STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2016
v	No. 326209 Genesee Circuit Court
JOSEPH DANTE LEE, Defendant-Appellant.	LC No. 13-034264-FC

Before: O'CONNELL, P.J., AND MARKEY AND O'BRIEN, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a crime, MCL 750.227b. We affirm.

I. UNDERLYING FACTS

Defendant shot the complainant in the chest. Defendant and the complainant were friends, and the complainant performed home improvement and repair work for defendant. The complainant also was addicted to crack cocaine and purchased crack from defendant, who sometimes paid the complainant for work with crack cocaine. On the night of the shooting, the complainant performed electrical work on defendant's house and smoked crack cocaine, which he claimed defendant gave him as a down payment for the electrical work. The shooting occurred at defendant's house in the early morning hours after the complainant had finished working on the house. Defendant and the complainant's account of the events leading up to the shooting differ.

The complainant testified that after finishing the rewiring work, he left defendant's house around midnight but returned around 1:00 or 1:30 a.m. after defendant returned to the house. At that point, defendant was not happy, was acting "crazy," like "he had flipped the strip" or "he was high," and was talking about how the complainant had left defendant's house unlocked or unsecured and something was missing. The complainant did not understand what defendant was talking about at this time but later discovered that defendant believed he was missing some drugs

from his house and thought that the complainant had them.[1] The complainant went to the basement to retrieve his tools, turned off the lights--making it dark in the house-- and went upstairs. The complainant went into the kitchen to gather his hand tools because he was ready to leave. As the complainant was putting his tools together, defendant, who was also in the kitchen, was talking about his house not being locked up and that something was missing. Defendant then "went somewhere," came back, and the next thing the complainant knew, he was shot in the chest area and was bleeding. At the time he was shot, the house was dark, and the complainant did not see who shot him.

Defendant, on the other hand, admitted that he shot the complainant, but claimed he acted in self-defense and did not intend to shoot him. According to defendant, when the complainant returned to the house, he criticized the complainant's work, after which the complainant started "tripping out" and "became irritated," "real hostile," and "real aggressive." Defendant told the complainant that he was not going to pay him because he still had work to do, after which the complainant, who was in the kitchen, told defendant he was not going home without any money and became "real belligerent," "started acting real combative," "was getting real highly upset," and was "thumping and throwing stuff." Defendant, who was in his bedroom located next to the kitchen, heard the complainant "tooling around slamming and throwing stuff around the kitchen." Defendant then heard the kitchen lamp smash, eliminating the only light in the house, and making it "pitch black." Defendant then headed toward the kitchen to see what was going on when the complainant confronted him with a "fierce attack," striking the area between defendant's shoulder blade and head multiple times with a "decapitating blow" by a "powerful" object. A struggle ensued and defendant, who was in fear for his life and believed he needed to protect himself, pulled a gun from his waistband and fired one shot to stop the complainant's attack. Defendant testified that he did not intend to shoot the complainant, could not see the complainant's silhouette when he fired the shot because of the darkness in the house, and did not know if the bullet hit the complainant. He stated he realized that the complainant was shot after he said, "I'm shot" and stepped out of the kitchen holding his chest.

After the shooting, defendant and another individual who was at the house with defendant assisted the complainant to the front porch. According to the complainant, before calling 911, defendant asked the complainant, "You see what you did? Why you make me do that?" Complainant also claimed that defendant told him "don't tell anyone," and "we're gonna say somebody come through the back yard and tried to rob us," which the complainant agreed to say because he was afraid that defendant would shoot him again. Defendant testified that he called 911 immediately and admitted that he told the 911 operator that someone had come in and tried to rob the complainant. While waiting for the ambulance to arrive, defendant tried to help the complainant as instructed by the 911 operator. Defendant testified that he did not want to leave the complainant "out there to die" because he had compassion for him as his friend, and he did not intend for the shooting to happen. Defendant, who was panicked and frightened, fled the

[1] Defendant testified that, although he has used crack cocaine, he did not have cocaine in the house, while the complainant testified that during the night, defendant was sitting in a chair in a bedroom of the house next to dresser or table with a gun and some crack cocaine on it.

scene when he saw the ambulances approaching. The paramedic who arrived on the scene and attempted to save the complainant's life characterized the complainant's gunshot injury as "a grave wound" and described the complainant as "extremely s[h]ort of breath." The complainant suffered from a gunshot wound to his chest. The bullet traveled through his abdomen into his pelvis and landing "very near" his ureter, creating injuries that required hospitalization and surgery.

After the shooting, defendant never contacted the police or told the police that the complainant had attacked him. Defendant admitted that he disposed of the gun after the shooting. The complainant eventually identified defendant as a suspect, and defendant was arrested. Defendant was charged with assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The jury convicted him of the lesser included charge of assault with intent to do great bodily harm, MCL 750.84, as well as possession of a firearm and felony-firearm charges. This appeal ensued.

II. REFERENCE TO JURORS BY NUMBER

Defendant first claims that the trial court's practice of referring to the jurors by number, instead of by name, and failing to give a cautionary instruction explaining the anonymity violated his due process right to a fair and impartial jury and warrants a new trial. We disagree.

Defendant failed to preserve this constitutional issue for our review by objecting before the trial court; consequently, we review this issue under a plain error analysis. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). "To establish plain error requiring reversal, a defendant must demonstrate that '1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Id*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court has recognized the potential that the selection of an anonymous jury might violate a defendant's due process right to a fair trial. See *Hanks*, 276 Mich App at 93; *People v Williams*, 241 Mich App 519, 523; 616 NW2d 710 (2000). "An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *Williams*, 241 Mich App at 522. An "anonymous jury" has the potential to impact the defendant's ability to conduct a meaningful examination of the jury and to maintain the presumption of innocence. *Id*. at 522-523. Thus, for a defendant to succeed in challenging the use of an "anonymous jury," the record must show that the parties have had information withheld from them that prevented a meaningful voir dire of jurors, or that the defendant's presumption of innocence was compromised. *Id*. at 523; *Hanks*, 276 Mich App at 93. The mere reference to jurors by number at trial instead of their names is insufficient to constitute a violation of a defendant's right to a fair trial. *Williams*, 241 Mich App at 523-524.

The record does not support defendant's claim that the trial court's practice of referring to the jurors by number, instead of by name, violated defendant's due process right to a fair and impartial jury. As discussed, a challenge to an "anonymous jury" will only succeed where the record reflects that the court's use of numbers to identify the jurors prevented the defendant from conducting a meaningful voir dire of jurors or that his presumption of innocence was compromised. Defendant failed to establish either of these requirements. First, while it is not

disputed that the trial court referred to the prospective jurors by badge number and not by name, there is nothing to suggest, nor does defendant allege on appeal, that the trial court withheld any juror information from the parties[2] or that he was denied the opportunity to conduct meaningful voir dire. To the contrary, the record reveals that the trial judge, prosecutor, and defense counsel participated in extensive voir dire of the potential jurors regarding the jurors' backgrounds, attitudes, and other inquiries focusing on their ability to remain fair and impartial in deciding the case. There is simply no indication from the record that the court's use of numbers to identify the jurors deprived defendant of meaningful voir dire.

Additionally, "there is nothing in the record to indicate that the use of numbers undermined [defendant's] presumption of innocence." *Williams*, 241 Mich App at 524. There is nothing in the record that would suggest to the jurors that it was unusual or out of the ordinary for the court to identify the jurors by number, rather than name, or that referring to the jurors by number was of any significance so as to undermine the presumption of innocence. *Id*.; see also *Hanks*, 276 Mich App at 93-94. As in *Williams*, "there was no suggestion that defendant's trial was being handled in a special way, with the resulting implication that he was generally dangerous or guilty as charged." *Williams*, 241 Mich App at 524. Moreover, during voir dire, the trial court repeatedly instructed the jurors regarding the necessity that they remain fair and impartial, the presumption of innocence, the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, the responsibility of the jurors to decide the facts of the case solely from the evidence and not on bias, sympathy, or prejudice, and the jurors' obligation to follow the law. And, during voir dire, the trial court, prosecutor, and defense counsel extensively examined the potential jurors to ensure that they understood and would follow these principles. Further, when the impaneled jury was sworn in, the trial court again instructed them regarding defendant's presumption of innocence and the prosecution's burden to prove the elements of the crime beyond a reasonable doubt. Jurors are presumed to have followed the court's instructions. *People v Unger*, 278 Mich App 210, 235, 237; 749 NW2d 272 (2008). Thus, this record does not suggest that the court's practice of referring to jurors by number compromised defendant's presumption of innocence. Instead, like in *Hanks*, the jury "was anonymous only in a literal sense," without implicating the dangers of an "anonymous jury." *Hanks*, 276 Mich App at 94.

We conclude that defendant has failed to demonstrate plain error affecting his substantial rights. *Id*. at 92. Defendant has not shown that the court withheld any juror information from him so as to prevent meaningful voir dire or that the use of numbers to identify the jurors compromised his presumption of innocence to implicate his due process rights. There is also no reason to presume prejudice in this case. *Williams*, 241 Mich App at 524-525. Although, as defendant argues, this Court in *Hanks*, 276 Mich App at 94, "strongly urge[d] trial courts to advise the venire that any use of numbers in lieu of jurors' names is simply for logistical purposes and they should not in any way consider it a negative against the defendant," this precaution is advisory, not mandatory. Where, as here, nothing in the record suggests that the

[2] It is evident from the record that the parties had the prospective jurors' questionnaires because the attorneys occasionally referred to the questionnaires during voir dire. See MCR 2.510, requiring the use of juror personal history questionnaires, to which all parties must have access.

trial court's practice of identifying the jurors by number might create a potential for prejudice, we find that the lack of a cautionary instruction explaining the anonymity does not constitute plain error affecting defendant's substantial rights. *Id*. at 92.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next claims that the evidence was insufficient to support his conviction of assault with intent to do great bodily harm. We disagree.

"Challenges to the sufficiency of the evidence are reviewed de novo, in the light most favorable to the prosecution, to determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014). The prosecution may prove the elements of an offense with circumstantial evidence and reasonable inferences from the evidence. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). We resolve any evidentiary conflict in favor of the prosecution and will not interfere with the trier of fact's determinations regarding the weight of the evidence or the credibility of the witnesses. *Unger*, 278 Mich App 222.

The crime of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, requires proof of "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *Stevens*, 306 Mich App at 628 (citation omitted). Defendant challenges only the second element: he asserted that he did not intend to shoot the complainant, and that he fired one shot in the dark in self-defense to stop the complainant's assault against him. Furthermore, despite having the opportunity to inflict far greater harm on the complainant, he did not do so.

To sustain a conviction for AWIGBH the defendant must intend to commit a serious injury of an aggravated nature. *Stevens*, 306 Mich App at 628. When a defendant acts with such intent, it is irrelevant whether he was provoked or that he acted in the heat of passion. *Id*. at 628-629. "Because of the difficulty of proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent." *Id*. at 629. A jury may infer a defendant's intent to do great bodily harm from the act itself, the means employed to commit the assault, and the manner of the assault. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). As such, the intent to do great bodily harm can be inferred from the use of a dangerous weapon and the making of threats. *Stevens*, 306 Mich App at 629. Further, although not an element of the crime, intent may be inferred from the injuries the victim suffered. *Id*. at 629. "[T]he extent of any injury and the presumption that one intends the natural consequences of one's acts are both proper considerations for the jury." *People v Dillard*, 303 Mich App 372, 378; 845 NW2d 518 (2013).

Viewing the evidence in the light most favorable to the prosecution and resolving all credibility issues in favor of the verdict, we find that a rational trier of fact could have found beyond a reasonable doubt that defendant intended to inflict a serious injury of an aggravated nature when he fired the gun. First, the complainant's testimony that defendant was angry with and acting crazy toward him at the time of, or immediately before, the assault because the complainant had left defendant's house unsecured and his drugs were missing and that defendant believed the complainant had his drugs provides a motive for defendant's conduct and is relevant

to his intent. See generally, *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925); *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). Defendant's use of a firearm while aware that he was in close proximity to the complainant, the use of which has the natural consequence to cause serious injury, especially considering the location of the gunshot wound in the chest, also shows defendant's intent to cause serious injury. *Stevens*, 306 Mich App at 629; *Dillard*, 303 Mich App at 378. Further, the serious injury the complainant suffered, necessitating hospitalization and surgery, is evidence of defendant's intent. *Stevens*, 306 Mich App at 629. Additionally, defendant's conduct after the shooting in fleeing the scene, attempting to cover up his involvement in the shooting by fabricating the account of events leading up to the assault, and destroying evidence by disposing of the gun are circumstances tending to show consciousness of guilt. See *Unger*, 278 Mich App at 226.

Under these circumstances, we find sufficient proof existed from which a rational trier of fact could reasonably infer that defendant intended to inflict serious injury of an aggravated nature on the victim. Although defendant testified that he did not intend to shoot the complainant when he fired his gun, the jury obviously did not believe defendant's account, and this Court will not interfere with the jury's determination regarding the credibility of witnesses or the weight to assign to the evidence. *Id.* at 222; *Stevens*, 306 Mich App at 628.

Defendant further argues that the prosecution failed to disprove his claim of self-defense beyond a reasonable doubt. We disagree. "Once a defendant raises the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution must exclude the possibility of self-defense beyond a reasonable doubt." *Stevens*, 306 Mich App at 630 (quotation marks and citation omitted). MCL 780.972, provides, in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she as the legal right to be with no duty to retreat if . . .
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

Defendant's theory of self-defense is based on his own testimony that he honestly believed that his life was in danger when he fired the gun to defend himself from complainant, who was high on crack cocaine, angry, and had attacked defendant by striking him multiple times with a powerful object in the dark. The prosecution's theory, on the other hand, was based on the complainant's testimony that the complainant did not attack defendant at all; rather, defendant shot the complainant because he was upset with the complainant and acting crazy after the complainant left defendant's house unsecured and believed drugs were missing from the house. The complainant's account, if believed by the jury, negated defendant's claim that he acted in self-defense, i.e., that he acted with an honest and reasonable belief that he had to use force to protect himself from imminent harm or death, because according to the complainant's account, he never attacked, or even threatened, defendant. Although defendant's account and the complainant's account of the circumstances leading up to the shooting clearly conflict, it was solely for the jury to resolve issues of witness credibility and to weigh the evidence. *Stevens*,

306 Mich App at 628; *Unger*, 278 Mich App at 228, 240. The jury was free to believe the complainant's testimony, which negated defendant's claim of self-defense beyond a reasonable doubt.

IV. ALLEYNE CHALLENGE

Finally, defendant claims that the trial court engaged in impermissible judicial fact-finding in scoring his sentencing guidelines in violation of his Sixth Amendment right to a jury trial, contrary to *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Because defendant failed to object on this basis at sentencing, our review is limited to plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "To establish entitlement to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Lockridge*, 498 Mich at 392-393, citing *Carines*, 460 Mich at 763.

In *Lockridge*, our Supreme Court held that "the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne* . . ., applies to Michigan's sentencing guidelines and renders them constitutionally deficient." *Lockridge*, 498 Mich at 364. The Court concluded that Michigan's sentencing scheme "constrains the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone . . . to the extent that the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict." *Id.* at 373. "Stated differently, to the extent that the [Offense Variables] (OVs) scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment." *Id.* at 373-374. To remedy this constitutional violation, the Court severed MCL 769.34(2) "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Lockridge*, 498 Mich at 364. The Court also struck down the requirement of MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure. *Lockridge*, 498 Mich at 364-365. Additionally, the Court held:

> [A] guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and . . . sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. [*Id.* at 365.]

Thus, in cases before *Lockridge* was decided where the sentencing guidelines determination relied on judicially found facts, there is a risk that the court was unconstitutionally constrained in violation of a defendant's Sixth Amendment right to a jury trial. *Id.* at 388-389. "Because the rule from *Alleyne* applies, the Sixth Amendment does not permit judicial fact-finding to score OVs to increase the floor of the sentencing guidelines range." *Id.*

The *Lockridge* Court explained how we should apply the plain error standard in addressing potential *Alleyne* violations that occurred before the Court's decision. *Id.* at 394-397. The Court concluded that when facts admitted by the defendant or found by the jury verdict "were sufficient to assess the minimum number of OV points necessary for [the] defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," the defendant was not prejudiced, so "there is no plain error and no further inquiry is required." *Id.* at 394-395. On the other hand, "when the facts admitted by a defendant or found by the jury verdict were insufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," "an unconstitutional constraint actually impaired the defendant's Sixth Amendment right." *Id.* at 395, 399. In such a case, if there is no upward departure, a defendant "can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id.* Thus, "in cases in which a defendant's minimum sentence was established by the application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id.* at 397, 399.

Defendant claims that the trial court's assessment of 25 points under OV 3, pertaining to the extent of physical injury to a victim where "life threatening or permanent incapacitating injury occurred," MCL 777.33(1)(c), and 10 points under OV 4, pertaining to the "serious psychological injury" to the victim requiring professional treatment, MCL 777.34(1)(a), was based on impermissible judicial fact-finding, contrary to *Alleyne*. We agree with defendant that the assessment of 10 points for OV 4, MCL 777.34(1)(a), for the victim's serious psychological injury, was based on judicial fact-finding. Whether a victim suffered serious psychological injury is not an element of any of the offenses of which the jury convicted defendant, nor did defendant admit this fact. So, the judge must have determined this fact from the record evidence, potentially violating defendant's Sixth Amendment right. *Lockridge*, 498 Mich at 373-374.

We find, however, that the assessment of 25 points under OV 3, which considers the extent of the physical injury to the victim, MCL 777.33, was supported by defendant's admissions during his testimony. It was not based on impermissible judicial fact-finding. A score of 25 points under OV 3 is assessed when the victim's injury was "life threatening or permanently incapacitating." MCL 777.33(1)(c). Although the life threatening or permanently incapacitating nature of the injury to the victim is not a necessary element of assault with intent to do great bodily harm, *Stevens*, 306 Mich App at 629, defendant admitted to the life-threatening nature of the complainant's injury during his trial testimony. Defendant's admissions that he shot the complainant, that the complainant was holding his chest area and was injured, that defendant assisted the complainant after he was shot and immediately called 911, that he or another individual administered compression to the complainant's chest to stop the bleeding as instructed by the 911 operator, and that defendant testified that he did not want to leave the complainant "out there to die," establishes the life-threatening nature of the complainant's injury beyond a reasonable doubt and sufficiently supports the trial court's assessment of 25 points for OV 3. Because defendant admitted the life-threatening nature of the

complainant's injury during his testimony, defendant failed to establish that OV 3 was impermissibly scored on the basis of judicial fact finding that was not supported by defendant's admissions or the jury's verdict.[3] When a defendant admits the facts forming the basis for an OV score, there is no Sixth Amendment violation. *Lockridge*, 498 Mich at 394-395. Accordingly, the court's scoring of OV 3 did not violate his Sixth Amendment right.

Defendant's conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, is a class D felony. MCL 777.16d. Before considering the challenged OVs, defendant's OV score was 100 points, placing him at OV Level VI (75+ points) of the sentencing grid for Class D offenses. MCL 777.65. Defendant was assessed 60 prior record variable ("PRV") points, placing him in PRV Level E for Class D offenses. MCL 777.65. OV Level VI and PRV Level E intersect on the sentencing grid for Class D offenses for a fourth habitual offender at a recommended minimum sentence range of 38 to 152 months. MCL 777.65; MCL 777.16d. The trial court sentenced defendant within this range to a minimum term of 120 months in prison. As discussed, the court impermissibly relied on judicial fact-finding regarding OV 4, MCL 777.34(1) (serious psychological injury to the victim requiring treatment) because serious psychological injury was not a necessary element to prove the charged offense, nor did defendant admit such a fact. On the other hand, the trial court's assessment of 25 points for OV 3 for life threatening injury to the victim was supported by defendant's own admissions during his testimony, so it was not based on impermissible judicial fact-finding. The deduction of 10 points for OV 4 from the original OV score of 100 results in a revised OV score of 90 points, which places defendant in the same OV Level VI (75+ points) for Class D offenses. MCL 777.65. Because the facts admitted by defendant or found by the jury verdict "were sufficient to assess the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he . . . was sentenced," defendant has not demonstrated that his guidelines minimum sentence range "was actually constrained by the violation of the Sixth Amendment." *Lockridge*, 498 Mich at 394-395. Accordingly, defendant has not established the threshold showing of plain error necessary to warrant remand for further inquiry. *Id*.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Colleen A. O'Brien

[3] The sentencing court found both life-threatening and permanent incapacitating injury. Although the court's finding that the complainant suffered permanently incapacitating injury was necessarily based on judicial fact-finding, as defendant did not admit this fact, nor was it an element of the offense, OV 3 requires an assessment of 25 points for "life threatening *or* permanent incapacitating" injury. MCL 777.33(1)(c) (emphasis added).