STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKEY LEON BETHEL, a/k/a MICHAEL GASKIN,

Defendant-Appellant.

UNPUBLISHED
December 2, 1997

No. 196574
Ingham Circuit Court
LC No. 93-065606-FH

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan,* J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to six to ten years in prison. He appeals as of right. We affirm defendant's conviction and sentence but remand for correction of his presentence investigation report in accordance with this opinion.

Defendant first claims that there was insufficient evidence to support his conviction. We disagree. This Court review a sufficiency of the evidence claim by considering the evidence in the light most favorable to the prosecution, and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Head,* 211 Mich App 205, 210; 535 NW2d 563 (1995). The elements of assault with intent to do great bodily harm less than murder are (1) an attempt or offer with force or violence to do corporal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Harrington,* 194 Mich App 424, 428; 487 NW2d 479 (1992). No physical injury is required for the elements of the crime to be established. *Id.* Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime, *People v Jolly,* 442 Mich 458, 466; 502 NW2d 177 (1993). This Court has held that specific intent may be inferred from circumstantial evidence. *People v Denton,* 138 Mich App 568, 573; 360 NW2d 245 (1984).

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

On appeal, defendant challenges the sufficiency of the evidence only as to the jury's finding of specific intent to do great bodily harm less than murder. Defendant admitted that he knew the iron was hot and that a hot iron could inflict injuries. Moreover, the victim testified that, after defendant pressed the hot iron to her cheek causing her to exclaim that he burned her, he showed apathy and stated that he was going to be incarcerated anyway. He then reapplied the hot iron to her jaw for one minute. Although defendant testified that he did not intend to cause harm to the victim, the prosecution presented sufficient evidence from which the trier of fact could infer that defendant specifically intended to do great bodily harm.

Defendant next claims that he was denied his right to a fair and impartial trial because the trial court improperly permitted questioning regarding a prior wrongful act. We disagree. This Court reviews a trial court's admission of evidence for an abuse of discretion. *People v Sawyer,* 222 Mich App 1, 5; 564 NW2d 62 (1997). Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as claimed. *People v Vasher,* 449 Mich 494, 503; 537 NW2d 168 (1995); MRE 404(a)(1).

Here, defendant placed his character in issue by attempting to establish that he was caring toward the victim and had not hurt her in the past. On cross-examination, the prosecutor attempted to rebut the defendant's assertion of good character by inquiring into an incident in October of 1992. Such rebuttal was proper. *Vasher, supra;* see also, MRE 405(a). Further, the evidence was not substantially more prejudicial than probative. MRE 403. Defendant claims relief based on either MRE 404(b) or MRE 609. However, both are inapposite. The evidence was independently admissible under MRE 404(a)(1).

Defendant raises three sentencing issues on appeal. First, defendant claims that remand is required because the trial court failed to delete irrelevant information contained in defendant's presentence investigation report. We agree. If a trial court finds that challenged information contained in a presentence investigation report was irrelevant but fails to delete it from the report before submitting the report to the Department of Corrections, this Court will remand for the challenged parts of the report to be stricken. *People v Taylor,* 146 Mich App 203, 204-206; 380 NW2d 47 (1985).

In this case, defendant objected at sentencing to information in the report from a prisoner-informant who claimed that defendant expressed a desire to kill the victim. The trial court stated that this information would "not have a great deal of impact on the sentence," but did not strike the information from the presentence investigation report. Later, in announcing the sentence, the trial court rephrased the importance of threats allegedly made by defendant by stating that this information was "not important enough to affect . . . [the] sentence one way or the another [sic] . . ." Although the trial court's first statement indicates only that the information was not very relevant, the court's second statement indicates that the court found the challenged information to have no bearing on the matter of

sentencing. We therefore remand for the purpose of striking the challenged information from the presentence investigation report.

Defendant next claims that the trial court abused its discretion in assessing fifty points under offense variable two, "excessive brutality." However, a challenge directed not to the accuracy of the factual basis of the sentence but rather to the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

In this case, defendant challenges the trial judge's calculation of offense variable two on the basis that the type of injuries sustained by the victim did not reflect excessive brutality to warrant a scoring of fifty points. However, under *Mitchell, supra,* this type of challenge does not set forth a cognizable scoring claim on appeal.

Finally, defendant claims that his he is entitled to resentencing because his sentence is not proportionate to the offense and his background. Under *People v Milbourn,* 435 Mich 630, 661; 461 NW2d 1 (1990), a sentence within the guidelines can be an abuse of discretion in unusual circumstances. *People v Sharp,* 192 Mich App 501, 505; 481 NW2d 773 (1992). "Unusual" is defined as "uncommon" or "rare". *Id.* Moreover, defendant must present to the sentencing judge, in open court before sentencing, those unusual circumstances which he or his attorney believes would render a sentence within the guidelines' range disproportionate. If this is not done, then the issue that a sentence within the guidelines' range violates the principle of proportionality and may not be raised upon appeal. *Id.*, 505-506.

In this case, defendant's request for a sentence toward the lower end of the guidelines' range of thirty-six to eighty months was based on defendant's model prison behavior since his original sentence for the same offense in 1993, and on the victim's statement that defendant should be sentenced to one year in jail and counseling. Since these do not constitute the type of unusual or mitigating circumstance which would overcome the presumption of proportionality, the issue is not preserved for appeal. *Sharp, supra.*

Defendant's conviction and sentence are affirmed. We remand for the limited purpose of striking that portion of the presentence investigation report dealing with the statement of the prisoner-informer. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan