, he heard muffled yelling and kicking. He saw Sinclair approaching the police car and defendant kicking at the

¹ Defendant's daughter was also in the car.

rear passenger side window with both feet. Defendant's kicking caused the window to be pushed out of the doorframe.

Sinclair testified that defendant did not comply with his order to stop kicking the window. When he opened the door to tell her again not to kick the window, she pulled back her leg as if she planned to kick him, so he sprayed her with pepper spray. Waldo also testified that defendant tried to kick Sinclair when he opened the door. After Sinclair sprayed defendant, she became compliant.

Defendant argues on appeal that the trial court misscored OV 12 (contemporaneous felonious criminal acts). We review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.*

MCL 777.42, which governs the scoring of OV 12, provides that ten points are appropriate where "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(b). "A felonious criminal act is contemporaneous" if the act "occurred within 24 hours of the sentencing offense" and "has not and will not result in a separate conviction." MCL 777.42(2)(a). The trial court scored OV 12 at ten points because there was evidence that defendant was involved in an initial assault on Zinalatarrae Hudgins before the chase, and that she later tried to kick Sinclair when he opened the door to tell her to stop kicking the window.

As to this latter offense, the trial court did not err, given the officers' testimony concerning defendant's refusal to comply with Sinclair's order to stop kicking the window and her attempt to kick Sinclair.

As to defendant's initial assault of Hudgins, according to the agent's description of the offense portion of the presentence investigation report (PSIR), Hudgins stated that she was standing outside her home when defendant arrived. Defendant and Hudgins started arguing about a man. Defendant returned to her car, opened her trunk, retrieved a chef meat cleaver and a wooden table leg, and approached Hudgins with the weapons. Hudgins was frightened and grabbed her bicycle and tried to use it to defend herself, with her friend's assistance. Defendant swung the cleaver several times and struck the bicycle with the cleaver. Hudgins retreated inside and grabbed a stick, fearful that defendant would follow. Defendant instead took the bicycle, placed it in the road, and ran over it when she drove away. A witness told the police that defendant had swung her cleaver at Hudgins several times. An officer who interviewed Hudgins testified during trial that Hudgins told him that defendant "wanted to kill [Hudgins] with a meat cleaver or a chef cleaver and she also had a table leg." Waldo testified that, when he searched defendant's car, on the floor of the driver's side he found a "big brown, wood handled, like a big chopping butcher, like cleaver knife. It looked more like a hatchet almost."

This evidence supports the trial court's finding that defendant had assaulted Hudgins prior to her flight from the police. The rules of evidence do not apply to a sentencing proceeding

and are not required by due process. *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008), citing *United States v Hamad*, 495 F3d 241, 246 (CA 6, 2007), and MRE 1101(b)(3). “Thus, when considering a defendant’s sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence.” *Uphaus (On Remand)*, 278 Mich App at 184, citing *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). However, the defendant must be afforded an adequate opportunity to rebut any matter he believes to be inaccurate. *Uphaus (On Remand)*, 278 Mich App at 184. The information in the PSIR is presumed to be accurate, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *Uphaus (On Remand)*, 278 Mich App at 182; *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Once a defendant effectively challenges a factual assertion, the prosecutor has the burden to prove the fact by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing. MCR 6.425(E)(2).

While defendant does not appear to challenge the fact that she swung a cleaver at Hudgins, she maintains, as she did during sentencing, that she did so in self-defense. Although defendant presented evidence to this effect, the trial court stated during sentencing that he did not find defendant’s testimony, or that of her daughter, credible as to this assertion. We find no error in the trial court’s decision to rely on the testimony and information in the PSIR to decide that the prosecution had established the assault on Hudgins by a preponderance of the evidence.

The trial court did not err in scoring OV 12 at ten points.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering