

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERVON SAMWON WARD,

Defendant-Appellant.

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UNPUBLISHED

March 24, 2009

No. 280672

Calhoun Circuit Court

LC No. 2007-000553-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Defendant was found guilty by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and was sentenced as a second habitual offender, MCL 769.10, to 83 to 180 months' imprisonment. He appeals as of right. We affirm his conviction but remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in which he and a co-assailant accused the victim of stealing property belonging to defendant. During a physical altercation between defendant and the victim, the co-assailant shot the victim in the back. When the victim collapsed to the floor, defendant repeatedly stomped on his head and threatened to kill him.

Defendant first argues on appeal that the evidence was insufficient to convict him of assault with the intent to do great bodily harm less than murder. We disagree.

This Court reviews sufficiency of the evidence challenges in a criminal trial de novo. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). In reviewing the sufficiency of the evidence, this Court determines whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In determining whether sufficient evidence had been presented to support a conviction, "this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).

The elements of assault with intent to do great bodily harm are: “(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 Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Great bodily harm is defined as “a physical injury that could seriously and permanently harm the health or function of the body.” CJI2d 17.7(4). “Assault with intent to do great bodily harm is a specific intent crime,” and the trier of fact may infer intent from the defendant’s conduct. *Parcha, supra* at 239. “Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient to establish the element of intent.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.* It is solely within the province of the trier of fact to weigh the evidence and assess the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Therefore, “it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewing the evidence in a light most favorable to the prosecution, the jury properly found beyond a reasonable doubt that defendant possessed the intent to do great bodily harm less than murder. After the co-assailant shot the victim in the back and the victim collapsed on the floor, defendant stomped on the victim’s head numerous times, although it was apparent the victim could not rise from the floor or shield himself from the kicks. After defendant finished stomping on the victim, he asked the co-assailant for the gun so he could “finish off” the victim.

Defendant’s aggressive and violent actions toward the victim sufficiently establish that he possessed the intent to do great bodily harm less than murder. Although defendant argues that the victim only received a bruise and thus, his conviction for assault with intent to do great bodily harm is not supported, physical injury is not required for the elements of the crime to be established. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Viewing the evidence in a light most favorable to the prosecution, the jury could have found that the essential elements of the crime were proved beyond a reasonable doubt.

Defendant also argues that offense variables (OVs) 1, 2, 3, 7, 10, and 12 were misscored. We agree in part.

This Court reviews the trial court’s decision to score points for an offense variable for abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). In scoring a particular offense variable, a trial court’s determination need only be supported by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). If there is any evidence to support the trial court’s scoring decision, it will be upheld on appeal. *Hornsby, supra*.

Defendant claims that OVs 1 (aggravated use of weapon), 2 (lethal potential of weapon possessed), and 3 (physical injury to victim) were incorrectly scored on the basis of the assault with intent to commit murder committed by the co-assailant, who shot the victim, but not by

defendant himself. The trial court scored defendant similar to the co-assailant on the basis that, in multiple offender cases, if one offender is assessed points under an OV, all offenders must be assessed the same number of points. MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a). However, according to the holding in *People v Johnston*, 478 Mich 903, 904; 732 NW2d 531 (2007), this is not a multiple offender case because defendant was not charged with an offense related to the shooting and was convicted of a separate crime from that of the co-assailant. Therefore, in accordance with *Johnson*, this case is not a “multiple offender case,” and defendant should not have been scored on this basis. Accordingly, the case must be remanded for the rescoring of OVs 1, 2, and 3, and for resentencing based on the new guidelines range.

In regard to defendant’s other scoring challenges, a trial court is to score 50 points for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). Here, as the victim lay on the ground after having been shot in the back, defendant repeatedly stomped his head while yelling, “I’m going to kill your bitch ass for stealing from me.” The stompings were described by the victim and witnesses as “hard” and repetitive. The assault by defendant on the victim was clearly excessively brutal. The evidence also supports that defendant’s behavior was designed to increase the victim’s fear and anxiety. The factual review of the crime by the prosecutor at sentencing and in the presentence report relied upon by the sentencing judge are consistent with the victim’s testimony in every important respect. Accordingly, the trial court did not err in scoring OV 7 at 50 points.

Defendant received ten points under OV 10, which relates to the exploitation of a vulnerable victim and is to be scored ten points if the offender “exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). Here, the victim had just been shot and was lying on the floor unable to get up or defend himself when defendant repeatedly stomped on his head. There is factual support for this score.

Defendant was scored one point for OV 12. The trial court may score points, from a minimum of one to a maximum of 25, for OV 12 if the defendant committed felonious criminal acts contemporaneously with the sentencing offense. MCL 777.42(1). A contemporaneous criminal act is one that occurred within 24 hours of the sentencing offense and “has not and will not result in a separate conviction.” MCL 777.42(2)(a)(ii).

The record reflects that defendant tried to cover up for the co-assailant after the shooting, although the accessory after the fact charge against defendant was ultimately dismissed. Initially, defendant stated that he was not at the scene during the incident. When questioned further, defendant told police that he was on the scene and heard the gunshots but did not know who fired the shots. The record supports that defendant did indeed know the co-assailant fired the gun and that he was trying to cover up that person’s involvement in the shooting. Accordingly, there was a sufficient contemporaneous criminal act to score OV 12 at one point. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Finally, defendant argues that due process requires resentencing because the trial court enhanced his sentence based on facts neither admitted by him nor proven to a jury beyond a reasonable doubt in violation of the rule of law set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). That claim was rejected by our Supreme Court in *Drohan, supra*. Therefore, defendant is not entitled to resentencing on this ground.

Defendant's conviction is affirmed but the matter is remanded for rescoring OV's 1, 2, and 3 and for resentencing based upon the new guidelines range. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood  
/s/ Alton T. Davis