

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD FORD GARLAND,

Defendant-Appellant.

UNPUBLISHED

April 29, 2008

No. 274058

Livingston Circuit Court

LC No. 05-015540-FH

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to 28 months to ten years' imprisonment. He appeals as of right. We affirm.

I

Defendant's convictions arose from evidence that he intentionally rammed his Jeep Cherokee into a car operated by the victim, who was defendant's former girlfriend, on December 6, 2005. The victim testified that she obtained a personal protection order (PPO) against defendant on December 5, even though defendant told her that obtaining a PPO would "mean war." Shortly after 7:00 p.m. the next day, while the victim was driving on a road in Hamburg Township, a green Jeep Cherokee of the same type driven by defendant twice bumped the back end of the victim's car. The road conditions were snowy and icy. As the victim picked up speed to get away, her car was struck a third time and pushed across the road into a ditch. The other driver then backed into another road and sped away.

The whole back end of the victim's car was damaged. Defendant's vehicle, which sustained damage to the front bumper and the driver's side fender, was left in a wooded area behind an acquaintance's home after this incident. Defendant then went to another acquaintance's house. Livingston County Sheriff's Deputy Mark King found defendant hiding under a bed after he and other law enforcement officers were allowed entry into the house to search for defendant. Defendant was transported to the Hamburg Township Police Department, where he was questioned about the incident. At trial, defendant testified that he was involved in the incident, but claimed that the victim caused the collisions. Defendant denied ever seeing the victim's car in the ditch.

II

On appeal, defendant argues that the evidence was insufficient to support his conviction of assault with intent to do great bodily harm less than murder. He argues that he is entitled to a verdict of acquittal or, alternatively, a reduction of the conviction to simple assault. We disagree.

“[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A prosecutor need not negate every reasonable theory consistent with innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). Any conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to do great bodily harm less than murder are “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The second element has been defined as “an intent to do serious injury of an aggravated nature.” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). “An actor’s state of mind may be inferred from all of the facts and circumstances, . . . and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Viewed in the light most favorable to the prosecution, the victim’s testimony, and other evidence establishing defendant’s identity as the driver of the Jeep Cherokee, was sufficient to establish that defendant assaulted the victim by ramming the back of her car three times with his Jeep Cherokee, causing her car to cross the road and end up in a ditch. A prosecutor is not required to introduce physical evidence to corroborate a complainant’s eyewitness testimony. *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). Moreover, it is only in narrow circumstances, such as where testimony defies physical realities or contradicts indisputable physical facts, that the assessment of a witness’s credibility will be taken from the jury. *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998).

The victim’s testimony that her car was rammed by defendant’s vehicle was consistent with the physical evidence. Hampton Township Police Officer Brian Medbury testified that he matched pieces missing from defendant’s damaged vehicle to the damage to the victim’s car. He found damage to the left side of defendant’s vehicle that was consistent with the damage to the victim’s car. Also, while he did not reconstruct the accident, he opined from his investigation that the damage was consistent with defendant’s hitting the back of the victim’s car and pushing it to the left as defendant’s vehicle went forward. A police officer may give a lay opinion that is rationally based on his or her perceptions and is helpful to a clear understanding of the testimony or a determination of an issue of fact. See MRE 701; see also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-456; 540 NW2d 696 (1995) (police officers’ lay opinions based on accident investigation were admissible). Therefore, viewed in the light most favorable to the prosecution, the evidence was sufficient to establish an assault. The weight and credibility of the evidence was for the jury to resolve. *Wolfe, supra* at 514-515.

Further, the circumstantial evidence was sufficient for the jury to find beyond a reasonable doubt that defendant had the requisite intent to do serious injury of an aggravated nature. *Fetterley, supra* at 517-518; *Mitchell, supra* at 39. As defendant concedes on appeal, it was not necessary that the prosecutor prove an actual physical injury to establish the requisite intent. *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992).

III

Next, defendant argues that the trial court erred in overruling defense counsel's objection to the prosecutor's cross-examining him about his failure to tell a police officer, after he was given *Miranda*¹ rights, that the victim caused the incident. Defendant argues that the prosecutor's cross-examination violated his constitutional rights to remain silent and to due process, guaranteed by US Const, Ams V and XIV, and Const 1963, art 1, §§ 17 and 20. Defendant seeks either a new trial or a remand to the trial court to develop factual support for this claim.

In general, we review a trial court's evidentiary rulings for an abuse of discretion, but preliminary questions of law affecting the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Constitutional issues are also reviewed de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

Although we agree that defendant preserved this issue to the extent that defense counsel objected to the prosecutor's cross-examination, because defense counsel did not move for an evidentiary hearing outside the jury's presence to develop support for his claim of constitutional error, as permitted by MRE 104(c), there are no factual findings to review.

Moreover, although this Court has discretion to remand for an evidentiary hearing, MCR 7.216(A)(5), it is incumbent upon a defendant seeking a remand to set forth additional facts to be developed on remand by an appropriate offer of proof. MCR 7.211(C)(1)(a); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007); *People v Dixon*, 217 Mich App 400, 406; 552 NW2d 663 (1996). We conclude that defendant has failed to show that a remand is warranted.

Defendant waived his privilege against self-incrimination when he took the stand to testify at trial. *Dixon, supra* at 405. Because defendant's argument on appeal does not raise any other Fifth Amendment concerns, such as whether he made an involuntary statement, the material issue is whether defendant's due process rights were violated. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *Dixon, supra* at 406. In general, due process bars the use of a defendant's silence following the receipt of *Miranda* warnings to impeach a defendant's credibility, because the silence may reflect nothing more than an exercise of *Miranda* rights, and the *Miranda* warnings themselves carry "an implicit assurance that silence in reliance on those warnings will not be penalized." *Dennis, supra* at 573-574.

Whether the prosecutor is permitted to impeach a defendant's testimony with his silence, following the receipt of *Miranda* warnings, depends on the factual setting in which the

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prosecutor seeks to admit it. *People v Boyd*, 470 Mich 363, 376; 682 NW2d 459 (2004). If a defendant does not make post-*Miranda* statements, the prosecutor cannot use the defendant's silence to impeach the defendant's exculpatory explanation at trial, provided the defendant does not claim to have told the police the same version at trial or to have cooperated with the police. *Dixon, supra* at 406. Conversely,

[w]here a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial. [*People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999); see also *People v Davis*, 191 Mich App 29, 34-35; 477 NW2d 438 (1991).]

However, legitimate issues can arise concerning the use of a defendant's post-*Miranda* statements where there is evidence that the defendant placed limits on his willingness to speak with the police. *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996).

In situations where a defendant voluntarily waives his Fifth Amendment right to be silent, makes some statements, and then fails to respond to other questions, the focus of the inquiry is whether the defendant is now manifesting either a total or selective revocation of his earlier waiver of Fifth Amendment rights and whether that revocation is induced by the implicit assurances contained in the *Miranda* warnings. [*People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990).]

In the instant case, considered in context, it is apparent that the prosecutor's cross-examination of defendant was directed at statements that defendant made to a police officer during an interview at the Hamburg Township Police Department after his arrest on December 6, 2005, and after defendant was advised of his *Miranda* rights. At trial, defendant admitted lying to a police officer about where his vehicle was parked that night. Defendant also agreed that he was asked about the incident involving the victim. He responded "no, sir, I didn't say anything to her," when asked whether he told the police officer anything about the victim causing the incident.

It was only after the prosecutor continued this line of questioning, by asking defendant whether he told the police officer to arrest the victim, that defense counsel objected on the ground that defendant had the right to remain silent. Although defense counsel characterized defendant's previous answer as an indication that he had invoked his right to remain silent, the context of his answer reveals that it was, at best, ambiguous with respect to the reason why he did not say anything about the victim. Moreover, in his subsequent testimony, defendant offered different explanations for his silence. He stated that he did not tell the police officer that the victim was the "root of this problem" because "I'm not a vindictive person." When asked by defense counsel on redirect examination why he did not talk about the victim after he was given *Miranda* warnings, he initially stated, "Because I didn't want her to get into any trouble." After defense counsel responded by asking defendant if he understood *Miranda*, defendant testified that he knew that he had the right to remain silent and "that's what I did. I remained silent."

Thus, although defense counsel was successful in eliciting testimony that defendant exercised his right to remain silent, considering defendant's testimony that he did, in fact, make

post-*Miranda* statements concerning the events of December 6, 2005, and offered explanations for not making accusations against the victim that were not based on the invocation of the right to remain silent, it cannot be said that the prosecutor's cross-examination violated defendant's due process rights. The concerns in *McReavy, supra*, are not evident when defendant's testimony is considered in its entirety. Defendant has neither shown sufficient facts to warrant a remand for an evidentiary hearing on this issue, *Dixon, supra* at 406, nor any basis for reversal based on the trial court's decision to overrule defense counsel's objection at trial.

IV

Next, defendant seeks resentencing on the ground that four offense variables in the sentencing guidelines were misscored. The record indicates that defendant was sentenced to a minimum term of 28 months, beginning May 12, 2006, with credit for 156 days served. Because it appears that defendant's minimum sentence has been fully served, this issue is moot and we decline to consider it. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

V

Finally, defendant argues that the trial court erred in denying his post-sentencing motion to correct allegedly inaccurate information in the presentence report. The proper time to raise a challenge to the accuracy or relevancy of information in the presentence report is at the time of sentencing. *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992); MCL 771.14(6); MCR 6.425(E)(2). Defense counsel sought corrections to the presentence report at the time of sentencing but did not argue the specific grounds raised in the post-sentencing motion. However, at sentencing, he also did not affirmatively express satisfaction with the remainder of the presentence report. Under these circumstances, we shall treat this issue as an unpreserved claim subject to forfeiture, rather than a waived claim.² See, generally, *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007). Because the trial court considered defendant's post-sentencing motion to correct the presentence report and the Department of Corrections is entitled to a copy of that report, we shall consider defendant's claim. See *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986) (challenges to the presentence report under MCL 771.14 are to resolved, in part, because the presentence report is relayed to the Department of Corrections).

² The one exception is defendant's claim regarding the paint transfer information in the "probation agent's description of the offense" section of the presentence report. We deem this claim waived because defense counsel withdrew it at the hearing on defendant's motion to correct the presentence report. We further note that defendant's reliance on MCR 6.429(C) as authority for the post-sentencing motion is misplaced because the motion was not accompanied by a request for resentencing. Moreover, while defendant now seeks resentencing based on alleged inaccuracies in the presentence report, he has not established any plain error to warrant such relief. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). As indicated earlier, any claim of error necessitating resentencing is moot.

A trial court has discretion in responding to a presentence report challenge. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The trial court did not abuse its discretion in refusing to amend the “evaluation and plan” section of the presentence report to add defendant’s acquittal of a felonious assault charge. Defendant’s failure to demonstrate any inaccuracy in the information provided, coupled with the fact that defendant’s acquittal of the charge was contained in the “criminal justice” section of the presentence report, supports the trial court’s decision.

We also find no abuse of discretion in the trial court’s refusal to amend information in the “evaluation and plan” section of the presentence report regarding the police investigation of defendant’s alleged criminal sexual conduct. The trial court’s reliance on information in the police report in denying defendant’s request for an amendment was appropriate. Moreover, considering that there is no indication that defendant was formally charged with a criminal sexual conduct offense at the time of sentencing, we are not persuaded by defendant’s argument that information regarding alleged charging documents should have been added to the presentence report. Additionally, to the extent that defendant suggests that the trial court was required to amend the presentence report to include post-sentencing events, he has not cited any authority in support of his position and, therefore, we decline to address this issue further. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (issue given cursory treatment deemed abandoned).

We also conclude that the trial court did not abuse its discretion in responding to defendant’s belated challenge to the probation agent’s reference to defendant’s polygraph examination. The probation agent did not identify the offense for which the polygraph was administered. Further, information in a presentence report is presumed to be accurate unless it is effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Whether a flat denial is adequate, or an affirmative factual showing is required, depends on the nature of the disputed matter. See, generally, *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), abrogated on other grounds in *People v Mitchell*, 454 Mich 145 (1997).

Here, defendant did not offer any basis for his challenge to the information about the polygraph examination other than his allegation that the polygraph was taken only with respect to a felonious assault charge and his alleged belief that he did not fail the polygraph. Defendant made no offer of proof relevant to the probation agent’s concern that defendant had changed his story and, therefore, failed to effectively challenge the information relevant to the probation officer’s opinion. Given the evidence that defendant did, in fact, change his story with respect to at least the instant offense, the trial court did not abuse its discretion in responding to defendant’s claim of inaccuracy.

Turning to defendant’s final argument concerning various conclusions reached by the probation agent regarding defendant’s lack of remorse and risk to property and persons, we again conclude that the trial court did not abuse its discretion in refusing to delete the information. See *Dobek, supra* at 104 (although a sentence cannot be based on a defendant’s refusal to admit guilt, evidence of a lack of remorse is relevant to an individual’s potential for rehabilitation), and

People v Wybrecht, 222 Mich App 160, 173; 564 NW2d 903 (1997) (where a claimed inaccuracy in a presentence report pertains to conclusions regarding a defendant's character that were drawn from facts, and not a factual inaccuracy, a trial court need not resolve the claimed inaccuracy).

Affirmed.

/s/ Kurtis T. Wilder

/s/ William B. Murphy

/s/ Patrick M. Meter