STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 9, 2016
v	No. 325761 Washtenaw Circuit Court
BEVAN LESTER WILSON, Defendant-Appellant.	LC No. 14-000259-FC

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84; assault with a dangerous weapon (felonious assault), MCL 750.82; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 17 months to 10 years' imprisonment for AWIGBH, to be served concurrently to a sentence of 17 months to 4 years' imprisonment for felonious assault and consecutively to a two-year mandatory term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for further consideration of his sentences under *People v Lockridge*, 498 Mich 358, 365; ___ NW2d ___ (2015).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

These charges arise out of an incident that occurred at the Valley Ranch Apartments in Pittsfield Township on February 18, 2014. Benjamin Clink, the victim, was clearing snow from the Valley Ranch parking lot using a front-end loader equipped with a ten-foot plow.

Defendant and his wife lived at Valley Ranch. The couple had installed a security system and camera to record their vehicle in the parking lot. On the morning in question, defendant used the security system to watch his wife walk to her vehicle. He testified that he saw the victim plowing the parking lot and became concerned when he noticed that the victim had left a

pile of snow behind his wife's vehicle. Defendant put his handgun in a holster on his hip and went to the parking lot.[1]

Defendant approached the victim as he was plowing and asked why he had piled snow behind defendant's wife's vehicle. The victim testified that he could tell by the way defendant approached him that "something was wrong." The victim testified that he told defendant that he was following a process for snow removal and that he would remove the snow from behind defendant's wife's vehicle shortly. According to defendant, however, the victim said that instead of removing the snow, he would pile additional snow behind defendant's wife's vehicle. After the conversation, the defendant went toward his wife's vehicle and the victim continued to gather snow. The victim testified that he pushed the snow toward defendant's wife's vehicle in order to combine the piles and push all of the snow out at once, and that he angled the plow blade away from the vehicles in order to minimize the amount of snow left behind the vehicles.

Shortly after the first confrontation, defendant approached the victim a second time and stood directly in front of the front-end loader. Defendant testified that, as the victim brought his machine to a stop, the snow in the plow "compressed" and hit defendant's leg. Defendant's wife testified that she saw the encounter as she was cleaning off her vehicle and that she yelled to the victim, "stop, you're going to hit my husband" and "you're going to squish him." The force of the impact of the snow "moved [defendant] a few inches" but he did not fall. As the victim brought the plow to a stop, he honked the horn. When the victim honked the horn, defendant took out his gun and fired at the front-end loader. Defendant testified that he fired the gun because he was worried that the victim would continue driving toward him and he wanted to "render the vehicle helpless" in order to stop the threat. He testified that he chose to fire instead of stepping out of the plow's way because he had a painful back injury that limited his movement.[2] Defendant testified that he aimed at the top right corner of the windshield because he was afraid the bullet would ricochet off the machine's steel body. He maintained that he did not intend to hit the victim when he fired the shot.

The victim testified that he was "totally surprised" when defendant fired his weapon and that he immediately ducked his head down. He remembered feeling terrified. The bullet hit the front-end loader in the top right corner of the windshield but did not go all the way through the glass and into the cab. It left a hole in the lettering across the top, directly in line with where the victim's head was positioned as he sat in the cab. After the shot, defendant continued to point his gun at the victim. Defendant stepped around the snow plow blade and approached the door of the front-end loader. The victim opened the door and begged defendant not to shoot again. Defendant's wife testified that she heard defendant say, "what were you trying to do, you're going to run me over." Brandon Hambrook, a sidewalk cleaner employed with A and H Lawn Care who was shoveling sidewalks nearby, testified that he heard the victim tell defendant, "I'll

[1] Defendant had a concealed pistol license, which was suspended after this incident.

[2] Defendant testified that when he walked out to speak with the victim initially, he was able to move quickly because he was concerned about his wife's vehicle and was "pushing through the pain."

do whatever you want." Hambrook noticed that the victim appeared to be "kind of in shock and . . . it looked like he was scared."

Both defendant and the victim called 911. Officer James Maudlin of the Pittsfield Township Police Department was dispatched to Valley Ranch Apartments in the morning of February 18, 2014. Maudlin testified that the 911 dispatcher had instructed defendant to wait outside for the police but that defendant was not outside when Maudlin arrived. Once Maudlin made contact with defendant, he testified that defendant was cooperative and seemed calm. Officer Matt Ritzler of the Pittsfield Township Police Department was also dispatched to Valley Ranch Apartments and arrived after Maudlin. Ritzler spoke with the victim, who looked pale and seemed "soft spoken" and in a "state of disbelief."

Defendant was charged with assault with intent to murder, MCL 750.83; felonious assault, MCL 750.82; and felony-firearm, MCL 750.227b. The jury ultimately found defendant guilty of the lesser included offense of AWIGBH, MCL 750.84; felonious assault; and felony-firearm. He was sentenced as described above. At sentencing, the trial court scored 10 points for offense variable (OV) 4, psychological injury to the victim. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to sustain his convictions. We disagree. A challenge to the sufficiency of the evidence requires this Court to view the evidence de novo in a light most favorable to the prosecution and determine whether any reasonable juror would be warranted in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). Both direct and circumstantial evidence can constitute sufficient proof of the elements of a crime, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-18; 583 NW2d 199 (1998).

Defendant was convicted of three offenses: AWIGBH, felonious assault, and felony-firearm. To convict defendant of AWIGBH, the prosecution was required to prove two elements: (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). The intent to do great bodily harm is defined as "an intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Defendant argues that the evidence presented at trial was insufficient to demonstrate his intent to do great bodily harm less than murder. However, the victim testified that defendant intentionally stood in the path of the victim's snow plow. When the victim stopped the machine and honked the horn, defendant took out his gun and shot the front-end loader's windshield directly in front of the victim's head. A reasonable jury could infer from this testimony that defendant attempted or threatened with force or violence to do corporal harm to the victim and that defendant intended to cause the victim great bodily harm. Therefore, the evidence was sufficient to prove defendant committed AWIGBH. *Fetterley*, 229 Mich App at 517-18.

To convict defendant of felonious assault, the prosecution was required to prove that defendant committed (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). A pistol or other firearm qualifies as a dangerous weapon under MCL 750.226. Pointing a firearm at a victim, even without firing a shot, may constitute a felonious assault if the intent to injure or place the victim in reasonable apprehension of an immediate battery is proven. *People v Johnson*, 407 Mich 196, 210-211; 284 NW 2d 718 (1979) (lead memorandum opinion). Defendant again argues that the evidence was insufficient with regard to his intent. We disagree. The victim testified that, after defendant shot at the victim, defendant advanced toward the victim with his weapon pointed directly at him. The victim begged defendant not to shoot again, and even after defendant walked away, the victim feared for his safety. A reasonable jury could infer from this testimony that defendant used his firearm to assault the victim and that he intended to place the victim in reasonable apprehension of being shot, especially in light of defendant having already fired a shot at the victim's windshield. Therefore, the evidence was sufficient to support defendant's conviction for felonious assault.

Defendant argues in the alternative that the prosecution failed to disprove his claim of self-defense. Once evidence of self-defense is introduced, the prosecution must disprove self-defense beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). Under MCL 780.972(1), a defendant may use deadly force against another if he "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual."

We note that defendant testified at trial that he did not intend to harm the victim, not that he intended to harm the victim in self-defense. Self-defense is an affirmative defense that excuses the use of force despite the intent to cause injury or death. See *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013). Nonetheless, the jury was instructed on self-defense. We conclude that the prosecution proved beyond a reasonable doubt that defendant did not honestly and reasonably believe that he was in danger of death or great bodily harm and that it was necessary to employ deadly force to prevent that harm. Defendant testified that he believed the victim was going to intentionally hit him with the plow and that he felt it was necessary to fire his gun at the machine in order to stop the threat. However, a reasonable jury could infer from the fact that defendant did not shoot until after the victim had already brought the machine to a stop, staggering defendant with the snow from the plow but not causing him to fall, that defendant did not honestly and reasonably believe that he was in danger of death or great bodily harm and that it was necessary to fire his gun to prevent that harm. Further, although defendant testified that he could not move swiftly because of a back injury, he also testified that he was able to "push through the pain" when necessary. Therefore, a reasonable jury could infer that defendant could have moved out of the path of the stopping plow and was not required to fire his gun to prevent the victim from driving forward and causing him injury. The prosecution presented sufficient evidence to disprove defendant's claim of self-defense.

Because both AWIGBH and felonious assault can serve as the predicate felony for a felony-firearm conviction, MCL 750.227b, the evidence presented at trial was sufficient to support defendant's felony-firearm conviction.

III. SENTENCING

Lastly, defendant challenges the scoring of OV 4. We disagree that the trial court erred in scoring this variable. However, we conclude, in light of our Supreme Court's decision in *Lockridge*, that a *Crosby*[3] remand, rather than resentencing, is appropriate.

Under the sentencing guidelines, the trial court's factual determinations are reviewed for clear error to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

OV 4 deals with the degree of psychological injury suffered by a crime victim. MCL 777.34. The statute provides that OV 4 should be scored at 10 points if serious psychological injury requiring professional treatment occurred to a victim and at 0 points if no serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2).

At trial, the victim testified that he was terrified when defendant shot at him, and another witness testified that even days later the victim appeared very visibly upset. The victim stated that incident was a "very traumatic event" and that it changed the way he sees people. He stated that he is now afraid to approach strangers. This evidence supports the finding that the victim suffered a serious psychological injury that may require professional treatment. Accordingly, OV 4 was properly scored.

Nonetheless, remand for consideration of defendant's sentence is required by *Lockridge*. In *Lockridge*, the Court held that in order to avoid any Sixth Amendment violations, Michigan's sentencing guidelines scheme was to be deemed advisory rather than mandatory. *Id*. at 391-392. However, sentencing courts must consult the guidelines and " 'take them into account when sentencing.' " *Id*. at 392, quoting *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005).

When a trial court sentences a defendant and the facts admitted by the defendant and the facts necessarily found by the jury were insufficient "to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced[,]" plain error has occurred. *Id*. at 395. Thus, remand to the trial court is required to allow it to determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence. *Id*. at 397. If the court determines that it would have imposed a materially different sentence, then it shall order resentencing.

Here, proof of a victim's fright, fears, or subsequent alteration in feelings towards strangers was not an element of any of the offenses of which defendant was convicted. Those

[3] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

factors were neither found by the jury nor admitted by defendant. If the points for OV 4 were not scored, defendant's sentence would be outside the guidelines recommendation. Therefore, defendant's "guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment" and defendant is entitled to remand procedures. *Id*. On remand, the trial court should determine whether it would have imposed a "materially different" sentence if it had been aware of the advisory nature of the guidelines. *Id*. Our Supreme Court has set forth the requirements for a *Crosby* remand as follows:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Id*. at 398.]

Affirmed as to defendant's convictions. Remanded with regard to defendant's sentence. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray