

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK JAMES FISHER,

Defendant-Appellant.

UNPUBLISHED

January 11, 2002

No. 225794

Tuscola Circuit Court

LC No. 96-006920-FH

Before: Meter, P.J., and Jansen and R. D. Gotham*, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of seventeen to thirty years in prison for his conviction of armed robbery, MCL 750.529, imposed on remand. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of armed robbery, first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, and cutting telephone lines, MCL 750.540. The evidence showed that defendant entered the home of a seventy-eight-year-old woman, displayed a knife, cut her telephone line while she watched, and demanded money and keys. The evidence also showed that on the same night defendant attempted to gain entry into the home of another elderly woman, Mrs. Beste, by falsely stating that he needed to make a telephone call because his car had broken down. The prosecution also presented evidence that on the night of the robbery defendant went to the home of Teresa Lynch, his former girlfriend, displayed a knife, and took money and keys from the home. The trial court sentenced defendant to concurrent prison terms of twenty-five to fifty years for armed robbery, twelve to twenty years for home invasion, three to four years for larceny in a building, and one to two years for cutting telephone lines.

In *People v Fisher*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 1999 (Docket No. 202821), this Court vacated defendant's larceny conviction on double jeopardy grounds, affirmed his remaining convictions, vacated his sentences on the remaining convictions, and remanded for resentencing. This Court vacated defendant's sentences on the ground that the trial court based its sentencing decision in part on an unsupported finding that defendant's actions caused the elderly robbery victim to have a stroke.

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

At resentencing, defendant raised objections to the scoring of the applicable judicial sentencing guidelines, and to the inclusion of certain information in the presentence information report (PSIR). Defendant objected to the scoring of Offense Variable (OV) 2, physical attack and/or injury, at twenty-five points on the ground that the robbery victim was subjected to terrorism. He also objected to the scoring of OV 25, contemporaneous criminal acts, at fifteen points for three or more contemporaneous criminal acts consisting of his vacated larceny conviction, his actions against Lynch, and his actions against Mrs. Beste. The trial court rejected defendant's arguments regarding the scoring of the guidelines, and declined to remove certain information regarding defendant's prior record, certain dismissed charges, and an allegation by Lynch from the PSIR. The trial court sentenced defendant to concurrent terms of seventeen to thirty years for armed robbery, twelve to twenty years for home invasion, and one to two years for cutting telephone lines, with credit for three years and 273 days on each sentence.

Application of the guidelines presents a cognizable claim for review only if: (1) a factual predicate is wholly unsupported; (2) a factual predicate is materially false; and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). If the sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998).

Initially, defendant argues that he is entitled to resentencing because the trial court's misscoring of OV 2 and OV 25 resulted in his being sentenced on inaccurate information. Defendant asserts that no evidence supported the trial court's findings that the elderly robbery victim was terrorized, or that he engaged in three or more contemporaneous criminal acts. We disagree. The judicial sentencing guidelines define "terrorism" as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." The evidence supported the scoring of OV 2 at twenty-five points.

The evidence showed that defendant broke into the home of the elderly robbery victim during the night, and enticed her to come downstairs by pretending to be a person the victim knew. He then displayed a knife, cut the victim's telephone wire while she watched, and demanded money and her keys. The victim testified that after defendant left she could not take any action for a time because she was afraid that defendant was hiding in the bushes outside her home. We conclude that defendant's act of cutting the victim's telephone wire while she watched was specifically designed to substantially increase the victim's fear. The trial court's scoring of OV 2 at twenty-five points was not wholly unsupported by the evidence or based on a materially false predicate. Defendant has not stated a cognizable claim for review in regard to OV 2. *Mitchell, supra*.

Defendant's argument regarding the scoring of OV 25 at fifteen points is similarly without merit. The fact that the charges resulting from the incident with Lynch were dismissed is irrelevant. The trial court was entitled to rely on Lynch's preliminary examination testimony to find by a preponderance of the evidence that defendant engaged in acts of unarmed robbery and larceny. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994).

Furthermore, the evidence established by a preponderance of the evidence that defendant attempted a larceny at the home of Mrs. Beste. Mrs. Beste did not unlock her screen door; nevertheless, defendant kept pulling on the door in an attempt to open it and gain entrance to the

house. The fact that defendant engaged in this behavior on the same evening that he in fact invaded the home of another elderly woman and committed a robbery supported an inference that he intended to commit a robbery or a larceny in the home of Mrs. Beste. *Id.* Finally, defendant's assertion that his vacated conviction of larceny cannot be considered for purposes of scoring OV 25 is without merit. The scoring of the guidelines does not implicate double jeopardy issues. *People v Gibson*, 219 Mich App 530, 535; 557 NW2d 141 (1996). Defendant has not stated a cognizable claim for review in regard to OV 25. *Mitchell, supra.*

Next, defendant argues that the trial court's erroneous scoring of the guidelines resulted in the imposition of a disproportionate minimum term for the offense of armed robbery. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. As stated above, we conclude that the guidelines were scored properly. The guidelines recommended a minimum term range of eight to twenty years. Defendant's minimum term of seventeen years is within the guidelines, and thus is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant's lack of a significant prior record, his family support, and his efforts to overcome drug and alcohol addiction do not rebut the presumption that the sentence is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

At sentencing, either party may challenge the accuracy or the relevancy of any information contained in the PSIR. MCL 771.14(6); MCR 6.425(D)(2)(b). When a defendant claims that the PSIR contains an error, the court may hold an evidentiary hearing to determine the report's accuracy, may accept the defendant's unsworn statement, or may ignore the allegedly erroneous information when imposing sentence. MCR 6.425(D)(3); *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1998). The decision to hold a hearing is within the discretion of the court. *People v Harvey*, 146 Mich App 631, 636; 381 NW2d 779 (1985). If the court finds that the challenged information is inaccurate or irrelevant, the information must be corrected or stricken from the report. MCL 771.14(6).

Defendant argues that he was entitled to have objected to information regarding prior uncounseled convictions for traffic offenses, dismissed charges, a probation violation, and an allegation by Lynch removed from the PSIR. We disagree. Defendant correctly notes that prior uncounseled convictions should be stricken from a PSIR. *People v Martinez*, 193 Mich App 377, 386; 485 NW2d 124 (1992). However, defendant did not make even a prima facie showing that he was not represented by counsel on those occasions. The trial court stated that it gave very little if any weight to the existence of those convictions. The trial court acted within its discretion in so concluding. *People v Pierce*, 158 Mich App 113, 116-117; 404 NW2d 230 (1987).

Furthermore, the trial court did not err by declining to remove references to dismissed Florida charges and the dismissed charges resulting from the incident with Lynch. A PSIR may include references to arrests and charges that did not result in convictions. *People v Cross*, 186 Mich App 216, 218; 463 NW2d 229 (1990). In addition, defendant's contention that the reference to his probation status in Lapeer County should have been deleted is not supported by authority, and thus is waived. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Finally, the statement that defendant reportedly attacked Lynch is included in the PSIR's criminal history section. A PSIR must contain a defendant's prior criminal history. MCR 6.425(A). The police report indicated that Lynch stated that defendant pushed her and tackled

her in the yard. The PSIR is not inaccurate in that it states that defendant “reportedly” attacked Lynch. The trial court did not err by declining to remove this statement. MCL 771.14(6).

Affirmed.

/s/ Patrick M. Meter

/s/ Kathleen Jansen

/s/ Roy D. Gotham