

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIN JAY HERP,

Defendant-Appellant.

UNPUBLISHED

June 22, 2010

No. 291484

Eaton Circuit Court

LC No. 08-020070-FH

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of unlawful imprisonment, MCL 750.349b, felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and resisting arrest, MCL 750.81d(1). Defendant also appeals the accompanying sentences. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arose out of an altercation between defendant and his ex-girlfriend. Defendant entered the backseat of the victim's car while she was in a store. When she returned to the car, he grabbed her and attempted to force her to stay in the car with him. She escaped with the help of a passerby. She screamed several times that defendant had a gun and the passerby saw a gun in defendant's hand. Defendant fled on foot. The police later arrested him in a rural area.

Defendant first argues that the evidence was insufficient to establish that he used a gun during the incident. This Court reviews challenges to the sufficiency of the evidence de novo to determine whether a rational trier of fact could have found that the prosecutor proved that defendant used a gun. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990).

The witnesses gave divergent testimony concerning the characteristics of the gun. Nonetheless, both the victim and the passerby were firm in their testimony that defendant had a gun at the time of the incident. Viewing this testimony in the light most favorable to the prosecution, see *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), there was sufficient evidence to allow the jurors to conclude that defendant used a gun in the commission of the offenses. We also reject defendant's contention that the evidence was insufficient because it was equivocal as to whether the gun was real. Although a toy gun was later found in defendant's car, the victim testified that the toy gun was not the gun she saw during the incident.

The passerby also testified that the gun was real, not a pellet gun or a BB gun. Thus, the issue was ultimately a matter of the weight and credibility and this Court defers to the jury's assessment of the weight and credibility to be afforded to the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). There was sufficient evidence to support defendant's convictions.

Defendant also challenges his sentence, claiming that the trial court erred in assessing 15 points under offense variable (OV) 10, MCL 777.40. We review this preserved issue to determine whether the record evidence adequately supports the 15 point assessment. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

To assess points under OV 10, the sentencing court must determine that the victim was vulnerable, and that the offender exploited the victim's vulnerability. *People v Cannon*, 481 Mich 152, 159; 749 NW2d 257 (2008). Vulnerability is established by proof of "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c); see also *Cannon*, 481 Mich at 158 n 11. Here, the evidence showed that defendant got into the back seat of the victim's car after she went into a store. He then waited for her to return, and, after she got into the car, he tried to pin her in the small, readily controlled confines of the car—that is, defendant waited until the victim was in a particularly vulnerable position before attempting to abduct her. Accordingly, there was evidence that defendant exploited the victim's susceptibility to restraint.

We also reject defendant's argument that his behavior was not predatory. The *Cannon* Court defined predatory conduct under OV 10 as preoffense behavior "directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *Cannon*, 481 Mich at 161. The trial evidence established that defendant entered the back seat of the victim's car, concealing himself until she returned to the car. This deception was sufficient to assess 15 points against defendant for predatory conduct under OV 10.

Lastly, defendant argues that the trial court erred when it refused to strike certain speculative statements from his presentence investigation report (PSIR). If a defendant challenges the accuracy of information contained in a sentencing report, the trial court must respond by determining the accuracy of the information, accepting the defendant's version, or by simply disregarding the information. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). If the trial court disregards the challenged information, it should order the information stricken from the report. MCL 771.14(6); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). This Court reviews a trial court's response to the defendant's challenge for an abuse of discretion. *Uphaus*, 278 Mich App at 181.

In the PSIR, the preparer indicated that, on the basis of the details surrounding the events at issue, defendant must have planned the attempted abduction. He also noted that the victim felt that defendant might have been planning to take her to a secluded trailer with which defendant was familiar. Defendant challenged these statements as speculative. In response to the challenges, the trial court stated that the writer had the right to speculate about the inferences that could be drawn and noted that it was not deferring to the writer's speculation in sentencing defendant, but was relying on its own interpretation of the evidence.

On appeal, defendant does not challenge the accuracy of the facts stated in his PSIR. Rather, as the trial court recognized, he challenges the opinions offered by the preparer of the PSIR and the victim concerning the possible inferences that can be drawn from the facts of his case. The trial court stated that it was not relying on the opinions in sentencing defendant, but that the opinions should remain in the report. The preparer of defendant's PSIR could properly offer opinions about the import of defendant's behavior and the inferences that could be drawn from the facts of the case, and a trial court does not abuse its discretion when it permits such opinions to remain in the report as long as the report accurately reflects those opinions. See *People v Waclawski*, 286 Mich App 634, 691; 780 NW2d 321 (2009) (holding that the trial court did not abuse its discretion when it refused to strike the PSIR preparer's opinion as to how the defendant in that case cooperated with the preparation of the report). Defendant does not suggest that the PSIR does not accurately reflect the challenged opinions. Thus, the trial court did not abuse its discretion by rejecting defendant's challenge to the accuracy of the PSIR preparer's opinions concerning the possible inferences to be drawn from the facts adduced in this case. *Id.*

There were no errors warranting relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly