STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FATEEN ROHN MUHAMMAD,

Defendant-Appellant.

UNPUBLISHED
November 19, 2020

No. 349325
Ingham Circuit Court
LC No. 13-000161-FH

Before: REDFORD, P.J., and RIORDAN and TUKEL, JJ.

PER CURIAM.

Defendant appeals by right his judgment of sentence for his jury trial conviction of first-degree home invasion, MCL 750.110a(2), following our remand for resentencing. Defendant was sentenced to serve a term of 9 to 20 years in prison. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The following facts are taken from one of our prior decisions in this case, which returns to us for the fourth time:

> This case arises out of an incident involving defendant and Krystal Muhammad that occurred on February 5, 2013, at Krystal's residence. Krystal testified at trial that she and defendant had been legally married since 2004 and were still married at the time of trial. However, Krystal testified that the last time they lived together on a regular basis was 2011 or 2012 and that they did not live together in 2013. At the time of the incident, she lived in an apartment in Lansing, Michigan. Krystal testified that defendant was not on the lease for the apartment, did not have a key to the apartment, did not have her permission to receive mail at the apartment, and did not regularly come and go from her apartment. Defendant lived in a different county, although Krystal did not know exactly where defendant lived.

According to Krystal, she allowed defendant to spend the night at her apartment on February 4, 2013, and defendant left the apartment at approximately 9:00 a.m. the next morning. Krystal subsequently left the apartment for a "few hours." When she returned, she noticed "duffle bags[ ] and grocery bags" on her porch. She took them inside, assuming that they belonged to a friend. She did not believe that they belonged to defendant. At some point, she discovered that the bags belonged to defendant and put them back outside because she did not want him in her home. Defendant returned to the apartment that evening.

Penny Pennoni, a letter carrier for the United States Postal Service, testified that she was delivering mail to Krystal's apartment at approximately 5:00 p.m. on February 5, 2013. She saw defendant on the porch knocking and "begging to be let in." Pennoni asked defendant to step aside so she could reach the mailbox. Defendant moved out of the way, and Pennoni began to put the mail in the mailbox. Pennoni testified that when she began to deliver the mail, Krystal opened the apartment door "[p]robably halfway," and defendant "rushed" at Krystal. According to Pennoni, defendant "grabbed" Krystal's neck with his left hand, hit Krystal in the face with his fist, and "kicked the door shut behind him." Pennoni further testified that defendant "nudged" the door with his shoulder when he tried to hit her.

Krystal testified, "I had just opened the door to get the mail and he came from the side of the building and pushed his way in." Krystal also testified that "[h]e pushed me to get in," that she "was halfway through the door," and that she did not give defendant permission to enter her apartment. Defendant pushed the door further open in order to enter. Krystal further testified that defendant pushed her, slammed the door closed, and then assaulted her. According to Krystal, defendant

> [g]rabbed me by my hair and threw me around the living room, and then at some point he got me on to the floor and was strangling me from behind in a wrestling choke hold.

Krystal explained that she "couldn't breathe" and "started to blackout and see[ ] stars." Krystal testified that defendant only stopped choking her after noticing the police lights and sirens. After he released her, the police knocked on the door and defendant answered the door.

Pennoni testified that after seeing defendant enter the apartment, she went back to her vehicle to call the police but discovered that her cell phone was dead. Then Pennoni went to the apartment manager's office to ask the manager to call the police.

Officer Rachel Bahl testified that she responded to Krystal's apartment that evening. When she arrived, the door was closed and there were plastic bags on the front porch that appeared to contain clothing. She listened at the apartment door and heard a man and woman arguing. Bahl knocked on the door, and defendant

answered. According to Bahl, she asked him if everything was okay, and defendant responded that everything was fine and that Bahl was not needed. Bahl continued to speak with defendant and heard a woman yell from inside. The woman indicated that she had been assaulted and needed the police to come inside. Bahl went into the apartment, and she saw Krystal sitting on the couch. It appeared that Krystal was upset and had been crying, and at some point, Bahl noticed "red marks" around Krystal's throat. Bahl further testified that she saw signs that a struggle had occurred: there were items that appeared to have been knocked over onto the floor, and there were "drag marks in the carpeting." Bahl asked defendant what happened, and defendant indicated that he and his girlfriend had argued but that there had not been a physical assault. Defendant told Bahl that he entered the apartment without Krystal's permission when Krystal had opened the door for the mail carrier.

Officer Penni Elton testified that she also responded to Krystal's apartment that evening and that when she arrived, Bahl was inside the apartment speaking to Krystal and defendant. Elton spoke with defendant. Elton testified that defendant told her that once the apartment door was opened, he "pushed his way inside so he could get some of his property." According to Elton, defendant told her that he lived in Port Huron. He later gave her a specific residential address that was located in Fort Gratiot, which is located close to Port Huron.

Defendant testified in his own defense, and he denied beating, choking, or grabbing Krystal. According to defendant, it took approximately four hours, traveling by a combination of train and taxi, to get from East Lansing to his residence in Fort Gratiot. Defendant referred to this residence as his "hideaway." Defendant testified that he and Krystal had reconciled before February 2013 and that they were living together at Krystal's apartment. On the morning of February 5, 2013, defendant donated plasma. He then bought two beers and drank them as he walked back to Krystal's apartment. He had "the keys" to enter the apartment because Krystal was still asleep. Once inside the apartment, defendant watched television and continued drinking. At some point, he and Krystal had some type of verbal disagreement, and defendant left the apartment. Defendant testified that Krystal texted him to tell him that his things were outside the apartment. He returned to get his things. Defendant testified that he received additional text messages from Krystal indicating that he should get his things and that he should not knock on the door. Defendant explained that when Krystal opened the door while the mail carrier was there, he thought that she had opened the door for him to enter because he had been living at the apartment and was her husband. According to defendant, Krystal did not tell him not to come inside, and he thought it was okay for him to enter when she opened the door. Defendant claimed that he had permission to enter the apartment because he had been living there since January 1. Defendant also stated as follows:

> When she said, and don't knock on my door, I assumed she's going to open the door for me to come in because she knew I didn't have the keys. As I said, we have a marital relationship.

> The jury found defendant guilty of first-degree home invasion and not guilty of assault with intent to do great bodily harm less than murder. The trial court sentenced defendant [to 140 months to 20 years in prison]. [*People v Muhammad*, unpublished per curiam opinion of the Court of Appeals, issued June 28, 2018 (Docket No. 339157), pp 1-3.]

We affirmed defendant's conviction, but remanded for resentencing because OV 4 was improperly scored. *Id*. at 1, 16-19.

On remand, the trial court sentenced defendant to serve a prison term of 9 to 20 years. Defendant again appeals, arguing that offense variables (OVs) 3, 10, and 12 were improperly scored on the basis of acquitted conduct. The prosecution concedes that OVs 10 and 12 were improperly scored, but maintains that OV 3 was properly scored and that, because the applicable guidelines range is not affected by the conceded errors, defendant is not entitled to resentencing. We agree with the prosecution and hold that defendant is not entitled to resentencing.

II. STANDARD OF REVIEW

The trial court's factual findings to support its offense variable determinations are reviewed for clear error, while the trial court's application of the facts to the law is reviewed de novo. *People v Hardy*, 494 Mich 430, 438-439; 835 NW2d 340 (2013).

III. ANALYSIS AND APPLICATION

The prosecutor concedes, and we agree, that the trial court erred by assessing five points for OV 10[1] and five points for OV 12.[2] However, defendant's minimum guidelines range is not altered by the subtraction of these 10 points, and would be altered only if the assessment of 10 points for OV 3 was erroneous. Because we conclude that the trial court did not clearly err by assessing defendant 10 points for OV 3, defendant is not entitled to resentencing.

The trial court's factual determinations under the sentencing guidelines must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. The OVs are scored by considering only the sentencing offense unless the language of the OV specifically provides for consideration of other events or offenses. *People v Sours*, 315 Mich App 346, 349; 890 NW2d 401 (2016). When the OV statute's language is clear and unambiguous, courts assume that the Legislature intended its plain meaning and the statute will be enforced as written. *Hardy*, 494 Mich at 439. Resentencing is not required when an OV scoring error does not alter the appropriate guidelines

[1] OV 10 is scored for the "exploitation of a vulnerable victim." MCL 777.40(1). On appeal, both parties agree that there was no evidence to support this variable.

[2] OV 12 applies to contemporaneous felonious criminal acts. MCL 777.42(1). On appeal, the prosecutor concedes that the trial court erred by assessing five points for OV 12 on the basis of the charge of assault with intent to do great bodily harm less than murder, of which defendant was acquitted.

range, or when the trial court has clearly indicated it would have imposed the same sentence even without the scoring error. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

A defendant's sentence cannot be enhanced on the basis of acquitted conduct using a preponderance-of-the-evidence standard. *People v Beck*, 504 Mich 605, 627; 939 NW2d 213 (2019). When a jury acquits a defendant of a charge, the defendant retains the presumption of innocence, and it is inconsistent with the presumption of innocence to use acquitted conduct as an aggravating factor. *Id*. at 626-627.

OV 3 is scored for "physical injury to a victim." MCL 777.33(1). Ten points are assessed for OV 3 when "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). The term "bodily injury" encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence. *People v Lampe*, 327 Mich App 104; 933 NW2d 314 (2019). The requirement of OV 3 that the bodily injury required medical treatment "refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). It need not be established that the victim received medical attention, and the trial court may rely on the description of the attack on the victim, the victim's injuries, and the victim's statement that the victim intends to seek medical attention. *People v Maben*, 313 Mich App 545, 551-552; 884 NW2d 314 (2015).

Offense variables are scored with reference to the sentencing offense, unless the specific offense variable statute indicates otherwise. *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009). The elements of first-degree home invasion are: "(1) the defendant either breaks and enters a dwelling or enters a dwelling without permission; (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling actually commits a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling, either (a) the defendant is armed with a dangerous weapon, or (b) another person is lawfully present in the dwelling." *People v Bush*, 315 Mich App 237, 244; 890 NW2d 370 (2016). For the purposes of first-degree home invasion, assault is defined as it was under common law: an attempt to commit a battery, or an unlawful act that creates imminent fear of a battery. *People v Musser*, 259 Mich App 215, 222-223; 673 NW2d 800 (2003).

Defendant was acquitted of assault with intent to do great bodily harm less than murder, which occurs when the defendant either assaults the victim with the intent to do great bodily harm, or assaults the victim by suffocation or strangulation. MCL 750.84(1)(a) and (b). "Assault with intent to commit great bodily harm less than murder requires proof of (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). Assault with intent to do great bodily harm less than murder requires that the defendant have the intent to do serious injury of an aggravated nature. *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012).

Here, the assault was part and parcel of the offense of first-degree home invasion. In order to convict defendant of the sentencing offense, in the context of the facts of this case, the jury necessarily found that defendant intended to commit assault or actually committed assault when he entered the victim's dwelling. Therefore, the trial court's determination that the victim suffered

physical injury during the sentencing offense did not improperly take into account acquitted conduct. Assault with intent to do great bodily harm requires proof that the defendant acted with the intent to cause serious injury. *Russell*, 297 Mich App at 721. In contrast, first-degree home invasion, in the context of the facts of this case, requires only a showing that defendant intended to commit assault or actually assaulted the victim, applying the common-law definition of assault. *Musser*, 259 Mich App at 222-223. Defendant's acquittal of assault with intent to do great bodily harm precluded sentencing on the basis of facts related to having an intent to do great bodily harm, but it did not preclude sentencing on the basis of facts related to the intended or actual assault of the victim as a required element of the sentencing offense. The evidence established that defendant pushed his way into the victim's house, grabbed her by the hair, and put her in a choke hold. The trial court was not prohibited from using the injuries resulting from this assaultive conduct to assess 10 points for OV 3.[3]

IV. CONCLUSION

The trial court erred by assessing five points for OV 10 and five points for OV 12. However, the trial court did not clearly err by assessing defendant 10 points for OV 3. Therefore, despite the trial court's error, defendant's minimum guidelines range is not altered and defendant is not entitled to resentencing. Accordingly, we affirm.

/s/ James Robert Redford
/s/ Michael J. Riordan
/s/ Jonathan Tukel

[3] Defendant does not dispute, in either his counseled brief or his Standard 4 brief, that the victim in this case was injured and required medical attention.

Defendant's standard 4 brief raises, without elaboration, the additional argument that sentencing him on the basis of acquitted conduct violated his Sixth Amendment right to a jury trial. We decline to address this issue because defendant was not sentenced on the basis of acquitted conduct.