STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 287914 Wayne Circuit Court
THOMAS ARDRECE BAKER, Defendant-Appellant.	LC No. 07-008108-FH

Before: TALBOT, P.J., and FITZGERALD and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of assault with intent to commit murder, MCL 750.83, intentionally discharging a firearm from a motor vehicle, MCL 750.234a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 23 to 50 years' imprisonment for each assault with intent to commit murder conviction, two to four years' imprisonment for the intentionally discharging a firearm from a motor vehicle conviction, three to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and remand for resentencing.

Defendant first contends that there was insufficient evidence to support his conviction of assaulting Michael Brown with the intent to commit murder. When reviewing a claim of insufficient evidence, "this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). "In reviewing the sufficiency of the evidence, this Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

"The essential 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) (citations and footnote omitted). Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Brown and Yazmin Peterson were together in the front seat of their vehicle, following a failed drug transaction with defendant, when the shooting occurred. Peterson testified that she was familiar with defendant and had observed his gun during previous drug transactions. Immediately before the shooting, Brown and Peterson had interacted with defendant both by telephone and in person. After having driven away from an area where Brown and Peterson had stopped to speak with defendant, Peterson's cellular telephone began to ring. Although Peterson at first ignored defendant's call, after answering defendant's second attempt to contact her by telephone, Peterson heard a gunshot. Peterson was seated in the front passenger seat of the vehicle driven by Brown. When she turned to her right to look out the car window she observed that defendant was driving the vehicle next to her. Peterson saw defendant aim and discharge his weapon in the direction of Brown's automobile. Peterson was struck by the second gunshot, but before passing out she heard the gun discharge a third time and Brown's exclamation after being shot. As part of their investigation, police went to the hospital where Brown was admitted for treatment and confirmed that he was the victim of a gunshot wound.

A rational jury could infer from the evidence that defendant shot Brown with the intent to kill. Peterson had engaged in more than one interaction with defendant and identified him as the assailant. She observed defendant next to Brown's vehicle immediately before the shots were fired and saw defendant holding the gun. Minimal circumstantial evidence is required to establish an intent to kill, *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008), and the use of a lethal weapon serves to support such an inference, *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975).

In part, defendant relies on the provision of a missing witness instruction to support his contention of insufficient evidence. Defendant misconstrues the scope and impact of this instruction. Although the missing witness instruction, CJI2d 5.12,[1] permits a fact finder to infer that the witness would have provided unfavorable evidence to the prosecution, it is not dispositive of the outcome of this appeal. Although we must assume that the testimony of Brown, as a missing witness, would have differed from that of Peterson and been unfavorable to the prosecution, any such favorable inference afforded by the instruction was effectively negated on appeal because "[a]ll conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Consequently, viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to convict defendant of assaulting Brown with the intent to commit murder.

Defendant further asserts that the sentencing guidelines were incorrectly scored, mandating his resentencing. On appeal, the prosecutor concurs that errors occurred in scoring, which necessitate defendant's resentencing. This Court reviews de novo the application of the sentencing guidelines, but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Under the sentencing guidelines, if a minimum

[1] CJI2d 5.12 provides, "*[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004).

Defendant first argues that prior record variables (PRV) 1 and 2 were incorrectly scored.[2] Under MCL 777.51 (PRV-1) and MCL 777.52 (PRV-2), a prior felony conviction is a "conviction [that] was entered before the sentencing offense was committed." MCL 777.51(2); MCL 777.52(2). Defendant asserts the trial court erred because it used defendant's subsequent October 11, 2007, convictions in scoring these variables. Specifically, the trial court scored PRV 1 at 25 points and PRV 2 at 20 points. On appeal, defendant and the prosecutor concur that zero points should have been scored on PRV 1. With regard to PRV 2, defendant contends that the score on this variable should have been five points (for one prior low severity felony conviction). The prosecutor fails to address any error in the scoring on this variable. Based on these errors, defendant contends he is entitled to resentencing as the alteration of the scores on PRV 1 and PRV 2 would lower the applicable guidelines range.

However, the prosecutor asserts that additional scoring errors occurred. Specifically, the prosecutor argues that offense variable (OV) 4, which was scored as zero, should have been assigned ten points for "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). This increase in OV 4 is supported by Peterson's testimony that as a result of the shooting she was diagnosed with "ICU psychosis" and repeatedly relived the traumatic experience of the shooting. In accordance with MCL 777.34(2), "the fact that treatment has not been sought is not conclusive" in the scoring of this variable. In addition, the prosecutor contends that OV 13, which was also scored at zero points, should have been scored at 25 points because "[t]he offense was a part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Included in the purview of MCL 722.43(2)(a) are "all crimes within a 5-year period, including the sentencing offense . . . regardless of whether the offense resulted in a conviction." As such, the prosecutor contends that defendant's pending first-degree murder conviction, combined with the sentencing offenses, constituted the commission of three crimes within the requisite five year period for the imposition of 25 points on this variable. The prosecutor also notes that the trial court failed to sentence defendant in accordance with his status as a habitual offender. Further, the trial court indicated that it was imposing a sentence "at the very top of the guidelines" based on the absence of any discernable "redeeming value in your behavior."

Therefore, in accordance with MCL 769.34(10), we remand to the trial court for correction of the alleged scoring errors, consideration of defendant's habitual offender status, and based on the trial court's indication it intended to sentence defendant in accordance with the top of the applicable guidelines range. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

[2] Although defendant also references PRV 5 on appeal, he does not assert that the score of five, assigned to this variable by the trial court, is incorrect.

Finally, defendant argues that he is entitled to 533 days credit for time served. Although the prosecutor concurs that defendant might be entitled to some credit for time served, he contends that such entitlement is to a substantially reduced number of days from that alleged by defendant. Whether a defendant was inappropriately denied credit for time served in jail before sentencing pursuant to MCL 769.11b is question of law. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). This Court reviews de novo questions of law regarding statutory interpretation. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009).

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

According to the plain language of the statute, a defendant in entitled to credit for time served only when he is incarcerated because of an inability to post bond for the offense for which he was ultimately convicted and not for any unrelated convictions. *People v Adkins*, 433 Mich 732, 737; 449 NW2d 400 (1989). Hence, for defendant to receive credit in accordance with the statutory provision, he must demonstrate that his confinement was the result of an inability to post bond on the charged offense, and not based on an alternative reason. *People v Wagner*, 193 Mich App 679, 682; 485 NW2d 133 (1992).

Defendant committed to two separate crimes on March 13, 2007. A review of the presentencing report (PSIR), indicates that defendant was arrested on unrelated murder charges on March 13, 2007. He was convicted of the murder charges on September 11, 2007, with sentencing occurring on October 11, 2007. With regard to the charges involved in this appeal, defendant was arrested on March 28, 2007. He was convicted of the instant charges on August 27, 2008, with sentencing occurring on September 10, 2008.

Discussing MCL 769.11b in *People v Prieskorn*, 424 Mich 327, 341; 381 NW2d 646 (1985), our Supreme Court determined that Legislative enactment of the statute, "sought . . . to give a criminal defendant a right to credit for any presentence time served 'for the offense of which he is convicted,' and not upon any other conviction." Additionally, the court determined "[h]ad the Legislature intended that convicted defendants be given sentence credit for all time served prior to sentencing day, regardless of the purpose for which the presentence confinement was served, it would not have conditioned and limited entitlement to credit to time served 'for the offense of which [the defendant] is convicted.'" *Id.* As a result, "to be entitled to a sentence credit for presentence time served, a defendant must have been incarcerated 'for the offense of which he is convicted.'" *Id.* at 344. When defendant was arrested on the instant offenses he was already in jail and presumably denied bond based on the pending murder charges. This period of confinement was unrelated to the offenses for which defendant was convicted in this case. Therefore, because "defendant has served time not as a result of his inability to post bond for the offense for which he seeks credit, but because of his incarceration for another offense, [MCL 769.11b] is simply not applicable." *Idziak*, 484 Mich at 561, citing *Adkins*, 433 Mich at 751.

Affirmed with regard to defendant's convictions, but remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly