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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY LUHELLIER,

Defendant-Appellant.

UNPUBLISHED
November 19, 2020

No. 349490
Grand Traverse Circuit Court
LC No. 18-13113 FH

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

PER CURIAM.

Defendant appeals as of right following his jury-trial conviction of assault with a dangerous weapon ("felonious assault"), MCL 750.82. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 12 months in county jail and two years of probation. We affirm.

I. FACTS

This case arises out of a dispute between neighbors that occurred on July 4th, 2018, at around 1:00 a.m. The victim was asleep in his home when he was awakened by the noise of fireworks being set off by defendant who lived next door. The victim went outside and asked defendant to stop. After a heated verbal exchange, the victim went inside to his house and returned to his driveway with his cell phone and recorded what transpired next. Defendant grabbed a baseball bat and quickly approached the victim until there was about 20 feet separating them. As defendant approached he yelled "fuck you," shouted a racial epithet, and threatened, "I'll knock you white." Defendant placed the bat by some nearby bushes, and, still using racial epithets and threating language, he walked up the driveway toward the victim. Defendant's girlfriend stood at the end of the driveway trying to defuse the conflict. The victim told defendant and his girlfriend to go back to their house. Then, the victim called the police and reported that defendant had a baseball bat and was using racial epithets toward him. A deputy from the Grand Traverse Sheriff's Office responded to the scene and spoke with the victim. The victim told the deputy what happened and showed him the cell phone footage.

The deputy testified that when he questioned the victim at the scene, the victim stated that he was in fear for his safety. However, the victim testified that he did not believe defendant

intended to hit him with the baseball bat, that he was not afraid for his safety, and he denied making any such statement to the deputy at the scene.

The jury found defendant guilty of felonious assault, MCL 750.82, and but acquitted him of ethnic intimidation, MCL 750.147b. Defendant now appeals.

II. ANALYSIS

Defendant first argues there is insufficient evidence to sustain his conviction of felonious assault. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Evidence should be viewed in the light most favorable to the prosecution and we must determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. (quotation marks and citation omitted). We will not interfere with the tier of fact's determinations regarding the weight of the evidence or the credibility of the witnesses. *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014).

MCL 750.82(1) states that "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony" Thus, felonious assault has three elements: "(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).

Defendant only challenges the element of intent, and argues that he did not intend to hit the victim with the bat. Because the plain language of the third element uses the disjunctive term "or," *Avant*, 235 Mich App at 505, the prosecution need not establish both an intent to harm and an intent to place to place the victim in reasonable apprehension of an immediate battery. See *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). Thus, defendant's intent must have been either an intent to harm the victim, or an intent to place the victim in reasonable apprehension of immediate battery. "Intent is a mental attitude made known by acts" and has been defined as "a secret of the defendant's mind," which can be ascertained through words or actions, with recognition that a defendant's actions often "speak louder than words." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). The jury may draw the inference as to the intent with which a particular act was done as they draw all other inferences, from any fact in evidence that to their minds fully proves its existence. *People v Medlyn*, 215 Mich App 338, 344; 544 NW2d 759 (1996). "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The circumstantial and direct evidence presented at trial was sufficient to establish that defendant possessed the requisite intent to assault the victim. Defendant yelled at the victim, "Do you see this bat?" Defendant then used a racial epithet and threatened to beat the victim "white." Defendant shouted these threats while wielding a bat and advancing quickly toward the victim until he was less than 20 feet away from the victim and no obstacles stood between them. Defendant's verbal threats of attack, aggressive movement to close the distance between him and the victim, and his aggressive posture with a baseball bat is sufficient for a reasonable jury to conclude that defendant's actions were both the subject of a conscious decision on his part and intended to cause, at the least, the threat of an assault.

Defendant argues that the victim was never in fear of a battery and that any apprehension by the victim would be unreasonable because the victim did not retreat into his house and instead filmed the encounter on his cell phone and testified that he was not afraid. However, the deputy testified that the victim reported that he was afraid. Additionally, the jury could have inferred from the cell phone footage of the encounter that defendant intended to either hit the victim or to place the victim in reasonable apprehension of an immediate battery. To the extent that the victim's testimony contradicts the testimony of the deputy, "[a]ll conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

Viewing the evidence in light most favorable to the prosecution, there was sufficient evidence for a rational jury to conclude that defendant intended to injure the victim or to place him in reasonable apprehension of an immediate battery.

Defendant next argues that remand is required to correct factual inaccuracies in his presentence investigation report (PSIR). We disagree.

Due process requires that a defendant be sentenced on the basis of accurate information and that a defendant have a reasonable opportunity at sentencing to challenge the information contained in a PSIR. *People v Malkowski*, 385 Mich 244, 249; 188 NW2d 559 (1971); *People v Zinn*, 217 Mich App 340, 347-348; 551 NW2d 704 (1996). A sentencing court must respond to challenges to the accuracy of information in a PSIR, but it has wide latitude in responding to such challenges. *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010). Accordingly, this Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion. *People v Lampe*, 327 Mich App 104, 120; 933 NW2d 314 (2019).

A defendant has the right to challenge the accuracy of the information in a PSIR. See MCL 771.14(6). If a defendant challenges any information in the PSIR, the trial court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. MCR 6.425(E)(2). The trial court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. *Maben*, 313 Mich App at 554. If the trial court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. *Id.*; MCR 6.425(E)(2)(a).

Defendant contends that the PSIR erroneously states that the victim told him to "get back" and the testimony at trial was that the victim made this statement to defendant's girlfriend. However, defendant has not demonstrated that the information in the PSIR is factually inaccurate. The PSIR contains the agent's description of the offense and states that in the cell phone video that captured the events, "[the victim] can be heard to repeatedly tell the defendant to get back and it is clear the he is telling the defendant to return to his own property." At trial, the victim testified that he was "pretty sure [he] said Brittany get the fuck over there." The victim further testified, "I believe I was trying to say Brittany at the time not Barry." Thus, although the victim testified as to what he intended to say, he admittedly misspoke and the video footage depicts the victim telling the defendant to return to his own property. Accordingly, the trial court did not abuse its discretion by declining to direct the probation officer to correct or delete this challenged information. *Maben*, 313 Mich App at 553.

Defendant next argues that the PSIR erroneously states that he previously was convicted in Florida of possession of marijuana and drug paraphernalia and that the trial court noted this at the sentencing hearing, but failed to include correct the PSIR accordingly. The PSIR indicates that defendant was convicted following a plea to possession of more than 20 grams of marijuana and possession of drug paraphernalia. At the sentencing hearing, defendant stated:

> *Defendant*: I was in Altamonte Springs, sir. It was mid-evening. Knock on the door, boom, open the door, two black guys come in with pistols. Home invasion. I got run in a corner, shot three times. They tried to kill me. And, of course, cops come, they run out, I got the one pistol, tried to shoot him. . . . End result was – end result was took me off, cops come in, shots fired, searched the house.
>
> *The Court*: You have recollection of what the disposition of the case was?
>
> *Defense Counsel*: What happened with the court case?
>
> *Defendant*: They threw it all out. It was a home invasion. The weed dude knows where the weed come from.
>
> *Defense Counsel*: Did you go to jail on –
>
> *Defendant*: Absolutely not. I never did a day. No. I went to the hospital, I was shot. I had three bullets in me.
>
> *Defense Counsel*: Were you arrested for possession of more than 20 grams of marijuana?
>
> *Defendant*: No. That might have been when they arrested it, but when it went to court, it was all threw out. Everything was threw – there was nothing -- there was never no sentence. There was no fines, no court costs, no nothing in that case.
>
> *The Court*: Mr. Tholen, any -- the People have any information on that case?

Defendant: I promise you.

Prosecutor: Yes. It sounds like he's not talking about the same case. Because the records show that he was arrested for a third-degree felony: Possession of more than 20 grams of Cannabis. The offense date was June 21 of [2009]. And then on May 11th of 2010 he pled no contest and received ten days in jail.

Defendant: Mr. Tholen, I'm sorry --

Prosecutor: That's what the records show.

Defense counsel noted that assuming defendant's statements regarding the prior offense was accurate, it would not alter the recommended sentence under the guidelines, but requested that the trial court note defendant's objection to preserve the issue for appeal.

Apparently, in the absence of any supporting documentation, the trial court found defendant's version of events less credible than the evidence presented by the prosecutor. The trial court had wide latitude in responding to defendant's challenge, and was within its discretion to not accept defendant's version of the information. *Lucey*, 287 Mich App at 275. After reviewing the record, and finding no evidence to substantiate defendant's version, we cannot conclude that the trial court abused its discretion by declining to direct the probation officer to correct or delete this challenged information. *Maben*, 313 Mich App at 553. Accordingly, remand for correction of the PSIR is not required.

III. CONCLUSION

Defendant's argument that there is insufficient evidence to sustain his conviction of felonious assault is without merit. Additionally, defendant has not demonstrated that the PSIR contains any factual inaccuracies requiring remand. Accordingly, we affirm defendant's conviction and sentence.

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