S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
V	No. 295967 Genesee Circuit Court
DEQUANDRE LONZO HUNT, Defendant-Appellant.	LC No. 09-025397-FC

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and first-degree home invasion, MCL 750.110a(2).[1] The trial court sentenced defendant as a second habitual offender to two to six years for cocaine possession and 78 months to 30 years for first-degree home invasion. Because sufficient evidence supported defendant's convictions, defense counsel was not ineffective at trial, and defendant is not entitled to resentencing, we affirm.

This case stems from a missing blue bicycle. The crux of the case involves the testimony of the complainants, Joshua Samuel and Amy Ogg, as well as a 12-year-old witness, Jakavious Darquell Hamilton, that defendant came to Samuel and Ogg's apartment door armed with a handgun demanding the return of defendant's cousin's bicycle.

Ogg testified that she and Samuel reside together in an apartment in Burton, Michigan. Ogg testified that on July 16, 2009, around 7:00 pm she was watching television with her young son when Samuel ran into the apartment yelling that she should call 911. She got up to see what was going on and saw defendant standing in her apartment pointing a gun in Samuel's face. She safeguarded her son, retrieved her telephone and then called 911. When defendant saw her calling the police he put the gun away and started to leave the apartment. Ogg told 911 that there

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[1] The jury acquitted defendant of the following counts: assault with a dangerous weapon, MCL 750.82; assault with intent to rob while armed, MCL 750.89; carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; and felony firearm, MCL 750.227b.

was "a black man with a gun" in her apartment. Ogg stated that defendant asked Samuel about defendant's cousin's bicycle. Defendant accused Samuel of stealing the bicycle with a loud voice. After defendant left, she locked the apartment door and waited for the police. When the police arrived she gave the police her statement. Shortly thereafter police asked Ogg to identify defendant. She stated that she went with police to their car and he was sitting in the car. Ogg identified defendant as the person who came into her apartment with a gun. Ogg testified that Samuel worked on bikes regularly and that there were bikes piled up on the corner of the apartment. When he works on bikes he lays out a tarp in the middle of the living room. At the time defendant came to the apartment, defendant was only working on Ogg's bicycle. But there were at least six bikes in the apartment at the time defendant came into the apartment. According to Ogg, Samuel fixes bikes for the children in the neighborhood for free.

Samuel testified that he is not currently employed but does maintenance work at the apartment complex for a percentage off his rent. Samuel's hobby is to ride and work on bicycles. He stated that he fixes bikes for the children in the apartment complex because they do not have the money to do it themselves. Samuel testified that on July 16, 2009, he spent the day working on his own bike first and then on Ogg's bike in the living room of their apartment. Some of the kids in the complex came by the apartment that day while he was working on the bikes. The kids (age range 6 to 11 years old) regularly stop by and hang out with Samuel while he works on bikes and they sometimes all go on bike rides. According to Samuel, at about 7:00 – 7:15 pm, he heard a knock at the door so he went and answered it. Some of the kids were still at his apartment at this time.

Samuel testified that he did not know the person at the door, defendant. Samuel stated that defendant asked if he could speak with Samuel for a minute and Samuel agreed. Samuel testified that he had just finished working on Ogg's bike at that time and was about to take the kids for a bike ride. So he came back inside, grabbed his bike, stepped just outside the apartment door to speak with defendant, and then closed the apartment door. The children also left the apartment and were standing on the sidewalk. Samuel stated that defendant said, "so I heard you have my cousin's bike." According to Samuel at first he said he did not know if he had the bike because he did not know defendant and did not know who his cousin was and he could have had the bike if it was one that a child had dropped off to be fixed. Samuel asked defendant the missing bike's color. Defendant said his cousin's bike was blue. Samuel said that he only had two bikes in the house that were blue and one was Ogg's bike and the other one was his own mountain bike. Samuel said he did not have the bicycle and defendant insisted that someone had told him that Samuel had the bicycle and that he was working on it and that he wanted the bike. Samuel testified that at one point he opened the door to his apartment and showed defendant, stating "I don't have your your cousin's bike . . . these are the bikes that I have."

According to Samuel defendant started to get upset when he said he did not have the bike. Defendant demanded the bike and lifted his shirt up exposing his waist band area to show Samuel the handle of a chrome gun. Samuel stated that he told the kids to get out of the area and then he opened his apartment door, pulled his bike back in, and then closed the door. Samuel stated that as he was trying to lock the door, defendant pushed the door back open and walked inside the apartment with the gun pointed in Samuel's face. Samuel described the gun as "a little western type six shooter." Samuel stated that he did not give permission for defendant to enter the apartment. According to Samuel, as defendant pointed the gun at him, defendant said "I want my cousin's bike now." Samuel testified that defendant did not say anything else and they did not have a conversation inside the apartment. Samuel stated that he had no idea what bike defendant was talking about and yelled multiple times for Ogg to call the police. According to Samuel, when defendant realized Ogg was calling the police, defendant left the apartment in a hurry. Samuel testified that the police showed up at the apartment quickly and he explained to them what happened and then he identified defendant as the person who came into his apartment when police asked him if he recognized the person sitting in their police vehicle. Samuel's memory was hazy on whether he knew that a bike was missing before defendant came to his door. Samuel testified that he thought one of the kids might have asked him if he "had seen a bike," but Samuel did not remember.

On cross-examination Samuel admitted that he heard Ogg tell 911 that "this is about a bicycle gotten out of the dumpster a couple days ago." Samuel also admitted that he had corrected Ogg while she was on the phone saying, "that was a couple weeks ago." Samuel testified that he remembered about two weeks before the incident that one of the kids had brought him a bike out of the dumpster and Samuel told the kid that he did not want it. Samuel testified that defendant never pointed out a specific bike out of the ones in the apartment and never said anything similar to: "give me that bike," "I'm taking this," or "hand over your wallet or anything else."

Jakavious Darquell Hamilton is twelve years old and stays at the complex sometimes because his grandmother lives there. Hamilton testified that he hangs out with Samuel and they ride bikes. Hamilton stated that Samuel lends him a bike to ride and that Samuel has different bikes. Hamilton testified that at the time of the incident he and some other kids were hanging outside Samuel's apartment waiting to go for a bike ride. Hamilton stated that he saw defendant and a twelve-year-old boy walking up to Samuel's apartment door. Hamilton testified that he told the police later that he had heard defendant and the twelve-year-old boy talking about a stolen bike. Hamilton stated that defendant and the twelve-year-old boy walked up to Samuel's apartment and that Samuel had the door open and at one point Samuel allowed defendant and the boy to walk inside his apartment and look for the bike. Hamilton testified that defendant had a gun out as he was walking up to the apartment but also testified that defendant pulled the gun on Samuel during their conversation outside the apartment. Though, he testified that he had no doubt that he saw defendant point a gun at Samuel. Hamilton testified that the boy stayed with defendant throughout the entire incident. According to Hamilton, Samuel told defendant and the boy that he found the bike they were claiming was theirs by the dumpster. Hamilton also testified that it was the maintenance man that threw the bike away.

Officer Jeremy Driggett testified that he responded to a call of an armed robbery at the Kings Lane Apartments on the date of the incident. Driggett testified that he was checking the complex and located defendant at building three. Driggett believed defendant matched the description given of the suspect. Driggett asked him to come to his location. Defendant stated that he needed to talk to his cousin and he walked into an apartment and closed the door. As Driggett walked to the back of the apartments, his partner yelled that defendant was walking out of the apartment and approaching police. Defendant was in the apartment, at most, one minute. Driggett placed defendant in handcuffs and then frisked him. Driggett found a plastic baggie containing crack cocaine in the left pocket of defendant's shorts. Police did not find a gun on defendant and placed him under arrest on suspected drug charges.

Driggett stated that he brought Samuel and Ogg separately to look into the back of the patrol car to identify defendant as the suspect. Driggett testified that Samuel was "very emotional, very upset, nervous, scared." He also spoke with Hamilton to get his statement. Driggett testified that after defendant was transported to jail and booked, Driggett notified defendant of the charges he was facing including armed robbery, home invasion, and possession of cocaine. According to Driggett, immediately after hearing the charges defendant got upset and started talking. Defendant said that he knew Samuel and that he had accused Samuel of stealing his cousin's bike and that he was going to go over to Samuel's apartment and fight him. He also said that he left Samuel's apartment because they accused him of having a gun when he did not and they said they were going to call the police. According to Driggett, defendant admitted to going to Samuel's apartment to confront him about a bike.

At trial, in lieu of further prosecution witnesses, the parties stipulated that the substance seized from defendant was cocaine.

Deondre Keel-Haywood is defendant's cousin and is twelve-years old and was the only defense witness at trial. He testified at trial that at the time of the incident he lived at Kings Lane Apartments. Keel-Haywood testified that he had a light blue bicycle that he kept outside under the porch at the apartment complex. He stated that he stayed at a cousin's house one night and when he came back the bike was gone. Keel-Haywood testified that he came to know that his bike might be at Samuel's apartment. He stated that he went to talk to Samuel by himself the first time. Then he returned with his cousin, defendant, later that day. According to Keel-Haywood, they went to Samuel's apartment together and spoke with Samuel outside the apartment. Defendant asked Samuel if he had seen a blue bike, then Samuel responded, "yes, I think it came out of the dumpster." Then defendant asked if they could see the bike and Samuel said "yes" and then pushed open the door of his apartment. Keel-Haywood said he looked inside and saw a blue tarp (like one that would "go on top of the car") on the floor of the apartment and his bike was in pieces on the tarp. He testified that he recognized the "seat the handle bars, my tires, and the frame." According to Keel-Haywood, at that point defendant asked Samuel "why did he take my bike and take it all into pieces. And then [Samuel] said, don't be questioning me." Keel-Haywood stated that he said they should just leave because he did not want the bike anymore and Samuel could just have it. Keel-Haywood testified that defendant did not have a gun while they were talking to Samuel and that defendant did not have a gun and did not like guns. He also testified that neither he nor defendant went into Samuel's apartment. He said that they just stood outside the door. He did not remember whether anyone said to call the police. Keel-Haywood stated that later that night his mother went to Samuel's apartment and asked about the bike and Samuel said that he was going to give Keel-Haywood a bike, but that they never went to get it.

The defense also played the content of the 911 tape for the jury at trial. After closing arguments, the matter went to the jury. The jury found defendant guilty of both possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and first-degree home invasion, MCL 750.110a(2). But, the jury acquitted defendant of the following counts: assault with a dangerous weapon, MCL 750.82; assault with intent to rob while armed, MCL 750.89; carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; and felony firearm, MCL 750.227b. Defendant now appeals as of right.

Defendant first argues that his conviction of first-degree home invasion should be reversed where there was insufficient evidence of larcenous intent. We review de novo a challenge to the sufficiency of the evidence. *People v Chapo*, 283 Mich App 360, 363; 770 NW2d 68 (2009). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation omitted).

In general, to convict defendant of first-degree home invasion, the prosecution is required to prove beyond a reasonable doubt that (1) defendant broke and entered a dwelling, (2) when entering, he intended to commit a felony, larceny, or assault, and (3) another person was lawfully present in the apartment. MCL 750.110a(2)(b); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

Here, defendant argues that there was insufficient evidence of larcenous intent on the part of defendant because the testimony indicated that defendant only wanted to retrieve his cousin's bicycle when he went to Samuel's apartment. But, defendant was charged in the felony information with first-degree home invasion with the underlying felony as *assault, not larceny*. While defendant argues that the trial court instructed the jury on first-degree home invasion with the predicate felony as larceny, defendant mischaracterizes the record. It is true that when the trial court was instructing the jury, it inadvertently read the jury instruction for first-degree home invasion with the underlying felony as larceny. But, after a short bench conference where we assume the mistake was brought to the trial court's attention, the trial court corrected itself, properly reinstructing the jury on the elements of first-degree home invasion with the underlying felony as assault.[2]

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[2] While defendant does not raise this issue because he did not bring the reinstruction to this Court's attention in his brief on appeal, in the interests of completeness and intellectual honesty, we note that we find no error in the trial court's jury instructions as read. Indeed the trial court mistakenly instructed the jury on first-degree home invasion with the underlying felony as larceny before correcting itself and reinstructing the jury on first-degree home invasion with the underlying felony as assault. "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). They must include all elements of the charged crime and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Even if jury instructions "are somewhat imperfect, reversal is not required as long as

Because of the difficulty in proving a defendant's state of mind, minimal circumstantial evidence is sufficient to establish the defendant's intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). A defendant's intent may be proved by the nature, time, and place of the defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Here, when viewing the evidence in the light most favorable to the prosecutor, the evidence shows that defendant was upset about his cousin's missing bicycle and went to retrieve it from Samuel. Samuel, Ogg, and Hamilton all testified that defendant pushed himself into Samuel's apartment and pointed a gun at Samuel's face demanding information about the missing bicycle. Samuel yelled to Ogg that defendant had a gun and she needed to call 911. Driggett testified that Samuel was "very emotional, very upset, nervous, scared," when he interviewed him a short time after the incident. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant intended to commit an assault. Defendant's conviction of first-degree home invasion is supported by sufficient evidence.

Defendant next argues that he was denied his right to effective assistance of counsel where defense counsel requested a general claim of right instruction but failed to object when the prosecutor maintained that the claim of right instruction was only relevant to the assault with intent to commit armed robbery count. Both the prosecutor and defense counsel provided a written list of requested jury instructions to the trial court before trial. And, both the prosecutor and defense counsel requested a claim of right instruction specifically identifying CJI2d 7.5. However, while defense counsel requested the instruction to be given in general, the prosecutor's written list stated that he wanted the claim of right instruction limited to the assault with intent to rob while armed count. The prosecutor set out his request as follows:

> **<u>Count 4</u>**:
> CJI 2d 18.3 Assault with Intent to Commit Robbery Being Armed
> CJI 2d 7.5 Claim of Right (THIS COUNT ONLY)

The prosecutor did not reference a claim of right instruction anywhere else on his proposed jury instructions.

On the second day of trial, the trial court specifically asked defense counsel if he had any "objections or corrections" to the prosecutor's jury instructions. Defense counsel responded, "No, your Honor." There was some further discussion on the record about the assault with intent to rob while armed jury instruction. At the end of the exchange, the trial court asked defense counsel, "Does that allow you to get to the verdict form now[?]" Defense counsel answered, "Sure." At no point did defense counsel object to the prosecutor's list of proposed jury

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they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124. Defendant's Felony Information is clear that he was charged with first-degree home invasion with the underlying felony as assault. The record reflects that the trial court properly provided the elements of that crime to the jury after being made aware of its previous misstatement. Despite the inadvertence, as a whole, we find no error in the jury instructions.

instructions or request the claim of right instruction with regard to the first-degree home invasion count.

Because defendant did not request a claim of right instruction with regard to the first-degree home invasion count and expressed satisfaction with the instructions, any error was waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant bases his ineffective assistance of counsel claim solely on the fact that defense counsel failed to object to the jury instructions and failed to request a claim of right instruction with regard to the first-degree home invasion count. Because defendant did not raise a claim of ineffective assistance of counsel in the trial court or request a *Ginther*[3] hearing, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To show ineffective assistance of counsel, a "defendant must show that his attorney's performance fell below an objective standard of reasonableness." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). A defendant must also show that the performance of trial counsel prejudiced him to the point of depriving him of a fair trial. *Id*. at 486. To do so, there must be a reasonable probability that the outcome of the case would have been different absent the deficient performance of counsel. *Id*. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1994). There is a presumption that the actions of trial counsel are sound strategy, which presumption the defendant must overcome. *Id*. at 689. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005).

Again, defendant specifically contends that defense counsel should have requested that the claim of right instruction be read along with the elements of first-degree home invasion with the underlying felony of *larceny* during the trial court's reading of the instructions to the jury. But again, defendant's entire argument is premised on his mischaracterization of the record that he was charged with first-degree home invasion with the underlying felony of larceny and not assault. Because the underlying felony is actually assault and the trial court properly instructed the jury that was the charge against defendant, a claim of right instruction would not have been applicable to the charge and therefore, the defense counsel was not ineffective for choosing not to request it or failing to object. Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Defendant also argues that he was denied his right to the effective assistance of counsel at trial when counsel failed to inquire further into the potential bias of a juror. Defendant is specifically referring to Juror H-189 who identified himself as having a close friend in the Flint Police Department, being a captain of the Northville Fire Department, having two pending court cases involving car accidents in which his son was the victim, and finally, that he had been the

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[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

victim of two assaults in his lifetime, one with a handgun and one with a knife. Defendant argues that Juror H-189's testimony during voir dire revealed that he had "several implied biases" against defendant "for different reasons." But defendant ignores the fact that Juror H-189 repeatedly stated that he could be a fair and impartial juror and that none of these factors would cause him to be biased. Defendant states that his trial counsel was ineffective for failing to exercise a peremptory challenge on Juror H-189 or for failing to question him further about his potential biases. But defendant does not set out what those further questions should have been or what he thinks they might have revealed about Juror H-189.

In *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008), the defendant argued that counsel was ineffective for failing to challenge an allegedly biased potential juror, who admitted that he had discussed the defendant's case with others and had read various newspaper accounts of the case. However, further questioning revealed that the juror had not read anything that would influence his decision. He confirmed that he could "be fair and impartial to both sides." *Id*. This Court concluded that defendant's trial counsel was not ineffective:

> [D]efendant's trial counsel was not ineffective for failing to challenge the potential juror in question. Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we "cannot see the jurors or listen to their answers to voir dire questions." For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [*Id*. at 258 (citations omitted).]

It is clear from the record that Juror H-189 expressed no bias against defendant or an inability to judge the case fairly and impartially. Absent a showing of actual bias against defendant, defense counsel's decision to keep Juror H-189 was a matter of trial strategy, which we will not second guess. *Id*.

Moreover, the prosecutor points out that the jury ultimately acquitted defendant of many of the charged counts. We agree that the jury's multiple acquittals undercut defendant's argument with regard to Juror H-189 who was obviously a participant in these acquittals. Defendant has not shown that his counsel was ineffective at trial with regard to jury selection.

Finally, defendant contends that he is entitled to resentencing where the trial court incorrectly scored OV 1 and OV 2. Arguing *in pro per* in a Standard 4 brief, defendant similarly argues that he is entitled to resentencing with regard to OV 4, OV 9, and OV 13. This Court reviews de novo the proper interpretation of statutory sentencing guidelines. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An appellate court must affirm a sentence that is within the appropriate guidelines range unless there is "an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence." *Id*. This Court reviews a trial court's findings of fact at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Endres*, 269 Mich App at 417. A scoring decision "for which there is any evidence in support will be upheld." *Id*.

Defendant challenges the trial court's score for OV 1 of 15 points (MCL 777.31(1)(c) - a firearm was pointed at or toward a victim) and the trial court's score for OV 2 of 5 points (MCL 777.32(1)(d) - the offender possessed or used a pistol) on the basis that he was acquitted of all charges related to discharging a firearm by the jury. However, it is well established that a different burden of proof applies at sentencing and, therefore, the scoring of the guidelines need not be consistent with a jury's verdict. "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *Osantowski*, 481 Mich at 111; see also *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003) (stating that "situations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing."). Consequently, the prosecution's failure to prove that defendant pointed a pistol at defendant beyond a reasonable doubt did not prevent the trial court from considering the evidence at sentencing. Eyewitness evidence at trial indicated that defendant possessed a handgun and pointed that handgun at Samuel's face while demanding the return of his cousin's bicycle. Applying the appropriate burden of proof, the evidence was sufficient to support the trial court's score of 15 points for OV 1 and 5 points for OV 2.

With regard to OV 4, the trial court scored it at ten points. Ten points may be scored for OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, Samuel testified that defendant pushed his way into his apartment and pointed a gun at his face. Samuel was clearly upset and yelled for Ogg to call 911. Ogg saw defendant in her home threatening Samuel, her fiancé, with a gun. All the while Ogg's young son was also in the apartment. Police testified that Samuel was "very emotional, very upset, nervous, scared," shortly after the incident. The trial court stated at sentencing that it had heard all the testimony including Ogg's 911 call. The trial court stated that Ogg "was obviously terrified" and that Samuel was quite upset and could not wait for the police to get there. This evidence adequately supports the trial court's finding that the victims sustained a serious psychological injury that may require professional treatment. Thus, the trial court did not abuse its discretion in scoring ten points for OV 4.

Defendant next contends that the trial court erred when it scored OV 9 at 10 points. The scoring of OV 9 is based on the number of victims. Ten points are to be scored if there were "2 to 9 victims who were placed in danger of physical injury or death[.]" MCL 777.39(1)(c). A court is to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). Defendant argues in his brief on appeal that Samuel had an "intimidating attitude" and there was a question regarding who really was put in danger. Defendant's argument does not dispute that at least two people, Samuel and Ogg, were victims and were placed in danger of physical injury or loss of life. The trial court did not abuse its discretion in scoring ten points for OV 9.

Finally, defendant argues that he should not be assigned any points for OV 13, continuing pattern of criminal behavior. The trial court assigned 25 points for OV 13. Twenty-five points are to be scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Defendant argues that although he was charged with seven crimes, and three of them were against a person, he was found guilty by the jury of only one crime against a person. Defendant once again ignores the proper standard. Again, it is well established that a different burden of proof applies at sentencing and, therefore, the scoring of the guidelines need not be consistent with a jury's verdict. On this record, we decline to interfere with the trial court's conclusion that defendant's activities during the incident constituted a pattern of criminal behavior involving three of more crimes against a person.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio