

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO COLLIER,

Defendant-Appellant.

UNPUBLISHED

May 10, 1996

No. 180223

LC No. 94-002701

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

JAREL LOREN SCOTT,

Defendant-Appellant.

No. 180224

LC No. 94-002701

Before: Taylor, P.J. and Fitzgerald and P. D. Houk,* JJ.

PER CURIAM.

Following a joint bench trial, each defendant was convicted of two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Each defendant now appeals as of right in this consolidated appeal. We affirm defendants' convictions, but remand for correction of defendant Scott's presentence investigation report.

Docket No. 180223

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant Collier's sole argument on appeal is that his convictions of assault with intent to commit great bodily harm and felony-firearm are not supported by sufficient evidence. In order to determine whether sufficient evidence was presented to sustain a conviction, we are required to view the evidence in a light most favorable to the prosecution and determine whether a trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of assault with intent to commit great bodily harm are: (1) an attempt or offer with force or violence to do corporeal hurt to another, coupled with (2) an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). The elements of felony-firearm are that the defendant possessed or carried a firearm during the commission or attempted commission a felony. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992). Preliminary examination testimony, which was admitted as substantive evidence at trial,¹ placed defendant in a car, shooting a gun out of the window at a group of young men. After reviewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to allow a reasonable factfinder to conclude that the essential elements of the crimes of which defendant Collier was convicted were established beyond a reasonable doubt.

Docket No. 180224

Defendant Scott argues that he was denied a fair trial because the court erroneously admitted into evidence the content of an alleged telephone call. One of the victims testified that he received a telephone call from someone who identified himself as Jarel Scott and told him that they needed to "squash it," referring to the prosecution. The victim admitted that he had never spoken to defendant before although he said that he knew who defendant was. The victim said that the way the speaker identified himself at the beginning of the conversation proved to him that he spoke with defendant. The victim said that defendant was a "big kind of slow guy" and that he recognized the speaker as defendant because the caller spoke in a slow manner and referred to the shooting. The court rejected defense counsel's objection based on a lack of foundation and stated that there had been a self-identification and that this was a sufficient foundation. The court mentioned this telephone conversation in summarizing the testimony at trial but did not refer to it or state that it was relying on it in explaining how it had been persuaded that defendant Scott had shot a gun from the front passenger seat of a car. We are satisfied that a marginally sufficient foundation was established to allow admission of the telephone call. *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983). Assuming, arguendo, that it was error to admit this evidence, we are satisfied that the error was harmless because (1) this was a bench trial, and (2) the court did not specifically rely on this evidence in finding defendant guilty. *People v Sullivan*, 290 Mich 414, 419-420; 287 NW 567 (1939); *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992).

Defendant Scott also argues that he is entitled to resentencing because the court improperly based its sentence on defendant's refusal to admit his guilt, as well as on the alleged telephone call he made to one of the victims. While a trial court may not base a sentence on a defendant's refusal to admit guilt, it may consider a defendant's lack of remorse. *People v Calabro*, 166 Mich App 389,

395-396; 419 NW2d 791, lv den 431 Mich 876 (1988). After reviewing the record, we find the trial court considered defendant's lack of remorse without considering defendant's refusal to admit guilt. This was proper. In fact, the court specifically stated that defendant had the right to maintain his innocence. When defendant proclaimed his innocence at sentencing, the court did refer to the telephone call defendant was alleged to have made to one of the victims. There was nothing improper in this reference, however, because it was based upon testimony admitted at trial and defendant was free to deny having made the telephone call. *People v King*, 158 Mich App 672, 679; 405 NW2d 116 (1987).

Defendant Scott also argues that he is entitled to resentencing because the court did not appropriately respond to an alleged error in the presentence report. At sentencing, defense counsel pointed out that the investigator's description of the offense erroneously stated that Carlos Davis saw defendant shooting a gun from the front passenger seat of a car. Defense counsel reminded the court that Davis did not testify to this effect at trial. The court's sole response was "Okay, thank you." A review of the presentence information report shows that this challenged statement was not stricken from the report. Defendant is not entitled to resentencing because we are satisfied that the court's response showed it did not take this inaccurate statement into account in pronouncing sentence. However, the court's response was inadequate. MCR 6.425(D)(3); MCL 771.14(5); MSA 28.1144(5). Defendant is entitled to have the inaccurate statement stricken from the PSIR and to have a corrected copy of the PSIR transmitted to the Department of Corrections. *People v Martizez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995).

In a supplemental brief that is difficult to follow, defendant Scott argues that the police investigation was inadequate and that the evidence produced at trial was insufficient to support his convictions. After a careful review of the record, we find that defendant is not entitled to any relief and that his convictions were supported by sufficient evidence. Testimony at trial placed defendant Scott in the front passenger seat of a car that was owned by Scott's grandmother. There was further testimony that gunshots came from the front passenger seat of this car. After reviewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to allow a reasonable factfinder to conclude that the essential elements of the crimes of which defendant Scott was convicted were established beyond a reasonable doubt. *Jaffray, supra*. Defendant's claim that the court was required to compel the prosecutor to submit "radio runs" from the night of the shooting is without merit.

We affirm defendant Collier's and defendant Scott's convictions. We remand for correction of Scott's presentence investigation report in accordance with this opinion.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk

¹ *People v Hayward*, 127 Mich App 50, 55-57; 338 NW2d 549 (1983).