

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHRISTOPHER ALEX JOHNSON, a/k/a
CHRISTOPHER ALEXANDER JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 13, 2003

No. 241284
Oakland Circuit Court
LC No. 01-179864-FC

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for conspiracy to commit burning of a dwelling house, MCL 750.157a and MCL 750.72, burning of a dwelling house, MCL 750.72, and two counts of attempted assault with intent to do great bodily harm less than murder, MCL 750.84, on the basis that insufficient evidence was presented on the principal charge of attempted murder and that the convictions of attempted assault with intent to do great bodily harm less than murder were against the great weight of the evidence. The defendant claims error in the trial court's declination of the jury's request to rehear witness testimony and the ultimate sentence guideline scoring on the attempted assault charges. Defendant was sentenced to ten to thirty years' imprisonment on the conspiracy conviction, ten to thirty years' imprisonment on the arson conviction and three to seven and a half years' imprisonment on each attempted assault conviction. Because sufficient evidence was presented on the attempted murder charge, the convictions of attempted assault with intent to do great bodily harm less than murder were not against the great weight of the evidence, the declination by the court of the jury's request to rehear witness testimony was not an abuse of discretion, and the sentences imposed on the attempted assault charges were guideline sentences, we affirm.

Defendant first argues that it was improper to place attempted murder before the jury as there was insufficient evidence for that charge. We disagree. To make a determination regarding a directed verdict of acquittal, the court must consider all the evidence presented by the prosecution up to the time the motion was made in the light most favorable to the prosecution. In order to grant a motion for directed verdict of acquittal, the trial court must determine that a rational trier of fact could not have found that the essential elements were proven beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant raised this issue in his motion for new trial arguing that there was no basis to find that he intended to kill anyone. The trial court relied on *People v Graham*, 219 Mich App 707; 558 NW2d 2 (1996), to find that a rational trier of fact could have found that defendant had the requisite intent to kill. The elements of attempted murder are 1) attempt to commit the crime of murder, 2) by any means not constituting the crime of assault with intent to murder, and 3) defendant intended to bring about a death. MCL 750.91; *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). In *Graham, supra*, 219 Mich App 707, the defendant set fire to his former girlfriend's home at approximately 4:00 a.m. and the victim escaped. *Id.*, 708. This Court found that there was sufficient evidence to support the defendant's conviction for attempted murder as a rational trier of fact could have found that the essential elements of the crime, including the intent to kill, were proven beyond a reasonable doubt. *Id.*, 709.

The evidence shows that defendant set fire to the Nelsons' trailer out of revenge between 3:00 and 4:00 a.m., a time when most people are at home asleep. He planned to burn the trailer in a way to cause maximum damage—using gasoline and inflammable material, placing the fire under the trailer skirting, and opening the back door to allow the fire to move inside. He conspired with others to commit the crime and plan his escape. The Nelsons were in fact present in their home, injured, and treated for smoke inhalation. From this evidence, a rational trier of fact could have found that the essential elements of attempted murder, including the intent to kill, were proven beyond a reasonable doubt. As such, we find that there was sufficient evidence to place this charge before the jury.

On the convictions for attempted assault with intent to do great bodily injury less than murder, defendant argues that the convictions were against the great weight of the evidence. We disagree. To establish that a conviction is against the great weight of the evidence, a defendant must show that the "evidence preponderates heavily against the verdict." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The verdict cannot be disturbed unless the credible evidence in the defendant's favor outweighs the evidence against him. *Id.* 644-645.

The only evidence in defendant's favor is that he never told anyone that he intended to harm the Nelson brothers. The great weight of the evidence presented at trial goes against defendant. Defendant told many people of his plans to burn the Nelsons' trailer, he planned for a number of days the committing of the crime, and he involved others to assist him. Defendant's motive was revenge. He set the fire in a way to cause maximum damage and at a time when the Nelsons were certain to be inside asleep. Therefore, we find that the evidence did not preponderate heavily against the verdict.

Defendant argues that the trial court abused its discretion when it declined the request of the jury to rehear the testimony of certain witnesses during deliberations. We disagree. Because defendant also failed to preserve this issue for appeal by objecting to the judge's denial of the jury's request in the trial court, we review for plain error.

Although the trial court may decide in its discretion whether to allow the jury to rehear testimony, the court may not refuse a reasonable request. The court may require the jury to deliberate longer, as long as it does not deny any future possibility of rehearing the testimony. MCR 6.414(H); *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000). Here, the trial court did not instruct the jury that they could never rehear the testimony, it merely instructed them to rely on their collective memories. As the court did not foreclose the future possibility of

rehearing the testimony by the jury, the declination was within the court's discretion and did not violate MCR 6.414(H).

Defendant's final challenge concerns guideline scoring on the convictions of attempted assault with intent to do great bodily harm less than murder and his claim of right to resentencing. We disagree. Defendant attempted to preserve this issue under MCL 769.34(10) by raising the issue in his motion for new trial. MCR 6.429(C) requires a challenge to sentence guideline scoring at or before sentencing or as soon as defendant could reasonably have discovered the inaccuracy to preserve the issue for appeal. *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). Because the guideline scoring issue is not preserved for appeal, we review for plain error. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), lv gr'd 468 Mich 870 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture of a claim under the plain error doctrine, the defendant must show that 1) an error actually occurred; 2) the error was plain (clear and obvious); and 3) the plain error affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

We find that plain error did occur in scoring OV 17 and a ten point computational error, but the error does not require resentencing. OV 17 is only scored in a crime against a person and only applies to an offense in which a transportation vehicle was used. MCL 777.47. Defendant was scored ten points in error for OV 17. Defendant's original offense variable score was eighty-five, but this was reduced to eighty at his sentencing hearing to reflect a correction in the presentencing report. That score placed him in the sentencing guidelines range of 84 to 175 months, and the trial court sentenced him as such. If OV 17 had been accurately scored zero and the computational error noted, defendant would only have an offense variable score of sixty and would be in the sentencing guidelines range of 78 to 162 months. MCL 777.21(3); MCL 777.63. Defendant's minimum sentence falls within the appropriate guidelines range, and we must affirm that sentence absent an error in scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10). As noted *supra*, defendant's original sentence falls within the appropriate guidelines range, regardless of whether the computational error and OV 17 was corrected. Also, the trial court indicated in its opinion and order denying defendant's motion for new trial that defendant's sentence would not have changed with the correction.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio