STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2008
v	No. 277615 Wayne Circuit Court
DEMETRIUS CARTEZ BAKER, Defendant-Appellant.	LC No. 06-010671-02

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant Demetrius Baker appeals as of right the judgment of sentence convicting him of assault with intent to commit armed robbery (AWIRA), MCL 750.89; assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12. We affirm.

Defendant first argues that the evidence was insufficient to sustain his convictions of AWIRA and AWIGBH. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To prove that defendant committed the crime of AWIRA, the prosecution must prove (1) an assault with force and violence, (2) an intent to rob or steal, and (3) that the defendant is armed when the act is committed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Defendant only contests the intent element.

We conclude that the evidence was sufficient to prove that defendant had the intent to rob. Darius Brown, the codefendant, testified that he previously worked at the Quick Lube and knew there was a cash register inside. He also testified that he and defendant discussed robbing the Quick Lube and the reason for picking defendant up that day was to carry out the robbery. Hassan Amine, the Quick Lube clerk, testified that defendant confronted him in the parking lot, patted down his pants, and threatened to shoot if Amine did not return to the oil change and open the door. After Amine opened the door, he and defendant entered and the alarm sounded.

Defendant told Amine to turn off the alarm but Amine claimed he did not know the code. Amine then jumped onto a table next to defendant to scare him. Defendant then shot him in the right shoulder and then fled. Defendant's statement to Officer Eric Leinonen further corroborates Brown's and Amine's testimony. Defendant told Officer Leinonen that the robbery was Brown's idea and that he (defendant) was the one who pointed a gun at Amine, told him to return to the oil change, and later shot Amine. The evidence and reasonable inferences drawn therefrom supports beyond a reasonable doubt that defendant used the gun to gain entry to the oil change, access the cash register, and take the money inside the cash register.

Defendant attempts to argue that, because he merely patted down Amine's pants and did not feel inside his pants pockets or demand anything from Amine at any time during the incident, there was no intent to rob. However, defendant does not have to intend to rob the person assaulted. *People v Harris*, 110 Mich App 636, 643-644; 313 NW2d 354 (1981). The assault need only be in furtherance of the intended robbery. *Id.* Viewed in the light most favorable to the prosecution, the evidence supports the reasonable inference that defendant assaulted Amine to gain access to the money inside the Quick Lube.

"[AWIGBH] 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." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Again, defendant only disputes the intent element.

The evidence was sufficient to prove defendant intended to cause great bodily harm. Defendant was armed with a gun, confronted Amine with the gun, and threatened to shoot Amine if he did not open the door and allow him to enter the oil change. Soon after entering the building, defendant shot Amine in the right shoulder resulting in severe bleeding, and later surgery to remove the bullet. Threatening to shoot Amine with a gun if he did not return to the oil change and open the door, and then actually shooting Amine when he attempted to save himself, evidences intent to cause great bodily harm. "[I]ntent may be inferred from the act itself." *People v Medley*, 339 Mich 486, 493; 64 NW2d 708 (1954); see also *People v Strong*, 143 Mich App 442, 451-452; 372 NW2d 335 (1985).

Defendant claims that there was no intent to do great bodily harm because he shot Amine in a panic when Amine started "freaking out" after the alarm went off. However, in *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986), this Court held that provocation does not prevent conviction for AWIGBH. Whether defendant was provoked or acted in the heat of the moment is irrelevant. *Id*. at 38-39. "Deliberate" intent is not required for conviction, only intent to do great bodily harm. *Id*. at 41. We find that both provocation and panic involve acting in the heat of the moment preventing the intent from being deliberate. Even if defendant acted out of panic, the fact that there was sufficient evidence to prove intent is enough to sustain the conviction.

Second, defendant argues that the verdict was against the great weight of the evidence. In making this argument, however, defendant again actually argues that he should be granted a new trial because there was insufficient evidence to support the intent element for either the AWIRA or the AWIGBH conviction.

We review a trial court's denial of a new trial motion for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). An abuse of discretion will only be found where the denial is "manifestly against the clear weight of the evidence." *Id.* (quotation and citation omitted). A trial court may grant a new trial if, reviewing the proofs as a whole, "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003); see also *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). While a new trial may be granted even if the evidence is constitutionally sufficient to prove guilt beyond a reasonable doubt, *People v Allen*, 429 Mich 558, 694; 420 NW2d 499 (1988) (Boyle, J. dissenting), citing *People v Hampton*, 407 Mich 354, 372-374; 285 NW2d 284 (1979), where the evidence conflicts, this Court must leave the resolution of credibility issues to the trier of fact unless it can be said that the testimony was so far impeached that it "was deprived of all probative value or that the jury could not believe it" or it "contradict[ed] indisputable physical facts or laws" or it was "patently incredible or defi[ed] physical realities." *Lemmon*, *supra* at 642-644 (quotations and citations omitted).

We hold that, for the reasons already expressed in addressing defendant's insufficiency of the evidence argument, the guilty verdicts for AWIRA and AWIGBH were not against the great weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that the trial court improperly scored offense variable (OV) 8, MCL 777.38, which addresses victim asportation or captivity. A sentencing court has discretion in scoring, and a trial court's scoring of the offense variables will be upheld if there is any evidence to support the score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

As just noted, OV 8 relates to victim asportation or captivity, and should be scored at 15 points if defendant asported the victim to another place or situation of greater danger, or the victim was held captive beyond the time necessary to commit the offense. MCL 777.38.

There was evidence to support the trial court's scoring. Jeffrey Swindlehurst, the valet for an adjacent business, testified that from his position he was able to see defendant and Brown walk toward and then behind the Quick Lube building. Five minutes after watching them walk behind the building, he heard a loud pop coming from the direction of the Quick Lube and then saw defendant and Brown run to the Monte Carlo and drive off. Based upon Swindlehurst's testimony, it was reasonable for the trial court to infer that Amine's chance of rescue was greater in the parking lot than inside the oil change. In the parking lot, Amine could have attempted to run away, shout, or otherwise call attention to his plight where his shouts were more likely to be heard and his movements able to be seen by someone such as Swindlehurst. And, we have previously held that moving a victim away from the observation of others supports a finding that the victim was moved to a place of greater danger. *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996). The trial court correctly scored OV 8.[1]

[1] Defendant's suggestion that Amine was not scared once in the shop takes that testimony out of its proper context. Amine testified that "[w]hen the alarm went off, to tell you truth I wasn't

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We also reject defendant's argument that because prior record variables (PRVs) 4, MCL 777.54, and 5, MCL 777.55, were incorrectly scored, he is entitled to resentencing. This Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining defendant's sentence. MCL 769.34(10). If the scoring error does not alter the minimum recommended sentence range under the legislative guidelines, resentencing is not required. *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006), citing *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Although PRV 4 and PRV 5 were incorrectly scored, the trial court ordered the corrections and a new presentence investigation report to be issued. Both before and after the rescoring, defendant was in PRV level "F".[2] Thus, despite the error in scoring the PRVs, that error did not affect the guidelines range. Further, the trial court stated that when sentencing defendant, it did not rely on the juvenile record upon which PRVs 4 and 5 were incorrectly scored. Because the trial court clearly indicated that it would have imposed the same sentence regardless of the scoring error and defendant's sentence fell within the sentencing guidelines range, resentencing is not required. *Francisco, supra* at 91 n 8, citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003).

Finally, defendant argues that because the robbery was his codefendant's idea and his codefendant was given a plea and sentence agreement to a sentence below the recommended minimum sentence under the legislative guidelines, defendant should be given a sentence at the low end of the guidelines. This argument is without merit. As stated above, defendant's sentence was within the sentencing guidelines pursuant to MCL 777.21(3)(c) (habitual fourth offender) and MCL 777.61-69 (sentencing grids) and is therefore presumed to be proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, "[s]entences must be individualized and tailored to fit the circumstances of the defendant and the case." *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). The trial court is not required to take a codefendant's sentence into consideration. *People v Bisogni*, 132 Mich App 244, 245-246; 347 NW2d 739 (1984). The trial court properly tailored the sentence to defendant in this case. The trial court based its sentence on defendant's "continuing criminal career history of escalating violence, prior conviction for unarmed robbery, as well as carjacking and [AWIRA]." In addition, although the robbery was the codefendant's idea, defendant is the one who brought the loaded gun to the robbery and shot the victim. Thus, the trial court did not abuse its discretion in setting the sentence.

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scared any more. I was thinking he's going to kill me. So I tried to push something to hit him with. Then he just pop, shot me." The reasonable inferences from Amine's testimony are that, once he was secreted away, he was no longer afraid because he knew that there was nothing he could do to escape, and that he was going to be killed. In other words, once in the shop Amine was not scared about what might occur, he was in the more severe predicament of believing he was going to be killed because he was alone inside the shop with defendant.

[2] The crime class for AWIRA is class "A" and the crime class for AWIGBH is class "D". MCL 777.16d. Looking at the sentencing grids, with a PRV score of 107, defendant is in PRV level "F" for both crime classes. MCL 777.62 and MCL 777.65.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray