

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 13, 2011

v

TOMA JUNCAJ,

No. 295450
Macomb Circuit Court
LC No. 2009-000068-FC

Defendant-Appellant.

Before: SAWYER, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a; MCL 750.84. Defendant was sentenced to concurrent terms of 48 to 120 months' imprisonment for both convictions. We affirm.

Defendant argues that the trial court erred in scoring OV 3 at 25 points and OV 8 at 15 points. We disagree. This Court reviews de novo the application of the sentencing guidelines, but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *Hornsby*, 251 Mich App at 468. "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10);¹ *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

¹ MCL 769.34(10) provides:

[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on

Under MCL 777.33(1)(c) (OV 3), 25 points are scored if “[l]ife threatening or permanent incapacitating injury occurred to a victim.” But, only 10 points are scored under OV 3 if “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). “[R]equiring medical treatment’ refers to ‘the necessity for treatment and not the victim’s success in obtaining treatment.’” *People v Cathey*, 261 Mich App 506, 513; 681 NW2d 661 (2004), quoting MCL 777.33(3). Defendant argues that the scoring of OV 3 at 25 points was based on mere speculation and contends that the evidence only supports a finding that Andi Puju, the victim, suffered bodily injury requiring medical treatment. As previously noted, a scoring decision will be upheld if there is any record evidence to support it. *Elliott*, 215 Mich App at 260. During the attack, Puju lost consciousness. He was in the hospital for approximately one week. Puju received multiple, deep puncture wounds to his left chest area that resulted in the collapse of his left lung. Furthermore, Puju had puncture wounds on his right hand and lacerations and abrasions on his forehead, nose, and chin. This evidence is sufficient to uphold the trial court’s scoring of OV 3 at 25 points.

Under MCL 777.38(1)(a) (OV 8), 15 points are scored if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” Asportation “can be accomplished without the employment of force against the victim.” *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The defendant’s movement of the victim, even if voluntary, to the location where the criminal acts can occur in secret supports a score of 15 points. *Id.* at 648. Here, defendant drove Puju, who willingly entered defendant’s vehicle, from Puju’s motel to the empty condominium. At the condominium, defendant and codefendant, Nuo Nuculovic (Nuculovic), attempted to further isolate Puju by going into the basement of the condominium. Ultimately, defendant and Nuculovic assaulted Puju on the first floor of the empty condominium. Additionally, after the assault was completed, Puju begged defendant and Nuculovic to let him go. However, Nuculovic held Puju down by placing his foot on Puju’s chest. Puju begged for his life but Nuculovic told Puju that it was too late. Then, when Puju attempted to stand up, defendant walked over to Puju, pushed him back onto the floor, and told Puju not to do anything that would force him to stab Puju again. This evidence is sufficient to uphold the trial court’s scoring of OV 8 at 15 points. Because no error occurred in the scoring of defendant’s sentencing variables, his minimum sentencing guidelines range has not changed, and he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant asserts that the trial court erred in ordering \$4,000 restitution and remand is necessary to correct the amount of restitution in the presentence investigation report (PSIR). We disagree. This Court generally reviews a trial court’s order of restitution for an abuse of discretion. *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007). But when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo as a question of law. *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008). This Court

appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

reviews a trial court's factual findings in calculating an order of restitution for clear error. MCR 2.613(C).² A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Pursuant to MCL 780.766(2),³ a trial court is required to order a defendant to make full restitution to a victim where the defendant's course of conduct gives rise to the conviction. *People v Dimoski*, 286 Mich App 474, 477; 780 NW2d 896 (2009). MCL 780.767(1) provides that in determining the amount of restitution "the court shall consider the amount of the loss sustained by any victim as a result of the offense." "Thus, the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997).

After reviewing the record, we conclude that the trial court did not clearly err in calculating restitution in the amount of \$4,000. *Akins*, 259 Mich App at 564. As noted by the trial court, defendant does not contest that he took \$4,000 from Puju during the assault. Rather, defendant merely complains that he should not be required to repay the \$4,000 because he was not convicted of taking the money. Accordingly, the trial court did not abuse its discretion when it ordered defendant to pay \$4,000 in restitution because defendant took the money from Puju during the course of conduct that resulted in defendant's convictions. *Gahan*, 456 Mich at 272; MCL 780.766(2).

Furthermore, defendant is not entitled to correction of the PSIR. As discussed above, because defendant does not challenge the accuracy of the amount taken from Puju, there is no error in the PSIR. Defendant also does not identify any other specific inaccuracy on appeal. Therefore, a remand to correct purported clerical errors in the PSIR is not warranted. MCR 6.435(A).⁴

² MCR 2.613(C) provides, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

³ MCL 780.766(2) provides:

[W]hen sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

⁴ MCR 6.435 (A) provides, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it."

Defendant contends that the PSIR contains inaccurate information. We disagree. This Court reviews a sentencing court's response to a claim of inaccuracy in a defendant's PSIR for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). An abuse of discretion occurs when a trial court makes a ruling that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A defendant is generally entitled to have information that is irrelevant or inaccurate stricken from his PSIR. *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). However, a PSIR is presumed to be accurate, and a trial court may rely upon the report unless it is effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Furthermore, although a trial court must respond to challenges regarding the accuracy of the PSIR, it has wide latitude regarding its response to the challenged information. *Spanke*, 254 Mich App at 648. Specifically, the trial court "may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id.* at 648-649.

After reviewing the PSIR, we note that the PSIR accurately reflects the changes made by the trial court during the sentencing hearing in response to defendant's objections. Furthermore, the trial court acted properly when it chose to note in defendant's description of the offense that defendant disagreed with the agent's description of the offense and the evaluation and plan within the PSIR. *Spanke*, 254 Mich App at 648. Therefore, the trial court did not abuse its discretion in correcting the PSIR. Remand for correction of the PSIR is unwarranted. MCR 6.435(A).

Defendant argues that there is insufficient evidence to show that he and Nuculovic formed an agreement to commit assault with intent to do great bodily harm less than murder. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of assault with intent to do great bodily harm less than murder are: (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. MCL 750.84;⁵ *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The second element requires proof of specific intent. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "An intent to harm the victim can be inferred from [the] defendant's conduct." *Id.*

⁵ MCL 750.84 provides, "[a]ny person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars."

“A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective.” *People v Martin*, 271 Mich App 280, 317; 721 NW2d 815 (2006), aff’d 482 Mich 851 (2008); MCL 750.157a.⁶ Conspiracy requires proof of specific intent to both combine with at least one other person and to accomplish an illegal objective. *People v Justice (After Remand)*, 454 Mich 334, 346-347; 562 NW2d 652 (1997). The prosecution need not offer direct proof of the conspiracy. *Martin*, 271 Mich App at 317. Rather, the circumstances, acts, and conduct of the parties can be sufficient to establish an agreement in fact. *Id.* Additionally, circumstantial evidence and inferences arising from the evidence may establish the existence of the conspiracy. *Id.*

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact could conclude that there was sufficient evidence to prove beyond a reasonable doubt that defendant and Nuculovic agreed to accomplish the illegal objective of assaulting Puju with the intent to do great bodily harm less than murder. “What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do.” *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Here, defendant called Nuculovic before taking Puju to the empty condominium. At the condominium, defendant and Puju surveyed the layout of the condominium until Nuculovic arrived. Once Nuculovic, who pretended to be the owner of the condominium, arrived, he and defendant attempted to lead Puju into the basement. However, Puju received a phone call and decided to remain on the first floor. Once Puju ended his phone call, Nuculovic and Puju agreed upon the lease terms, and Puju gave Nuculovic a down payment to lease the condominium. At that point, Puju began to walk towards the front door. However, once Puju turned away from Nuculovic, Nuculovic grabbed Puju from behind and began to choke him. At the same time, defendant also began to attack Puju. During the struggle, Puju suddenly felt a burning pain in his left chest area before he lost consciousness. When Puju awoke, Nuculovic was standing over Puju with his foot on Puju’s chest. Puju, who was having difficulty breathing, begged for his life; however, Nuculovic told Puju that it was too late. When Puju tried to get up, defendant came over, pushed Puju back onto the ground, and told Puju not to force him to stab Puju again. As defendant was walking away from Puju, Puju managed to stand back up, and he ran through the glass sliding door onto the backyard deck with defendant close behind him. On the deck, defendant continued to attack Puju while Puju crawled across the deck and fell onto the grass in the backyard. Once on the grass, Puju was able to stand up, and he ran away. Similarly, Janet Rentz testified that she saw two men attacking Puju on the backyard deck until Puju fell into the backyard grass and ran into the middle of the road. This evidence was sufficient for the jury to find that defendant and Nuculovic conspired to assault Puju with the intent to do great bodily harm less than murder. *Roper*, 286 Mich App at 83.

We note that defendant argues that he is entitled to resentencing because his minimum sentencing guidelines range changed. However, because there is sufficient evidence to uphold defendant’s conspiracy to commit assault with intent to do great bodily harm conviction, his

⁶ MCL 750.157a provides, “[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy....”

minimum sentencing guidelines range has not changed and resentencing is not required. Consequently, this issue is moot, and we need not address it further. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994) (an issue is moot when this Court cannot fashion a remedy).

Defendant asserts that the standard reasonable doubt jury instruction, CJI2d 3.2, improperly shifts the burden of proof and lowers the standard of proof. We disagree. This Court reviews claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82. "The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *Id.* The instructions must include all elements of the charged offenses and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

The standard reasonable doubt jury instruction, CJI2d 3.2, provides:

- (1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.
- (2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.
- (3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.

Defendant argues that that the word "possible" (in the third paragraph) improperly shifts the burden of proof to defendant and lowers the standard of proof needed to convict defendant. "To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court has held that CJI2d 3.2 adequately conveys the concepts of reasonable doubt, the presumption of innocence, and the burden of proof. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003); *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). Furthermore, this Court also has held that CJI2d 3.2 does not shift the burden of proof to the defendant. *Hill*, 257 Mich App at 152, citing *Hubbard*, 217 Mich App at 488. Thus, because the entire instruction from CJI2d 3.2 has been held to be adequate by this Court, defendant's argument is without merit. The trial court properly read CJI2d 3.2 to the jury. See

Hubbard, 217 Mich App at 488 (“Taken as a whole, [including the word “possible”] the instruction given [CJI2d 3.2] conveyed to the jury that a reasonable doubt is an honest belief based upon reason.”).

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio