

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 14, 2013

v

TONY LEE BOUIE,

Defendant-Appellant.

No. 308100
Wayne Circuit Court
LC No. 11-002717-FH

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and domestic violence, MCL 750.81(2). The trial court sentenced defendant to 6 years and 3 months to 20 years' imprisonment for the first-degree home invasion conviction and to 93 days in jail for the domestic violence conviction. Because defendant was sentenced based on accurate information and prior record variable (PRV) 6 and offense variable (OV) 12 were properly scored, we affirm.

Defendant's convictions stem from his unpermitted entry into the home of his former girlfriend, Cierra Reed. After entering the home, defendant pushed Reed and her companion, Brandon Johnson. Johnson left the home at Reed's request. Thereafter, defendant struck Reed in the face with his hand, pushed her onto a couch, and pulled her pants and underwear off. According to Reed, defendant attempted to engage in vaginal-penile penetration with her, but she kicked him away. Defendant then dragged her by her hair into the dining room, where he left her. As defendant left the home, he took Reed's laptop computer that had been sitting on a table in the living room. The jury convicted defendant of first-degree home invasion and domestic violence and acquitted him of larceny in a building, MCL 750.360, and assault and battery against Johnson, MCL 750.81. Defendant was also charged with assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), but the trial court declared a mistrial on that charge after the jury was unable to reach a verdict.

Defendant first argues that the trial court sentenced him based on inaccurate information and improperly scored 10 points for PRV 6 because he was not on probation at the time that he committed the instant offenses. "A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). "We review the trial court's scoring of a sentencing guidelines variable for clear error." *People v*

Hicks, 259 Mich App 518, 522; 675 NW2d 599 (2003). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.* (quotation marks and citation omitted).

Defendant asserts that although the trial court initially assessed 10 points for PRV 6, the court thereafter realized that defendant was not on probation when he committed the instant offenses and changed defendant’s PRV 6 score to zero. Defendant’s Sentencing Information Report (SIR) reflects that change. Defendant also correctly states that while the change decreased his PRV score from 40 to 30, the change did not affect his sentencing guidelines range of 57 to 102 months. Because the trial court decreased defendant’s PRV 6 score to zero, his PRV 6 score was accurate and he was not sentenced based on inaccurate information. Further, because defendant’s minimum sentence was within the appropriate sentencing guidelines range, as further discussed below, he is not entitled to resentencing. See *Francisco*, 474 Mich at 88.

Defendant also contends that the trial court erroneously scored five points for OV 12 because the court considered the conduct that gave rise to the assault and battery and larceny in a building charges notwithstanding that the jury acquitted defendant of those charges. Defendant misstates the record. The record shows that the trial court relied on the conduct that formed the bases of defendant’s charges of assault with intent to commit criminal sexual conduct involving sexual penetration and larceny in a building. The record does not reflect that the court relied on the conduct that formed the basis of defendant’s assault and battery charge involving Johnson. In his brief on appeal defendant does not challenge the trial court’s reliance on the conduct that gave rise to the charge of assault with intent to commit criminal sexual conduct involving sexual penetration.

MCL 777.42(1)(d) and (e) direct a sentencing court to score five points for OV 12, involving contemporaneous felonious criminal acts, if “[o]ne contemporaneous felonious criminal act involving a crime against a person was committed,” or if “[t]wo contemporaneous felonious criminal acts involving other crimes were committed.” A felonious criminal act is contemporaneous if it “occurred within 24 hours of the sentencing offense” and it “has not and will not result in a separate conviction.” MCL 777.42(2)(a). In sentencing defendant, the trial court determined that defendant’s conduct that resulted in his larceny in a building and assault with intent to commit criminal sexual conduct involving sexual penetration charges constituted two contemporaneous criminal acts. The court stated that although the jury did not find that defendant committed those offenses beyond a reasonable doubt, there was sufficient proof of those offenses for offense variable scoring purposes.

Defendant concedes that our Supreme Court addressed and rejected his argument in *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).¹ In that case, the Court stated that “a trial court *may* consider facts and circumstances not proven beyond a reasonable doubt in

¹ Defendant asserts that he is preserving this issue for “among other things, possible federal habeas review.”

imposing a sentence within the statutory range.” *Id.* at 683 (emphasis in original), quoting *People v Drohan*, 475 Mich 140, 156; 715 NW2d 778 (2006). The Court recognized that, “other than the fact of a prior conviction,” only those facts “that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.” *McCuller*, 479 Mich at 681 (brackets omitted), quoting *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Thus, “[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Drohan*, 475 Mich at 164.

It is well established that “the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense. A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Thus, “situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.” *People v Ratkov*, 201 Mich App 123, 126; 505 NW2d 886 (1993). That situation is what occurred in the instant case. Although the jury declined to convict defendant of larceny in a building and assault with intent to commit criminal sexual conduct involving sexual penetration, the trial court determined that defendant committed the conduct relevant to those offenses under the preponderance of the evidence standard and scored OV 12 accordingly. Because the evidence supported the trial court’s scoring decision, and defendant’s OV 12 score did not increase his sentence beyond the prescribed statutory maximum, he is not entitled to resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto