STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2015
v	No. 323239 Wayne Circuit Court
JAMES EARL BRAXTON, Defendant-Appellant.	LC No. 14-002327-FC

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, defendant appeals by right his convictions of felonious assault, MCL 750.82, fighting dog attack, MCL 750.49(11), and failing to provide information to a person bitten by his dog, MCL 750.66.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 10 years' imprisonment for his felonious assault conviction. The court sentenced defendant to time served for the remaining convictions. We affirm defendant's convictions, but remand for further proceedings in light of *People v Lockridge*, 498 Mich 358; ___ NW2d ___ (2015).

On February 25, 2014, Isaac Walker and Shinita Black were guests in defendant's house when they were attacked by defendant's two pit bulls. The testimony established that shortly before the attack, Black had been stomping her feet at the two pit bulls, both of whom were confined behind a glass door leading to defendant's basement. Observing this behavior, defendant directed Black and Walker to a backroom. Although defendant followed them, Black made it clear she did not want defendant to join them and he left them alone. After he left, the two previously confined pit bulls rushed into the room and began attacking Black and Walker. Black was able to escape relatively quickly; however, Walker suffered severe injuries to his left and right arms, his chin, and his right foot. The attack lasted 15 to 20 minutes before defendant was able to return the pit bulls to the basement. Defendant then drove Black home while Walker was rushed to a nearby hospital.

[1] Defendant was acquitted of four additional charges and the prosecution dismissed three charges midway through the trial.

The following day, defendant left the state for six days. Additionally, about a week after the attack, the police executed a search warrant at defendant's home. A police sergeant testified that when he flipped over the couch cushions and the rug, he discovered significant blood stains, and he discovered a bloody pillow stuffed into a closet in the room.

On appeal, defendant first argues that there was insufficient evidence to prove beyond a reasonable doubt that he intended to injure Walker or place him in reasonable apprehension of an immediate battery.[2] We disagree.

"The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "[F]elonious assault is a specific intent crime. Thus, felonious assault requires the additional showing that the defendant intended to injure or intended to put the victim in reasonable fear or apprehension of an immediate battery. The statute also requires the use of a dangerous weapon in carrying out the assault." *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551, 552 (1985) (quotations marks and citations omitted).

Defendant does not dispute that there was sufficient evidence to establish the first two elements. Both Walker and defendant testified that defendant's two pit bulls attacked Walker. See *People v Kay*, 121 Mich App 438, 443; 328 NW2d 424 (1982) (a dog may be a dangerous weapon). Further, Walker's testimony and the photographs of his injuries demonstrate that he was, in fact, assaulted by defendant's dogs.

Defendant argues, however, that there is insufficient evidence to establish that he intended to injure or place Walker in reasonable apprehension of an immediate battery. Defendant relies on two facts in support of his contention. First, Walker testified that he never heard defendant order the dogs to attack. Second, defendant testified that as soon as he heard the dogs in the backroom with his guests, he rendered aid to them and returned his dogs to the basement.

These facts may have been favorable to defendant, but viewed in the light most favorable to the prosecution, there was clearly sufficient evidence of intent. The evidence establishes that the dogs were behind the glass door, Black and Walker went to the backroom, Black expressed that defendant was not welcome, and then the dogs came in and attacked them. There was no testimony that the glass door was broken by the dogs or otherwise defective, nor was there any evidence that anyone else was present who could have released the dogs. Thus, it is reasonable

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[2] Challenges to the sufficiency of the evidence are reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). Due process requires, that when the evidence is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime established beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541(2011).

to infer that defendant released the dogs from the basement. Moreover, although defendant asserts he tried to stop the attacks, Walker testified that defendant's efforts were half-hearted at best because the only action he took was to lightly tap the dogs on the neck. Furthermore, a rational trier of fact could find that the hidden blood stains on the couch, rug, and pillow in defendant's home demonstrated a guilty conscience. *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008) ("A jury may infer consciousness of guilt from evidence of lying or deception."). Finally, defendant's six-day trip to Wisconsin immediately following the attack also supports a reasonable inference of a guilty conscience. See *id*. Therefore, viewed in the light most favorable to the prosecution, there was sufficient evidence to establish that defendant intended to injure Walker or place him in reasonable apprehension of an immediate battery.

Defendant next argues that the trial court incorrectly scored offense variable (OV) 7 during sentencing.[3] We disagree.

OV 7 provides for a score of 50 points 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). If the court does not find evidence of any of these four conditions, the court must score OV 7 at zero points. MCL 777.37(1)(b). In *People v Hardy*, 494 Mich 430, 434; 835 NW2d 340 (2013), our Supreme Court addressed what qualifies as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" as set forth in MCL 777.37. The Court concluded that a "defendant's conduct does not have to be 'similarly egregious' to 'sadism, torture, or excessive brutality' for OV 7 to be scored at 50 points[.]" *Hardy*, 494 Mich at 443. Further, the Court held that it is proper to score OV 7 at 50 points where there is "conduct [that] was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 444, 447.[4]

Here, Walker testified that the attack lasted for more than 15 minutes. He testified that during the attack, defendant had a "devilish grin" on his face and that he did nothing to stop the attack other than lightly tapping the dogs on the neck. Accordingly, the length of the attack combined with defendant's inaction gives rise to an inference that defendant's conduct was intended to make Walker's and Black's anxiety greater by a considerable amount. See *Hardy*, 494 Mich at 444. Therefore, sufficient evidence existed for the trial court to score OV 7 at 50 points.

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[3] "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). However, whether the facts as found by the court are sufficient to justify the scoring conditions prescribed by statute is a legal question to be reviewed de novo. *Id*.

[4] But c.f., 2015 PA 137, amending MCL 777.37 effective January 5, 2016, to provide that a score of 50 points is appropriate if "[a] victim was treated with sadism, torture, excessive brutality or *similarly egregious conduct* designed to substantially increase the fear and anxiety a victim suffered during the offense." (emphasis added).

Finally, we address the affect our Supreme Court's decision in *Lockridge*, 498 Mich 358 has on defendant's sentence.[5] This issue is unpreserved as to defendant because he did not object to the scoring of OV 7 based on the United States Supreme Court's decision in *Alleyne*.[6] See *Lockridge*, 498 Mich App at ___; slip op at 30.

In *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155, 2163; 186 L Ed 2d 314 (2013), the United States Supreme Court held that facts that increase a mandatory minimum sentence must be found by a jury. In *Lockridge*, this Court extended *Alleyne* to Michigan's sentencing guidelines. *Lockridge*, 498 Mich at ___; slip op at 11. The Court held that if judicial fact-finding was used to score OVs, the resultant score increased the minimum guidelines range in violation of the Sixth Amendment. *Id*. The Court concluded that, although trial courts must still determine the applicable guidelines range and take that range into account when imposing sentence, a range calculated in violation of *Alleyne* is advisory only. *Id*. at ___; slip op at 2. The *Lockridge* Court concluded:

> To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand for the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion. If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. [*Id*. at ___; slip op at 36-37.]

Here, the court's scoring was, by its own statements at sentencing, based on information from the preliminary examination and the presentence investigation report (PSIR). Thus, the court's assessment of points was dependent upon judicial fact-finding. Further, the trial court's scoring of OV 7 affected defendant's placement in the cell of the sentencing grid under which he was sentenced. If it had not been scored, defendant's OV score would be reduced to 21 points, placing him in OV Level II (10 to 34 points) instead of OV Level III (35 to 74 points), and defendant's guidelines range, as enhanced for defendant's habitual fourth status, would be 12 to 48 months instead of 14 to 58 months. MCL 777.67; MCL 777.21(3)(b).

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[5] Defendant argues that because OV 7 was incorrectly scored, he is entitled to a remand for resentencing because, even though *Lockridge* made the sentencing guidelines advisory, defendant still has a right to be sentenced on an accurately scored guideline range. However, because *Lockridge* sets forth a detailed remand procedure for defendants whose sentences were actually constrained by an unconstitutional violation of the Sixth Amendment, we decline to ignore that procedure by simply remanding for resentencing.

[6] *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

We affirm defendant's convictions and the scoring of OV 7, but order a remand for further proceedings consistent with *Lockridge* in regard to defendant's sentence. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher