

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUGUSTUS LEE BUTTS,

Defendant-Appellant.

UNPUBLISHED

February 10, 2011

No. 295392

Muskegon Circuit Court

LC No. 09-057968-FH

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right the sentence imposed for his bench trial conviction of second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to eight to 30 years in prison, and now challenges the guidelines scoring. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction stems from a home invasion on March 9, 2009. Defendant was accompanied by Eddie Spirvey and Kenneth Jordan.¹ One complainant testified that, as he and his friend approached the home he shared with his mother, he saw a person, later identified as Jordan, leaning against his fence. Complainant's friend asked the person what he was doing, and the person replied that he was waiting for a ride. Complainant then tried to enter his home by the front door, but could not do so, because someone had locked the dead bolt from inside the home. He went around to the side door of the home and, as he tried to open it, he saw defendant and Spirvey in the home. Both men were holding complainant's computer. The men dropped the computer, which smashed on the floor, and fled toward the front door. While his friend called the police, complainant attempted to keep the men in the home until the police arrived, but the men escaped out the side door and ran down an alley. A Muskegon police officer testified about Jordan's arrest and the damage to the front and side doors of the home.

¹ In the lower court record, Eddie Spirvey is also referred to as Eddie Spivey. At trial, defendant testified that Spirvey is his cousin. Theresa Jordan testified that she was defendant's ex-girlfriend and that Kenneth Jordan is her brother.

On appeal, defendant argues that the trial court misscored offense variables (OVs) 14 (leader in a multiple offender situation), and OV 16 (degree of property damage).

Barring constitutional error, if a sentence is within the appropriate guidelines range, we must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). A sentencing court has discretion in determining the number of points to be scored for each offense if record evidence adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). An error in scoring the sentencing guidelines that does not change the recommended minimum sentence range under the legislative guidelines is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Defendant argues that the trial court erred in scoring OV 14 at ten points. Ten points are to be scored if defendant "was a leader in a multiple offender situation." MCL 777.44(1)(a). In addition, MCL 777.44(2) provides both that, "(a) The entire criminal transaction should be considered when scoring this variable[.]" and "(b) If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader."

A presentence investigation report (PSIR) is presumed to be accurate, and the trial court is entitled to rely upon the report unless it is effectively challenged. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). In this case, the PSIR contains a statement, included in the agent's description of the offense, from Kenneth Jordan. Jordan told the officers that he was home with his sister, Theresa Jordan, when defendant came to the home with Spirvey and asked him if he wanted to be involved in breaking into a house. Jordan went with them, but refused to enter the home, stating instead that he would stand outside and act as a lookout. This evidence, coupled with the fact that defendant went into the home, provides support for the trial court's conclusion that defendant was one of the "leaders" here. Defendant cannot show that the trial court erred in scoring this variable.

Defendant also argues that the trial court erred in scoring OV 16 at five points. Five points are to be scored when the property obtained, lost, damaged, or destroyed "had a value of \$1,000.00 or more but not more than \$20,000.00." MCL 777.46(1)(c). Defendant maintains that because the only evidence of loss or damage is a request by complainants for \$863 in restitution, this variable should have been scored at one point. See MCL 777.46(1)(d).

Defendant's argument has merit. Nothing else in the record suggests that the property damage resulting from the home invasion, either to the house or the computer components, totaled more than \$1000. However, defendant is not entitled to relief. Defendant's OV score totaled 15 points. A reduction of four points, for a total OV score of 11 points, still results in the same sentencing grid for his class C offense, i.e., E II. MCL 777.64. Therefore, defendant is not entitled to resentencing based on the misscoring of OV 16. *Johnson*, 202 Mich App at 290.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood