STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	No. 298528 Oakland Circuit Court
RAYMOND DAVID HASLETT, Defendant-Appellant.	LC No. 2009-227631-FH

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first degree home invasion, MCL 750.110a(2), witness intimidation (threatening to kill or injure), MCL 750.122(7)(c), interference with electronic communication, MCL 750.540(5)(a), and domestic violence, MCL 750.81(2). Because the trial court did not abuse its discretion when it amended defendant's general information, the jury instructions were sufficient to protect defendant's right to a unanimous jury verdict, and defendant has not shown error in sentencing, we affirm.

Crystal Ann VanBrabant was married to defendant[1] for ten years (date of marriage June 27, 1999) and are recently divorced. The marriage produced four children: Dominic, aged five; Cathleen, aged eight; Chianne, aged nine; and Chantel, aged 11; at the time of trial.

On June 26, 2009, VanBrabant took her children to the store to purchase beach toys early in the morning because they had plans to spend the day at the beach. On their way home VanBrabant received a call from defendant saying he was hungry. VanBrabant and the kids stopped and picked up a submarine sandwich for defendant and then returned to their home in Rochester Hills. VanBrabant gave the submarine sandwich to defendant and began showing him the beach toys. Defendant got very angry because he thought the beach toys were "messy fucking toys," the two began to argue, and then defendant threw his submarine sandwich across

[1] VanBrabant testified that she is 5'3" approximately 140 pounds and defendant is 6'0" and approximately 240. According to VanBrabant, defendant received his black belt in tae kwon do in 1999 or 2000 and is a former kick boxer.

the room. VanBrabant went into the kitchen and got on her knees to pick up the sandwich and defendant walked away toward their bedroom.

According to VanBrabant, as she was picking up pieces of the sandwich and putting them onto a plate, defendant approached from behind her and hit her on the back of the head. VanBrabant did not see defendant walk into the kitchen or see the blow coming. Defendant then kicked her in the ribs/side stomach area very hard. VanBrabant testified that it hurt, and it knocked the wind out of her so she could not breathe. VanBrabant crawled into the bathroom and to try to catch her breath. It took her several minutes to do so. Defendant followed her into the bathroom and asked her why she had to "be such a fucking bitch" and told her not to talk back to him. Two of the children, Chianne and Dominic begged defendant to stop and stayed in the bathroom with VanBrabant. Defendant eventually left the bathroom. When VanBrabant could breathe again she got up and told defendant that she would take the kids and get defendant another sandwich.

VanBrabant took the kids and instead of heading to the sandwich shop she went to the sheriff's department and reported the incident. There were photos taken of her injuries/bruises but she did not go to the hospital. While VanBrabant was describing what happened to the deputy, VanBrabant was receiving phone calls from defendant. The deputy asked VanBrabant to put her phone on speakerphone and defendant, without knowledge that he was on speaker, continued yelling and cursing at VanBrabant. In particular, defendant asked VanBrabant when she was coming home with his food and why she was such a "fucking bitch." VanBrabant asked defendant "why he had to hit" her. Defendant responded, "[b]ecause [she] was such a bitch." According to VanBrabant, she filed a police report and deputies went to the house to talk to defendant. A condition of defendant's release bond was that he was not allowed to return to their home and he was not to have any contact with VanBrabant or the children either direct or indirect.

Deputy William Lambouris of the Oakland County Sherriff's Department testified that on June 26, 2009, he was on desk duty when VanBrabant and her children walked into the substation. VanBrabant was in a very excited state and wanted to file a complaint regarding and assault and battery involving defendant. At first Lambouris took a verbal statement from VanBrabant. He testified that VanBrabant stated that she had gone to the store with her children and when she left defendant was still in bed. When she returned home she had a submarine sandwich for defendant. Defendant became upset and threw the sandwich. As VanBrabant attempted to clean it up, defendant approached VanBrabant and kicked her in her thigh and rib area, and struck her in the head. Lambouris stated that VanBrabant completed a written statement to that effect as well. According to Lambouris, defendant was constantly calling her cell phone and Lambouris instructed VanBrabant to put the phone on speaker so he could hear both sides of the conversation. Lambouris heard VanBrabant say something like, "why did you do this to me?" Lambouris heard defendant's response which was, "because you're a fucking bitch," and "I'm tired of your bullshit." Lambouris took photos but nothing was evident to him in the rib cage area or on her head because of her hair.

Three days later defendant returned to the house at 3:00 a.m. on June 30, 2009. VanBrabant woke up to a loud banging sound and when she woke up she realized that the side back door was being kicked in. All four children were in bed with her. VanBrabant attempted to

run down the hallway. She made it halfway down the hall, and when she was about three or four feet from the door, the door flew open and defendant was there. When defendant was kicking the door in, the door frame came apart and a piece of molding hit her in the head and split her head open. Defendant was able to break the door down even though it was secured with a deadbolt.

When defendant came into the house, he told VanBrabant to give him her cell phone so she would not be able to call the police. VanBrabant told defendant that it was on the counter charging and defendant got it and put it in his pocket. They did not have a land line in the house and other cell phones in the house were inactive. VanBrabant kept the inactive cell phones on the counter because although they were inactive, 911 service is still available and she wanted her children to be able to call for help if something happened and she could not call for help. The last time she saw the inactive cell phones on her counter was before June 30, 2009 when defendant came into the house. After defendant was in the house, they were gone.

Defendant asked VanBrabant how she could do this to him, why she went to the police when he hit her, and why did she not love him anymore. VanBrabant responded that she did love him. At this point the children were awake and standing in the kitchen. Defendant took VanBrabant into their son's room and closed the door saying that he wanted to talk to her. Defendant held VanBrabant against the door by holding her arms and wrists and standing in front of her. They were in the room for five to 10 minutes and VanBrabant did not feel that she could leave. Defendant continued to ask her why she went to the police and then told her that he wanted her to go to court and lie for him. Specifically, defendant asked that VanBrabant say that defendant did not hit her so he would not get into trouble. Terrified, VanBrabant agreed that she would lie for defendant in court so he would not get into trouble.

VanBrabant told defendant that she wanted to check on the children and defendant let her go, but followed her into the kitchen. It was approximately 4:00 am and the children were in the kitchen upset, scared, and crying. VanBrabant tried to tell the children that she was okay and everything would be okay. At this time VanBrabant was covered in blood and her head was still bleeding. Defendant told the children not to worry because VanBrabant was going to put a Band-Aid on her head. Again defendant said he wanted to talk to VanBrabant and took her into the bathroom. VanBrabant was afraid of what might happen if she did not go into the bathroom with defendant. Once inside the bathroom defendant closed and locked the door. Defendant told VanBrabant that if she loved him she would have sex with him. Defendant was acting erratic and VanBrabant knew that he would hurt her if she did not cooperate and she did not have a way out of the bathroom so she agreed. As VanBrabant stood facing the counter, defendant stood behind her and pulled her pants down. He also lifted her shirt that was covered in blood. Defendant then proceeded to have sexual intercourse with VanBrabant in a standing position. VanBrabant testified that she just wanted it to be over. Afterward, defendant stated, "it wasn't even worth it."

Defendant and VanBrabant left the bathroom and defendant told her to change her clothes. Defendant took her bloody clothes and put them in the washing machine and turned it on. VanBrabant pleaded with defendant to let her take him to his mother's house so he did not get into trouble for being at the house when he was not supposed to be there and also so she could go get medical attention. VanBrabant repeatedly asked him if she could leave to get

medical attention because her head hurt so badly. Defendant stated that he wanted to stay with VanBrabant and the kids at the house. Defendant said that VanBrabant could not get medical attention because if she told them what he had done he would get into trouble. VanBrabant told him that she would tell the hospital staff that a door hit her but not that it was because of defendant. But defendant said that she would have to leave the children with him because he knew that one of them would tell hospital staff what happened. Eventually VanBrabant was able to talk defendant into letting the children go with her to the hospital by telling him that everything was going to be okay because she was not going to tell what he had done that night and she would lie for him with regard to the beating a few days prior.

When VanBrabant went into the garage she noticed that defendant had ridden his father's bicycle to the house. Defendant loaded the bicycle into the van so they could take it back to his parents' house. After the kids got into the van, VanBrabant drove to defendant's parents' house. When they arrived defendant got out of the van and unloaded the bicycle. VanBrabant could not pull away because defendant came to the driver's side window and sought confirmation once again that she was going to lie for him in court and that everything would be okay. In defendant's parents' community, there is a security vehicle on patrol. The vehicle drove by once and then turned around and stopped facing the van. Defendant stepped away from the van and gave VanBrabant her phone back.

VanBrabant left and went to the hospital and obtained treatment. Because she was afraid, she told hospital staff that she walked into a door and she also spoke with her children and told them not to say anything about what really happened. The children did not say anything at the hospital. VanBrabant's injury required six interior stitches and six exterior stitches. VanBrabant was at the hospital for five or six hours and during that time she and defendant spoke on the phone many times. During one of the calls defendant informed VanBrabant that he went back to the house to clean and try to fix the door. When she arrived home, defendant had cleaned up the blood and straightened up the broken pieces of molding. VanBrabant also noticed that the spare set of car keys was missing. Defendant's father returned the spare keys to VanBrabant after finding them in his truck a few days later.

VanBrabant went to the sheriff's station later that same day on June 30, 2009 and wrote a statement explaining that defendant kicked the door in, that she was hit in the head with a piece of molding, and that he begged her not to have him arrested. Police asked VanBrabant why she had not previously filed charges and she said she should have. VanBrabant told police that defendant had earlier said to her, "I've done so much worse and you did nothing." The following day, July 1, 2009, at 10:00 a.m., VanBrabant wrote a second statement including the sexual intercourse in the bathroom. Initially, VanBrabant did not tell the male deputies about defendant having sexual intercourse with her in the bathroom because she was humiliated and ashamed that it was her husband that had done this to her. VanBrabant returned the following day to explain what happened in the bathroom because she wanted the police to know the truth.

At trial, VanBrabant testified that these instances were not the only times defendant had assaulted her. VanBrabant testified that in October 2000 when she was eight months pregnant the two got into an altercation because defendant was cheating. Defendant sat on her chest almost on top of her stomach and repeatedly punched her in the face. VanBrabant went to her doctor's office for treatment because she was concerned for her unborn child. Afraid,

VanBrabant told staff that she was in a car accident. VanBrabant explained that on another occasion in 2006 they fought because defendant did not have a job. Defendant choked VanBrabant with his hands around her neck leaving marks. VanBrabant called the police. When police responded they asked one of them to leave the house. VanBrabant took the children to a hotel. VanBrabant stated generally that defendant has strangled her with a towel around her neck and has hit her with a dumbbell weight. With regard to nonconsensual sex, VanBrabant testified that while they were living in Florida a few years before the current incidents, defendant had duct taped her hands together and her feet together and then penetrated her vagina and anus with his fist. The children were home during the incident and screamed at the other side of the door. Although VanBrabant hemorrhaged for a she did not seek medical attention out of concern for what would happen to her children. VanBrabant testified that over the years she repeatedly told members of defendant's family that she was being abused but she never told anyone else.

At trial, Megan Widman, director of social action at Haven, was qualified as an expert witness in the area of domestic violence and its effects. Widman testified generally that only about 50% of victims of domestic violence call the police. She also testified that victims of domestic violence are commonly isolated from friends and family, live in fear, and have a limited sense of their options. Widman stated that statistically women are at a 75% greater risk of being stalked, or the victim of an attempted homicide or homicide after leaving their abuser.

Rachel Louzon and VanBrabant have been friends for five years. Louzon knows defendant and their four children. Louzon described a time in Summer 2006 when she had been at VanBrabant and defendant's house in Rochester Hills, left to get food, and then returned. When Louzon arrived at the door she could hear the children screaming and VanBrabant met her at the door very upset, crying hysterically, and physically shaking. Louzon testified that she and VanBrabant went and sat in VanBrabant's car. VanBrabant told Louzon that after Louzon left the house, she and defendant had gotten into an argument and defendant choked her. Louzon testified that VanBrabant stated it was the last time and then VanBrabant called the police. Louzon sat with VanBrabant and the children in the car in the driveway while they waited for police to arrive. Louzon observed red fingerprint marks around VanBrabant's neck. When the police arrived Louzon took the children to get ice cream. VanBrabant called Louzon back to the house and then Louzon drove VanBrabant and the kids to a hotel and checked them in for the night. They only stayed at the hotel one night.

Chianne Haslett, aged nine years, is VanBrabant and defendant's daughter. She testified that on June 26, 2009, she went with her mother and sisters and brother to buy toys. When they returned home defendant was upset that the toys were messy. Chianne stated that her mother was sarcastic and talked back to defendant. She stated that defendant threw his submarine sandwich and then got up and walked into the bedroom or the bathroom while her mother went to clean up the sub on the floor. Chianne was watching television and she heard her sisters and brother all screaming and crying and she saw defendant kick her mother in the side. Chianne went to the police station with her mother.

Chianne testified that a few days later on June 30, 2009, she was sleeping in her mother's bed with her mother and her siblings when the sound of kicking at the door woke her up. Chianne testified that she and her mom jumped up from the bed and came down the hallway when the door was finally kicked in. Chianne saw her father standing there in the doorway.

Chianne testified that they were all panicking and a piece of wood fly off the door and hit her mother in the head and split her head open. Chianne stated that everyone was upset, scared, screaming, and crying and they went into the kitchen where her mother put drops in her eyes because she had double pink eye. At that point, according to Chianne, defendant took VanBrabant into the bathroom to talk to her but she did not know what they were talking about. Chianne waited in the kitchen for her mother to come out of the bathroom. Chianne was scared of defendant while this was happening. They all drove defendant back to his parents' house. Chianne testified that she remembered other times when defendant hit VanBrabant and it was "just so, so scary" for her and her siblings. Chianne testified that she wanted to call the police but she did not do it "mostly because [she] was scared to do it and [she] did not have a phone." Chianne testified that her older sister Chantel has a phone but she did not know if Chantel had that phone during the incidents.

Richard Thomas Haslett, defendant's older brother, testified that he introduced defendant and VanBrabant in early 1996. Richard and his wife, Terra, have been together for 13 years and the two couples were close. Richard testified that he did martial arts with defendant for approximately a year and a half. Richard stated that although he made it to third degree black belt, defendant took the black belt test but had to quit for financial reasons and so defendant did not actually attain a black belt. Despite the fact that he did not actually attain the black belt, Richard testified that defendant does have a certificate saying he has a black belt. Richard testified that the certificate is invalid. Richard testified that both couples lived in Michigan and then moved to Florida around the same time and then eventually moved back to Michigan. According to Richard, the couples spent quite a lot of time together and he did not see any bruises, marks, or other injuries on VanBrabant. Richard admitted that he did not inspect VanBrabant's body for bruises and likely only saw her on a weekly basis.

Teara Haslett, Richard's wife, testified that she has known defendant and VanBrabant for 13 years and that the couples were "pretty close." Teara testified that she never saw injuries on VanBrabant throughout their relationship.

After the close of the testimony, the matter went to the jury. The jury found defendant guilty of first degree home invasion, witness intimidation, interference with electronic communication, and domestic violence. The trial court sentenced defendant to eight to 20 years' for the first degree home invasion conviction, eight to 15 years' for the witness intimidation conviction, 324 days' for the interference with electronic communication conviction, and 93 days' for the domestic violence conviction. The sentences for first degree home invasion and witness intimidation were consecutive sentences. Defendant now appeals as of right.

Defendant first argues that he was denied due process of law and unfairly prejudiced by a late amendment of the information that added an additional theory of witness intimidation. This court reviews a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision "falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

> The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any

> variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury . . . and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day . . . . [MCL 767.76 (emphasis added).]

"The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant . . . ." MCR 6.112(H). "A trial court may amend the information at any time . . . as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987); see also *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). In summary, "an amendment must not cause unacceptable prejudice to the defendant through 'unfair surprise, inadequate notice, or insufficient opportunity to defend.'" *People v McGee*, 258 Mich App 683, 688; 672 NW2d 191 (2003), quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Here, defendant's general information indicated that defendant was charged with witness intimidation, MCL 750.122, not indicating a specific subsection describing the theory of the crime. However, the description of the count on the general information was as follows:

> did discourage or attempt to discourage an individual from attending as a witness, testifying, or giving information at an official proceeding by committing or attempting Home Invasion Third Degree or Home Invasion First Degree or Interference with Electronic Communications; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

This description mirrors MCL 750.122(3)(a):

> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

At trial, after the prosecutor rested, defendant brought a motion for directed verdict. When the discussion reached the count of witness intimidation, the trial court observed that the victim's testimony was that defendant had encouraged her to go to court and to lie for him, not to not go to court at all. The trial court then pointed out that another section of the witness intimidation statute "might be applicable," MCL 750.122(3)(c). MCL 750.122(3)(c) states as follows:

> (3) A person shall not do any of the following by threat or intimidation:
>
> ***

> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

The prosecutor requested that the trial court amend the information to also include the alternative theory presented in MCL 750.122(3)(c) pursuant to the trial court's authority in MCR 6.112(H). Defense counsel argued that it was too late to move to amend the information because the prosecutor had already rested and that it was "disingenuous to allow her to decide oh we're going to change our theory at the last minute just because of the fact that the Court is questioning whether or not the proofs have been made in regard to that specific statute which they've been going along with for the past nine months." The trial court asked defense counsel if he could articulate any prejudice from the proposed amendment. Defense counsel responded:

> I just think it's too late in the game to do that, Judge. I've operated on the strategy of attacking this particular offense, this particular portion of the statute and we get this late in the game and now I've got to change my strategy and I think that's prejudicial to the defense and prejudicial to my case, Judge.

Discussion continued and the trial court delayed its decision to the next morning of trial and invited briefing on the issue.

On the next day of trial, the trial court again asked defense counsel about how allowing the amendment of the general information would be prejudicial in any specific way. Defense counsel responded as follows:

> Judge, I only indicated in chambers that I think it changes my ultimate argument in closing. I can't predict how or retroactively indicate how it would have indicated any change in my cross-examination strategy for any of the witnesses at this point, but I simply think because of the fact that a jury has been impaneled, has been partially charged at the initiation of the case, has been informed of the original charges, that there is prejudice attached and I object to any kind of amendment at this point.

The trial court found that "[d]espite opportunity to do so, the defendant has not been able to articulate any prejudice from allowing amendment of the Information to set forth the theory that the defendant encouraged the alleged victim to lie in court."

Ultimately, the trial court allowed both theories supporting witness intimidation to go to the jury. The trial court allowed the initial charge of MCL 750.122(3)(a) to stand because the prosecutor presented evidence that defendant discouraged VanBrabant from going to the police, relying on *People v Papineau*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket No. 254240) (holding that the "plain language of the statute does not require the pendency of an official proceeding as an element of the offense.") The trial court also allowed the amendment of the general information to present the alternate theory found in MCL 750.122(3)(c) stating as follows:

> Although the People have presented the alleged victim's testimony and addressed it, defense counsel hasn't articulated how in his cross-examination of the alleged victim would have been any different had this theory been specifically part of the

> Information. The Court notes that the alleged victim's testimony here at trial was consistent with what she testified to at the preliminary examination where she did testify that the defendant encouraged her to lie at a court proceeding. Given that the defendant has not been able to articulate any prejudice, I'm going to allow the amendment and I'm going to allow a charge that the defendant did encourage the alleged victim to testify falsely at an official proceeding which would be a violation of section 3C . . . .

The trial court's decision to amend the general information did not charge defendant with a new crime, but merely a different theory of liability than the prosecutor initially charged under MCL 750.122(3)(a). Defendant was not able to articulate any specific prejudice caused by the amendment either at trial or on appeal. Defendant cannot genuinely claim unfair surprise or other prejudice arising from the amendment because the at the preliminary examination, the prosecutor presented much of the same evidence elicited at trial, including specifically, VanBrabant's testimony that defendant had encouraged her to go to court and lie for him. Defense counsel was clearly aware of the testimony because he brought up VanBrabant's specific preliminary examination testimony at trial. As such, defense counsel was aware of VanBrabant's preliminary examination testimony and that it would be brought up at trial. In fact, VanBrabant testified nearly identically at trial stating that defendant told her that he wanted her to go to court and lie for him. It is plain that from the time of the preliminary examination that defendant had reasonable notice that the manner in which the prosecutor intended to prove his culpability for the witness intimidation count was, at least in large part, based on the testimony that defendant asked VanBrabant go to court and lie for him. Moreover, it does not appear from the record that the amendment in any way altered the nature of defendant's trial defense or the evidence supporting the defense. At trial, defendant's theory of the case was that he did not abuse VanBrabant, presenting evidence through Richard and Teara that over 13 years of close family relationship in Michigan and Florida, neither witnessed any bruises or marks or other physical indicia of injury on VanBrabant's body. It appears that defendant's chosen defense applied with equal force irrespective whether the prosecutor pursued defendant's witness intimidation conviction under MCL 750.122(3)(a) or (c).

In sum, the trial court did not abuse its discretion when it amended the information because: (1) defendant faced the same witness intimidation charge contained in the information, (2) defendant had reasonable notice of the potential applicability of a witness intimidation charge buttressed by the testimony that defendant encouraged VanBrabant to go to court and lie for him as a result of her preliminary examination testimony, and (3) the amendment occasioned no prejudice to defendant's trial defense. Defendant has not shown error.

Defendant next argues that the trial court's jury instructions were insufficient to protect his right to a unanimous jury verdict. Specifically, he asserts that the trial court erred when it submitted the witness intimidation count to the jury without requiring the jury to decide unanimously on which theory it was basing the conviction. Because defense counsel specifically indicated that he had no objections to the instructions as given, this claim of instructional error has been waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A waiver, as distinguished from an issue forfeited by lack of objection, extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). We therefore decline to review this issue. We do note however that had we reviewed this issue we would have concluded that defendant

would not be able to establish error because "it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). And, the record reflects that the trial court gave a general unanimity instruction, which is adequate in most instances. *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006).

Defendant asserts that the trial court erred in scoring OV 13 at ten points and therefore the matter should be remanded for resentencing. When scoring the sentencing guidelines, a trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*. We review any findings of fact made by the trial court at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A sentencing court may consider all record evidence, including evidence admitted at trial, when scoring the guidelines. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Under MCL 777.43, OV 13 is scored for a "continuing pattern of criminal behavior" for which ten points are appropriate if the "offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ," MCL 777.43(1)(d). Notably, the plain language of the statute does not require a criminal conviction to score ten points, but only requires "criminal activity." Here, the trial court assessed ten points to defendant for the instant home invasion and witness intimidation convictions together with a felony embezzlement charge alleged by an employer in Florida that was included in defendant's PSIR.

Defendant, for the first time on appeal, asserts that the Florida embezzlement charge should not be considered in scoring OV 13 for the reason that, "the supporting information for this charge in virtually non-existent." But defendant never challenged the accuracy of the Florida embezzlement charge before or at sentencing. And, a defendant's PSIR is presumed to be accurate, unless challenged by the defendant; and a trial court is entitled to rely on the factual information therein. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant has not established error requiring remand.

Finally, defendant contends that he be resentenced on the first-degree home invasion count because the recommended minimum sentence range under the sentencing guidelines would be reduced if the witness intimidation count is vacated. Because we have affirmed defendant's first-degree home invasion conviction, this issue is moot and we need not address it.

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause