

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 22, 2012

v

JUSTIN MAURICE SANFORD,
Defendant-Appellant.

No. 300852
Oakland Circuit Court
LC No. 2010-231164-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DONTE GREGORY LEONARD,
Defendant-Appellant.

No. 301192
Oakland Circuit Court
LC No. 2010-231056-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KYLE OTIS LESTER,
Defendant-Appellant.

No. 301211
Oakland Circuit Court
LC No. 2010-231055-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

In these actions consolidated on this Court's own motion, co-defendants Justin Sanford, Donte Leonard, and Kyle Lester each appeal as of right from their jury convictions for assault

with intent to rob while armed,¹ conspiracy to commit armed robbery,² first-degree home invasion,³ and conspiracy to commit first-degree home invasion.⁴

We affirm Sanford's convictions and sentencing in Docket No. 300852. We also affirm Lester's convictions and sentencing in Docket No. 301211. And we affirm Leonard's convictions and sentencing in Docket No. 301192, but remand for correction of the presentence investigation report (PSIR).

I. FACTS

This case arises out of an incident that occurred on January 25, 2010. According to the testimony of Darius Lewis, on January 25, 2010, he was at a friend's house playing cards when he received a telephone call from defendant Donte Leonard. Leonard asked Lewis to come to a strip club called "Cheetah's" and get him so that they could "hit this lick," which Lewis understood to mean rob someone.

Lewis, who was wearing a red sweater, a red hat, and black pants, drove his red Grand Prix to Cheetah's. Leonard was waiting outside in the parking lot. Leonard got into the car and said that they were "about [to] hit a lick on a stripper." Lewis also saw defendants Kyle Lester and Justin Sanford. Lewis testified that another individual, Jayson Holt, also came out of the strip club.

Lewis testified that he and Leonard were in the red Grand Prix and the others (Sanford, Lester, and Holt) were in a green Impala. Sanford was in the driver's seat of the Impala, Lester was in the front passenger seat, and Holt was in the backseat. Lewis testified that they then waited for a woman to come out of the club. Apparently, the woman got into what Lewis described as a beige Tahoe. Lewis did not actually see the Tahoe or the Impala leave, but he believed that the Impala followed the Tahoe because Holt then called Leonard, who directed Lewis to catch up with the other vehicle. Once Lewis caught up on Dorchester Street, he pulled up in front of a house behind the green Impala. Lewis saw the beige-colored Tahoe and saw a woman "closing the door."⁵

Leonard got out of Lewis's car and got into the Impala. The Impala then turned around and parked on the corner. Lewis followed suit, and turned around too. Lester, Holt, Sanford, and Leonard got out of the Impala, and Lewis got out of his car. Lewis testified that "they was ready to go." Leonard had a gray gun, and Holt had a black gun. Lewis did not see Sanford or Lester with guns. Lewis testified, "We wasn't going to go in, then [Holt] said, 'Come on. We're

¹ MCL 750.89.

² MCL 750.157a and MCL 750.529.

³ MCL 750.110a(2).

⁴ MCL 750.157a and MCL 750.110a(2).

⁵ The record is unclear whether she was closing the door of the vehicle or the door of her house.

going in [apparently referring to the house belonging to the woman who drove the Tahoe].’ I’m, like, ‘I ain’t going.’” Lewis did not know if anyone else said “no,” but he was the only one who turned around. Lewis testified that after he turned around, he went back to his car.

Lewis testified that the other four men, who all had masks on, then started to walk toward the house. Leonard and Holt went toward the back of the house, and Lester and Sanford walked toward the front of the house. Lewis got into his car, and as he was passing the house, he saw the police coming toward him. Lewis also heard the door to the house (608 Dorchester) being kicked in and heard, “Get down.” Lewis did not see who kicked the door in, but he saw Lester standing on the grass near the street. Lewis never saw anyone actually enter the house or leave the house. The police then stopped and arrested Lewis.

Lewis testified that no one had promised him anything in exchange for his testimony. Lewis testified that he was charged with unarmed robbery and conspiracy to commit unarmed robbery. He testified that his charges were still pending at that time. (According to Leonard’s PSIR, Lewis later pleaded guilty to those offenses.)

Jennifer Locke testified that on the evening of January 24, 2010, and going into January 25, 2010, she was working her shift as a hostess at Cheetah’s. Sanford, who had been at the club a couple times before that night, was there. According to Locke, Sanford repeatedly asked her where she lived and asked for her phone number, but Locke did not give him either. She testified that Sanford was with other people, but she did not pay attention to them. Locke saw Sanford leave, but she did not pay attention to whether he left with anyone.

Locke left work at approximately 2:30 a.m. and proceeded to drive home. She was driving a tan 2001 Suburban. Before exiting I-75 onto Eleven Mile Road, Locke noticed a dark car next to her, but she was not concerned about it. But Locke noticed that as she turned down a street, the dark car turned on the next street. Then, when Locke was getting ready to turn onto her block, she saw the car again with its headlights off. As Locke pulled into her driveway, she saw the dark car drive past her house, still with its headlights off. As she got out of her car and headed to the front door of her house, she then saw a red car pull up in front of her house. The dark car had parked two houses down the street. At that point, Locke hurried to get into her house. As Locke was entering the house, she saw a black male wearing gray sweatpants and a white t-shirt get out of the passenger side of the red car. When the interior lights of the red car came on, Locke could see that the driver was wearing dark clothing. On cross-examination, she testified that the driver was “bigger.”

Inside the house were Locke’s two youngest children, who were five and six years old, and the babysitter, Tonya Brown. Locke woke up Brown and told her that she thought someone had followed her home. Locke and Brown then looked out the window to “see if they’ll [the men] go away.” Locke saw the passenger from the red car talking to whoever was in the other dark car. The talk lasted for a minute and a half or two minutes. Locke then saw two men start to walk up to her house. One of the men was the man who had gotten out of the red car. Then, according to Locke, they turned around. They got back in the dark car, and the dark car turned around and parked on the corner. Locke believed that the red car moved as well, but was not certain. Locke thought they had left, so she opened her front door, but she then heard two doors, presumably car doors, slam. At that point, Locke saw two black men approaching her house, so

she grabbed her children, hid in a closet, and called 911. Locke could not tell if these two men were the same ones she had seen before. At the same time, Brown ran into the bathroom and shut the door.

Locke heard a door break in and heard someone yell, "ATF. Get the [F***] down." Brown similarly testified that she heard two voices yelling, "ATF. Police. Get down." Locke heard more than one person, but she did not know if more than one person yelled. Locke heard someone upstairs. Brown heard someone downstairs and heard someone go upstairs. Locke, who was terrified, remained on the phone with 911. According to Locke, the people were in the house for no longer than two minutes. Not long after hearing the people in the house, Brown saw police lights outside the bathroom window and saw an officer standing there, so she came out of the bathroom. Locke came out of the closet when she heard a police officer in her house. Locke heard the officers less than one minute after the men left.

Locke's purse and Brown's purse were missing, and Locke's laptop, which had been upstairs, was found downstairs on the kitchen floor. Both women's purses were returned, and nothing was missing from either purse.

At some point, Locke went with an officer to a police car that was parked in front of her house. Locke recognized the person seated in the back of the police car as Sanford because he had been in the club that night. Locke was unable to identify a person seated in another police car. Locke was unable to say whether she saw Leonard or Lester that night. Locke testified that she saw a person wearing a red sweatshirt or sweater, but it was unclear from her testimony which person she was referring to, and she never identified that individual at the scene. Locke never saw a gun that evening. Locke was unable to say for certain how many people were in the cars or were involved. Locke testified that there were more than two people in front of her house. On redirect examination, Locke testified that two doors had been broken in or forced open at the same time.

At approximately 3:00 a.m. on January 25, 2010, Officer Patrick Schneider received information via dispatch regarding suspicious circumstances at 608 Dorchester. As he was driving toward the location, he received information that there were four black males kicking in the front door at that address. As he turned onto Dorchester, he saw a vehicle coming toward him. Officer Schneider used his spotlight to illuminate the driver and saw one black male with no passengers. Officer Schneider then used his overhead lights to stop the vehicle. The car was a red 1997 Pontiac Grand Prix driven by Lewis. Lewis was wearing a red sweatshirt or shirt, a ball cap, and charcoal-gray sweat pants.

Officer Lindsay Bowen also received a dispatch about a 911 call from 608 Dorchester on January 25, 2010. Someone had followed the caller home and was kicking in the door. The suspect vehicles were believed to be a red sedan and a black Monte Carlo. Officer Bowen saw a dark-colored Chevy Impala parked on Farnum, east of North Dorchester. She pulled up behind the vehicle, put the spotlight on the vehicle, and walked up to the driver's side. No one was inside the vehicle. As she was looking in the driver's side, a black male, whom she identified as Sanford, was walking toward her. Officer Bowen ordered him to come to the car and put his hands on the hood. Sanford said that it was his vehicle. She detained him and placed him in the

back of her patrol car. She then turned him over to Officer Kenneth Spencer. She believed that Sanford was wearing a dark-colored hoodie, but was not certain.

Officer Spencer also received a dispatch regarding 608 North Dorchester on January 25, 2010. He parked a few houses down, walked toward the address, and heard a female voice screaming from inside the house. He began running toward the house, and two other officers began entering the house. Officer Spencer learned that four males had fled the house out the side door, so he went to the side door. The door was open, and there were muddy boot prints or scuff marks on the door. It appeared that the door had been kicked in, and there was damage to the door frame. He also saw mud and wetness on the threshold going into the kitchen. He saw one clear wet boot print going into the house on the concrete threshold. Officer Spencer testified that the boot pattern in People's Proposed Exhibit 17 was similar to the print he saw. (People's Proposed Exhibit 17 was later identified as a photograph of the bottom of Lester's boots.) Officer Spencer heard a neighbor yell that he had heard the noise and saw someone jump the fence into his yard and travel east. Officer Spencer went to the front of the house and met Officer Bowen, who indicated that she had stopped a black male. Officer Spencer looked inside the dark green Chevy Impala and saw a fresh, muddy boot print on the passenger floorboard that "matched exactly" the print he had seen on the threshold. Officer Spencer testified that the person he took from Officer Bowen's car was Sanford. Officer Spencer patted down Sanford and felt a soft object in his front pocket; Sanford said the object was his hat. However, during booking, Officer Spencer discovered that it was a cold-weather mask.

Sergeant David Szlezynsier was also dispatched to 608 North Dorchester on January 25, 2010. Sergeant Szlezynsier tried to photograph the side entry of 608 North Dorchester, but did not see any footprints on the ground. He also photographed the front passenger floorboard of a car where the police had located a suspect. After viewing a photograph of the soles of Lester's boots, Sergeant Szlezynsier testified that the pattern on the floorboard was similar to the pattern on Lester's boots. He believed they were a match. Sergeant Szlezynsier also testified that he found a cell phone on the fence line, across from the side door of the house.

When Officer David Koehler, a Madison Heights police officer with the K9 unit, arrived at the residence on 608 Dorchester, he was told that the suspects fled out the side door and through the backyard. Officer Koehler's dog picked up a track and went through the backyard. The dog went through the gate and into a park behind the house. The dog eventually led the officer to the front of the houses on Symes Avenue and alerted on something underneath some bushes in front of a house. The police found hand guns covered up lightly with leaves underneath the bush in the front yard of 607 Symes.

Officer Lawrence Fajardo took the guns that were recovered into evidence. One of the guns was a black "Glock, model 19, nine-millimeter handgun." Another was a silver "Ruger forty-caliber semi-automatic hand gun." Officer Fajardo also recovered two purses from behind the local baseball field.

Because two African American male suspects from the incident were still outstanding, Officer Andrew Izydorek and Officer Crane set up surveillance outside 607 Symes in order to locate the suspects if they returned for the guns. The officers were in unmarked vehicles for several hours. At approximately 12:00 p.m., a vehicle turned onto Symes and was driving very

slowly. As the vehicle passed Officer Izydorek's vehicle, he could see that it was a green Pontiac with four African Americans inside. The driver was an African American female. Officer Crane followed the Pontiac and told Officer Izydorek that the two backseat passengers had gotten out of the vehicle. Officer Crane indicated that he was going to follow the two passengers who had exited.

The Pontiac drove by Officer Izydorek again, and there were only two people inside. Officer Izydorek lost sight of the vehicle, but then saw it going west on Farnum, past Symes, and then lost sight of it again. At that time it was too far away for Officer Izydorek to see how many people were in the car. But approximately 30 seconds later, Officer Izydorek saw a young African American male walking east on Farnum and turn north on Symes. As the man got near 607 Symes, he slowed his walk and stared intently at the house, but he continued to walk by the house. The man walked up to Officer Izydorek's vehicle and tried looking inside. Officer Izydorek was lying down in his vehicle. The man walked past the vehicle, looked like he was talking on his cell phone, turned around, and started walking south. The man looked into Officer Izydorek's vehicle again as he passed. The man then started to walk up the driveway of 607 Symes. Officer Izydorek then saw the man get on his hands and knees and started digging into the bush where the guns had been located. Officer Izydorek identified the man as Leonard.

After Leonard got back up, Officer Izydorek pulled up, turned his flashers on, and Leonard started running toward Farnum. Officer Izydorek followed him in his vehicle, and Leonard ran toward the Pontiac. The Pontiac was parked with the front passenger door open. Officer Izydorek turned his siren on, and vehicle drove off. Leonard continued to run, and when he slid on ice, Officer Izydorek was able to take him into custody. The police also detained the driver of the Pontiac and the other two individuals who had gotten out of the vehicle.

At approximately 12:00 p.m. on January 25, 2010, Officer Kevin Isaacson was working patrol with Officer Hendry. Officer Crane stated via radio that two black males were let off at the intersection of Forest and Stephenson. Officer Isaacson and Officer Hendry responded to the area and saw two black males at the intersection of Gardenia and Stephenson. The officers stopped the individuals. Officer Isaacson identified Lester as one of the individuals. Officer Isaacson identified People's Proposed Exhibit 42 as the boots that Lester was wearing.⁶ The other individual was identified as Holt.

According to the testimony of William Foreman, he worked in the Latent Print Unit and Crime Scene Unit of the Oakland County Sheriff's Forensic Science Laboratory. He processed three vehicles that were in the possession of the Royal Oak Police Department, looking for fingerprints and collecting evidence. He also examined hand guns and a cell phone for fingerprints. Foreman testified that he found nothing in the green Pontiac. In the red Grand Prix, there were disposable cameras and a handwritten map in the trunk. In the green Impala there were two shotgun shells in the glove box; a folding knife and a blue bandana in the center console; green plant material between the front seats; and two black knit caps, a social club

⁶ However, previously, the prosecution stated that People's Exhibit 42 were photographs of the soles of Lester's boots.

invitation, and green plant material in the trunk. He found no identifiable fingerprints in the vehicles, on the hand guns, or on the cell phone.

The trial court ordered two separate juries, one for Lester, and one for Sanford and Leonard. A joint trial of all three codefendants began on August 31, 2010.

After the prosecution rested, Leonard moved for a directed verdict on the charge of assault with intent to commit robbery while armed, Lester asked that the trial court dismiss all four counts, and Sanford moved for a directed verdict on the charges. The trial court denied all three motions.

All three defendants rested. The jury found all three defendants guilty of all four offenses as charged. All three defendants now appeal.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law,⁷ which this Court reviews de novo on appeal.⁸ "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt."⁹

B. LEGAL STANDARDS

"[T]he fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt."¹⁰ The prosecution must prove its theory beyond a reasonable doubt in the face of any contradictory evidence provided by defendant.¹¹ "[T]he prosecutor need not negate every reasonable theory consistent with innocence."¹² "Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime."¹³ "Minimal circumstantial evidence is sufficient to prove an actor's state of mind."¹⁴ "A

⁷ US Const, Am, XIV; Const 1963, art I, § 17; *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁸ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

⁹ *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

¹⁰ *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

¹¹ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

¹² *Id.*

¹³ *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense."¹⁵

A person who aids and abets in the commission of an offense may be prosecuted, indicted, tried, and punished as if he directly committed the offense.¹⁶ "[I]t is unnecessary to charge the defendant in any form other than as a principal."¹⁷ "A defendant may be charged as a principal but convicted as an aider and abettor."¹⁸ The elements of aiding and abetting are:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.^[19]

"[A] defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime."²⁰

C. LEONARD'S IDENTITY

Leonard argues that there was insufficient evidence identifying him as the person who committed the offenses for which the jury convicted him. "[I]dentity is an element of every offense."²¹ Leonard argues that there was no evidence, other than the testimony of the "inherently-incredible" Lewis, placing Leonard at the scene. Leonard further argues that this Court can and should find that Lewis was not credible and should not consider Lewis's testimony in deciding whether there was sufficient evidence to support Leonard's convictions.

But the case that Leonard cites, *People v Lemmon*,²² is not applicable in this case. *Lemmon* involved the standard for granting a new trial.²³ Moreover, the Court in *Lemmon*

¹⁴ *Fennell*, 260 Mich App 270-271.

¹⁵ *Hawkins*, 245 Mich App 458.

¹⁶ MCL 767.39.

¹⁷ *People v Lamson*, 44 Mich App 447, 450; 205 NW2d 189 (1973).

¹⁸ *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615 (2001).

¹⁹ *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citation omitted; internal quotation marks omitted).

²⁰ *Id.* at 14-15.

²¹ *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

²² *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

²³ *Id.* at 647.

explicitly rejected the “thirteenth juror approach,” established in *People v Herbert*.²⁴ Rather, as stated, when reviewing the sufficiency of the evidence, “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”²⁵ Moreover, the court must view the evidence in the light most favorable to the prosecution.²⁶ Therefore, we shall consider the testimony of Lewis when reviewing the sufficiency of the evidence.

Lewis testified that Leonard called him to come pick him up in order to “hit this lick,” which Lewis understood to mean rob someone. When Lewis picked up Leonard, Leonard again stated that they were going to “hit a lick on a stripper.” Lewis testified that, when they arrived at Jennifer Locke’s house, he saw Leonard wearing a mask and holding a gray gun. Lewis saw Holt with a black gun. Lewis saw Leonard and Holt walk toward the back of Locke’s house. Lewis heard the door being kicked in and heard, “Get down.” Locke heard a door being broken in and more than one person in her house. A silver gun and a black gun were found in front of 607 Symes. The next day, the police saw Leonard digging under the bush where the guns were located. Viewing the evidence in the light most favorable to the prosecution and making reasonable inferences and credibility choices in support of the jury verdict,²⁷ there was sufficient evidence identifying Leonard as one of the individuals who committed the crimes. Further, as will be discussed, a rational trier of fact could also find that the other elements of the offenses were proven beyond a reasonable doubt.

D. ASSAULT WITH INTENT TO ROB WHILE ARMED

Sanford, Leonard, and Lester all contend that there was insufficient evidence to convict them of assault with intent to rob while armed.

“The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed.”²⁸ In order for a defendant to be convicted of assault with intent to rob while armed as an aider and abettor, the prosecution is required to prove: (1) that assault with intent to rob while armed was committed by the defendant or another person; (2) that the defendant performed acts or gave encouragement that assisted in the commission of assault with intent to rob while armed; and (3) that the defendant intended the commission of assault with intent to rob while armed or had knowledge that the principal intended its commission at the time he gave aid and encouragement.²⁹

²⁴ *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), overruled *Lemmon*, 456 Mich 625; *Lemmon*, 456 Mich at 640.

²⁵ *Nowack*, 462 Mich at 400.

²⁶ *Id.*

²⁷ See *Nowack*, 462 Mich at 399.

²⁸ *Akins*, 259 Mich App at 554, quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

²⁹ See *Robinson*, 475 Mich at 6.

Alternatively, a defendant could be liable for assault with intent to rob while armed if it was the natural and probable consequence of the crime he intended to aid or abet.³⁰

We conclude that a reasonable trier of fact could find beyond a reasonable doubt that Sanford, Lester, and Leonard committed or aided and abetted in the crime of assault with intent to rob while armed.³¹

First, there was evidence of an assault with force and violence. An assault is defined as either an attempted battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.³² The apprehension-type assault is satisfied when “an actor engages in some form of threatening conduct designed to put another in apprehension of an immediate battery.”³³ “[T]he inquiry turns on what the victim perceived, and whether the apprehension of imminent injury was reasonable.”³⁴ In *Reeves*, the Court concluded “that proof of either an apparent or actual present ability to commit a battery is sufficient to satisfy the assault element of” assault with intent to rob while unarmed.³⁵

Here, there was testimony that one or more individuals kicked in Locke’s door and yelled for everyone to get down. Locke testified that she was terrified. The 911 calls, which were admitted and played at trial, also demonstrated Locke’s fear. Lewis testified that he saw the individuals wearing masks, Sanford and Lester walked toward the front of the house, and Leonard and Holt walked toward the back of the house with guns. Lewis heard the door being kicked in and also heard, “Get down.” A rational trier of fact could find that the individuals involved committed an unlawful act, breaking into Locke’s house, which placed Locke in reasonable apprehension of receiving an immediate battery. Apprehension of an immediate battery is reasonable when the perpetrators kick in the door and command everyone to get down. Moreover, this assault was committed with force and violence because the individuals kicked in the doors and yelled for everyone to get down. The threat of imminent injury has been found sufficient to satisfy the force and violence element of assault with intent to rob while unarmed.³⁶

Second, there was evidence that the individuals had the intent to rob or steal from Locke. Lewis testified that Leonard stated that they were going to “hit this lick,” and “hit a lick,” which Lewis understood to mean rob someone. In addition, Locke’s purse and Brown’s purse were removed from the house and found in a baseball field. Locke’s laptop was also moved from

³⁰ See *id.* at 14-15.

³¹ See *id.* at 6.

³² See *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998) (citation omitted).

³³ *Id.* at 240-241.

³⁴ *Id.* at 244.

³⁵ *Id.* at 245.

³⁶ See *id.* at 245 n 11.

upstairs to downstairs. Thus, it can reasonably be inferred that the intent of the individuals in breaking in was to rob or steal.

Third, there was evidence that Leonard and Holt were armed. Lewis testified that he saw both Leonard and Holt with guns just before he saw them walk toward the back. Guns matching the description given by Lewis were found at 607 Symes. Leonard was apprehended while trying to recover the guns from that location. Thus, it can reasonably be inferred that Leonard and Holt were armed when they entered the house.

Moreover, a reasonable trier of fact could find beyond a reasonable doubt that Sanford, Leonard, and Lester each performed acts or gave encouragement that assisted in the commission of assault with intent to rob while armed. Leonard called Lewis, informing Lewis of the plan. Sanford drove his vehicle, with Lester and Holt inside, and followed Locke to her home. Lewis testified that he believed Holt called Leonard from the other vehicle and directed Leonard and Lewis. Lewis testified that, at Locke's house, he saw Sanford and Lester wearing masks and saw them walk up the street toward the front of the house. Lewis also saw Leonard with a mask and a gun, and saw Leonard walk toward the back of the house. There was also testimony that the print on the boots that Lester was wearing the next day when he was apprehended matched the print going into Locke's house from the side door and on the front door of the house. The print going into the house also matched the one on the floor on the front passenger side of the Impala, where Lewis testified that Lester was sitting. Moreover, Leonard was apprehended while trying to recover the guns the next day. Thus, it can reasonably be inferred that Sanford, Leonard, and Lester each assisted in the assault with intent to rob while armed.

Finally, a reasonable trier of fact could find beyond a reasonable doubt that Sanford, Lester, and Leonard intended the commission of assault with intent to rob while armed or had knowledge that the principal intended its commission at the time he gave aid and encouragement. Lewis testified that when Leonard first called him, Leonard stated that they were going to "hit this lick," or rob someone. According to Locke, that night at Cheetah's Sanford had asked where she lived. Sanford and Lester followed Locke to her home and parked several houses away. Lewis saw Sanford and Lester with a mask, and Sanford also had a mask in his pocket when the police apprehended him. Leonard also wore a mask and had a gun. This evidence shows that when Sanford and Lester provided assistance, they either intended or knew that the other individuals intended to commit assault with intent to rob while armed. It can reasonably be inferred that Sanford and Lester were aware that Leonard and Holt had weapons when they followed Locke to her house. Furthermore, after all the individuals got out of the cars, Lewis saw that Leonard and Holt had weapons. Thus, it can reasonably be inferred that Sanford and Lester saw the weapons at that point and knew Leonard and Holt were armed when they entered the house.

Alternatively, Sanford, Lester, and Leonard are guilty of assault with intent to rob while armed because assault with intent to rob while armed was a natural and probable consequence of the armed robbery, which they intended to aid and abet. As discussed above, it can reasonably be inferred that Sanford and Lester intended to assist in the robbery of Locke and were aware

that Leonard and Holt were armed. An assault with intent to rob while armed “‘might be expected to happen if the occasion should arise’” during the commission of armed robbery.³⁷

In sum, there was sufficient evidence to convict Sanford, Leonard, and Lester of assault with intent to rob while armed.

E. FIRST-DEGREE HOME INVASION

Leonard and Lester contend that there was insufficient evidence to support first-degree home invasion convictions.

The home invasion statute³⁸ provides, in part:

(2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

Therefore, the elements of first-degree home invasion are: (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission, (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault, and (3) the defendant is armed with a dangerous weapon or another person is lawfully present in the dwelling while the defendant is entering, present in, or exiting the dwelling.³⁹

In order for a defendant to be convicted of first-degree home invasion as an aider and abettor, the prosecution was required to prove: (1) that first-degree home invasion was committed by the defendant or another person; (2) that defendant performed acts or gave encouragement that assisted in the commission of first-degree home invasion; and (3) that

³⁷ *Robinson*, 475 Mich at 9, quoting *People v Knapp*, 26 Mich 112, 114 (1872).

³⁸ MCL 750.110a(2).

³⁹ See *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

defendant intended the commission of first-degree home invasion or had knowledge that the principal intended its commission at the time he gave aid and encouragement.⁴⁰

A reasonable trier of fact could find beyond a reasonable doubt that Leonard and Lester committed or aided and abetted in the crime of first-degree home invasion.⁴¹ First, there was evidence that the individuals broke and entered Locke's house. Locke heard a door being broken in and someone yelling for everyone to get down. Brown also heard a door being kicked in and two voices yelling, "ATF. Police. Get down." There was evidence that two doors were kicked in. Moreover, Lewis testified that he saw the individuals wearing masks, saw Sanford and Lester walk toward the front of the house, and saw Leonard and Holt walk toward the back. Lewis also heard the door being kicked in and "Get down."

Second, there was evidence that the individuals committed larceny while present in the dwelling. Locke's and Brown's purses were taken, and Locke's laptop was moved from upstairs to downstairs.

Third, there was evidence that Leonard and Holt were armed with guns when they entered the dwelling and that Locke was lawfully present in the dwelling. Lewis saw Leonard and Holt with hand guns just before they walked toward the back. And Locke was present in the house when she heard the door being kicked in and someone yelling.

Therefore, a reasonable trier of fact could find beyond a reasonable doubt that Leonard and Lester performed acts or gave encouragement that assisted in the commission of first-degree home invasion and that Leonard and Lester intended the commission of first-degree home invasion or had knowledge that the principal intended its commission at the time they gave aid and encouragement.⁴²

Nevertheless, Lester also contends that he abandoned any personal activity in the crimes by leaving the scene as they were occurring. Contrary to Lester's assertion, it is not clear that Lewis was referring to himself and Lester when he stated, "We wasn't going to go in, then [Holt] said, 'Come on. We're going in.' I'm like, 'I ain't going.'" Lewis testified that he did not know if anyone else said "no," but he was the only one who turned around. Lewis also saw Lester walk up to the front of the house with Sanford. There was also testimony that the print on the boots Lester was wearing the next day when he was apprehended matched the print going into Locke's house from the side door and on the front door of the house. The print going into the house also matched the one on the floor on the front passenger side of the Impala, where Lewis testified that Lester was sitting. However, as Lewis drove by and heard the door being kicked in and "Get down," he saw Lester standing on the grass near the street. Despite this testimony, viewing the evidence in the light most favorable to the prosecution,⁴³ and drawing all reasonable

⁴⁰ See *Robinson*, 475 Mich at 6.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *Akins*, 259 Mich App at 554.

inferences and making credibility choices in support of the jury verdict,⁴⁴ a rational trier of fact could find that Lester did not abandon his participation in the crimes.

In sum, there was sufficient evidence to convict Leonard and Lester of first-degree home invasion.

F. CONSPIRACY TO COMMIT ARMED ROBBERY AND FIRST-DEGREE HOME INVASION

Leonard and Lester contend that there was insufficient evidence to support their conspiracy to commit armed robbery and conspiracy to commit first-degree home invasion convictions.

This Court recently defined a conspiracy as follows:

A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. The individuals must specifically intend to combine to pursue the criminal objective, and the offense is complete upon the formation of the agreement. The intent, including knowledge of the intent, must be shared by the individuals. Thus, there must be proof showing that “the parties specifically intended to further, promote, advance, or pursue the unlawful objective.” Direct proof of a conspiracy is not required; rather, “proof may be derived from the circumstances, acts, and conduct of the parties.”^[45]

“Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective.”⁴⁶ The Michigan Supreme Court explained, “although the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that ‘the intended future conduct they . . . agreed upon include[s] all the elements of the substantive crime.’”⁴⁷ Therefore, in the present case, the prosecution was required to prove (1) that defendant intended to combine with others, and (2) that the conspirators intended to accomplish the illegal objective and their intended conduct included the elements of armed robbery and first-degree home invasion.⁴⁸

⁴⁴ *Nowack*, 462 Mich at 400.

⁴⁵ *People v Jackson*, 292 Mich App 583, 588; ___ NW2d ___ (internal citations omitted).

⁴⁶ *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001).

⁴⁷ *Id.* at 629 n 19 (citations omitted).

⁴⁸ See *id.*

The elements of armed robbery⁴⁹ are:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.^[50]

As discussed above, the elements of first-degree home invasion are: (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission, (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault, and (3) the defendant is armed with a dangerous weapon or another person is lawfully present in the dwelling while the defendant is entering, present in, or exiting the dwelling.⁵¹

In the present case, there was sufficient evidence that Leonard and Lester intended to combine with others to engage in conduct that constituted the elements of armed robbery and first-degree home invasion.⁵² Lewis testified that Leonard called him to pick him up at Cheetah's and said they were going to "hit this lick," which Lewis understood to mean rob someone. The individuals followed Locke to her home. According to the testimony of Locke, earlier that night, Sanford had tried to find out where she lived. When they arrived at Locke's house and exited their vehicles, Lewis saw all four individuals, including Leonard and Lester, with masks on and saw Leonard and Holt holding guns. Lewis saw Sanford and Lester walk toward the front of the house and Leonard and Holt walk toward the back, and heard a door being kicked in. As Lewis drove past, he heard, "Get down." There was evidence that both doors were kicked in. Locke and Brown heard people yell for everyone to get down. Locke's and Brown's purses were taken and Locke's laptop was moved from upstairs to downstairs. The circumstances and individuals' conduct show that they specifically intended to combine to break into Locke's house and rob her while armed with guns. Their intended conduct included the elements of armed robbery: (1) using force or violence, assaulting, or putting in fear any person during the course of committing a larceny, and (2) possessing a dangerous weapon during the course of committing the larceny.⁵³ Their intended conduct also included the elements of first-degree home invasion: (1) breaking and entering a dwelling, (2) committing a larceny while entering, present in, or exiting the dwelling, and (3) being armed with a dangerous weapon while

⁴⁹ MCL 750.529.

⁵⁰ *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).

⁵¹ See *Wilder*, 485 Mich at 43.

⁵² See *Mass*, 464 Mich at 629, 629 n 19.

⁵³ See *Chambers*, 277 Mich App at 7.

entering, present in, or exiting the dwelling and another person being lawfully present in the dwelling.⁵⁴

Contrary to Lester's assertions, even though he was not present when Leonard told Lewis of the plan to rob Locke, other circumstantial evidence establishes his knowledge and participation in the plan and that he was not merely present. Lester rode in Sanford's car to the location, he put on a mask, and he walked toward the front of the house. There was also testimony that the print on the boots Lester was wearing the next day when he was apprehended matched the print going into Locke's house from the side door and on the front door of the house. The print going into the house also matched the one on the floor on the front passenger side of the Impala, where Lewis testified that Lester was sitting. Thus, Lester likely kicked in one or both doors and entered the house through the side door. Despite Lewis's testimony that he saw Lester by the street as he drove by, a rational trier of fact could find beyond a reasonable doubt that Lester conspired to commit armed robbery and first-degree home invasion.

Lester additionally contends that, at most, the evidence establishes that he aided and abetted an unarmed robbery. However, the evidence establishes that Lester did more than aid or abet the others in the commission of the robbery and home invasion. The circumstantial evidence establishes that Lester actually agreed to commit the offenses. Further, the fact that two individuals were armed when they arrived at Locke's house together supports the finding that the agreement included the use of weapons.

In sum, there was sufficient evidence to support Leonard and Lester's conspiracy to commit armed robbery and conspiracy to commit first-degree home invasion convictions.

III. SENTENCING

A. STANDARD OF REVIEW

The interpretation and application of the statutory sentencing guidelines are questions of law that are reviewed *de novo*.⁵⁵ "We review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score."⁵⁶ "Scoring decisions for which there is any evidence in support will be upheld."⁵⁷ Alternatively, this Court has stated that it "reviews a trial court's scoring of a sentencing guideline variable for clear error."⁵⁸ "A scoring decision is not clearly erroneous if the record contains 'any evidence in

⁵⁴ See *Wilder*, 485 Mich at 43.

⁵⁵ *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

⁵⁶ *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

⁵⁷ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁵⁸ *People v Lockett*, __ Mich App __; __ NW2d __ (Docket No. 296747, issued January 10, 2012) (slip op at 7), citing *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

support of the decision.”⁵⁹ Defendants are entitled to be sentenced “according to accurately scored guidelines and in reliance on accurate information.”⁶⁰ However, a defendant is only entitled to resentencing if a scoring error altered the appropriate guidelines range.⁶¹

B. SANFORD’S APPEAL

At sentencing, Sanford argued that offense variable (OV) 10 should be scored at zero points. The trial court found that OV 10 was properly scored at 15 points. Sanford also argued that OV 14 should be scored at zero points, rather than 10 points, because there was no group leader. The trial court found that OV 14 was properly scored because Sanford was the leader. The trial court stated that Sanford’s sentencing guidelines range was 126 to 210 months. The trial court sentenced Sanford to 15 to 30 years in prison for the assault with intent to rob while armed and conspiracy to commit armed robbery convictions, and 13 to 20 years in prison for the first-degree home invasion and conspiracy to commit first-degree home invasion convictions.

After filing his appeal with this Court, Sanford moved for resentencing arguing that OV 1 should have been scored zero points, rather than five points, because the victim never saw a weapon. Sanford also moved to set aside the conviction or for a new trial, or for an evidentiary hearing based on ineffective assistance of counsel. At a hearing on Sanford’s motions, he withdrew his motion for a new trial based on ineffective assistance of counsel, stating that he was unable to support the claim. But with regard to the motion for resentencing, Sanford argued that OV 1 should be scored at zero points. Because rescoring that OV alone would not change the guidelines, the trial court denied the motion to resentence, but did not rule on Sanford’s argument. The trial court entered an order denying Sanford’s motion for resentencing.

1. OV 1

Sanford argues that the trial court erred in scoring five points for OV 1. “Offense variable 1 is aggravated use of a weapon.”⁶² Under OV 1, five points are scored if “[a] weapon was displayed or implied.”⁶³ “In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.”⁶⁴

There was evidence to support the scoring of five points for OV 1. Sanford argues that the statute cannot be read to include the situation where defendants display weapons among themselves, but the weapons are not seen by the victim. Sanford argues that the possession of a firearm alone is already covered by OV 2. It is true that, in this case, Locke testified that she

⁵⁹ *Id.* at 7-8, quoting *Hicks*, 259 Mich App at 522.

⁶⁰ *Francisco*, 474 Mich at 89.

⁶¹ *Id.* at 90 n 8.

⁶² MCL 777.31(1).

⁶³ MCL 777.31(1)(e).

⁶⁴ MCL 777.31(2)(b).

never saw a gun. However, the language of MCL 777.31(1)(e) does not require that the victim see the weapon, only that the weapon was displayed or implied. Further, displaying or implying a weapon differs from the mere possession of a weapon, covered by OV 2.⁶⁵ Moreover, OV 2 relates to the type of weapon possessed or involved,⁶⁶ whereas OV 1 relates to the type of use of the weapon.⁶⁷

In this case, there was evidence that Leonard and Holt entered Locke's home while not only in possession of firearms, but while displaying or implying them. Lewis testified that he saw both Leonard and Holt with guns just before they walked toward the back of the house. It can reasonably be inferred that they were displaying those weapons when they entered the house. In addition, Locke testified that when she heard the door breaking in, someone yelled for people to get down. Brown similarly heard two voices yelling, "ATF. Police. Get down." Lewis also heard, "Get down," as he drove past. Yelling for the victims to get down implies a weapon. For these reasons, there is evidence that a weapon was displayed or implied during the crimes. Therefore, the trial court did not abuse its discretion in scoring five points for OV 1.⁶⁸

2. OV 14

Sanford argues that the trial court erred in scoring 10 points for OV 14. "Offense variable 14 is the offender's role."⁶⁹ Under OV 14, 10 points are scored if "[t]he offender was a leader in a multiple offender situation."⁷⁰ In scoring this variable, "[t]he entire criminal transaction should be considered."⁷¹ "If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader."⁷²

In this case, there was evidence to support the trial court's scoring of 10 points for OV 14. According to Locke, Sanford spoke to her at the club that night and tried to find out where she lived. There was also testimony that Sanford was driving the vehicle that followed Locke to her home. Although Sanford did not have a gun, the evidence is sufficient to support the trial court's determination that Sanford was a leader. Therefore, the trial court did not abuse its discretion in scoring 10 points for OV 14.⁷³

⁶⁵ See MCL 777.32.

⁶⁶ MCL 777.32.

⁶⁷ MCL 777.31.

⁶⁸ See *Apgar*, 264 Mich App at 331.

⁶⁹ MCL 777.44(1).

⁷⁰ MCL 777.44(1)(a).

⁷¹ MCL 777.44(2)(a). See also *Apgar*, 264 Mich App at 330.

⁷² MCL 777.44(2)(b).

⁷³ See *Apgar*, 264 Mich App at 331.

C. LEONARD'S APPEAL

At sentencing, Leonard argued that OV 1 and OV 2 should not be scored. The trial court found that OV 1 and OV 2 were properly scored. Leonard also argued that OV 10 should not be scored 15 points. The trial court found that OV 10 was properly scored. Leonard also objected to the scoring of 25 points for OV 13. Leonard further objected to the mention in the PSIR of Locke reporting that she had witnessed a triple shooting at Cheetah's, which was not tied to this case, and asked that the paragraph be stricken. The trial court indicated that it would amend the PSIR. The trial court further indicated that Leonard's sentencing guidelines range was 171 to 356 months. The trial court then sentenced Leonard to 15 to 30 years in prison for each count of which he was convicted.

Leonard contends that the trial court abused its discretion in scoring OVs 1, 2, 10, and 13 because the scoring lacked any support in the record, and that the trial court failed to order that the reference to Locke's witnessing of a triple shooting be stricken from defendant's PSIR. We disagree that that the trial court improperly scored OVs 1, 2, 10, and 13, or that Leonard is entitled to resentencing. However, we remand to amend the PSIR consistent with the trial court's ruling.

1. OV 1 AND OV 2

As stated, "[o]ffense variable 1 is aggravated use of a weapon."⁷⁴ Under OV 1, five points are scored if "[a] weapon was displayed or implied."⁷⁵ "In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points."⁷⁶

"Offense variable 2 is lethal potential of the weapon possessed or used."⁷⁷ Under OV 2, five points are scored if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."⁷⁸ "'Pistol', 'rifle', or 'shotgun' includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle."⁷⁹ "In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points."⁸⁰

⁷⁴ MCL 777.31(1).

⁷⁵ MCL 777.31(1)(e).

⁷⁶ MCL 777.31(2)(b).

⁷⁷ MCL 777.32(1).

⁷⁸ MCL 777.32(1)(d).

⁷⁹ MCL 777.32(3)(c).

⁸⁰ MCL 777.32(2).

Leonard contends that his alleged possession of a weapon occurred the day after the crime occurred, given that Lewis's testimony should be discounted, and that the multiple offenders argument was inapplicable, given the testimony of Locke and the fact that Leonard was arrested the next day. However, we are to uphold scoring decisions if there is any evidence to support them.⁸¹

Lewis's testimony supports the scoring of both OV 1 and OV 2 at five points. Lewis testified that when he and the other men got out of their vehicles, Leonard had a gray gun and Holt had a black gun. Lewis saw Leonard and Holt go toward the back of the house. Lewis heard the door being kicked in and also heard, "Get down." Locke testified that she heard a door break in and someone yell for everyone to get down. A silver hand gun and a black hand gun were found covered up with leaves underneath a bush in front of the house at 607 Symes. The police apprehended Leonard the next day after he was digging in the bush where the guns had been located. Although Locke did not actually see any guns during the occurrence, it can reasonably be inferred that Leonard not only possessed a pistol (OV 2), but that the weapon was displayed or implied during the commission of the offenses (OV 1). Therefore, the trial court properly scored OV 1 and OV 2.

2. OV 10

"Offense variable 10 is exploitation of a vulnerable victim."⁸² Under OV 10, 15 points are scored if "[p]redatory conduct was involved."⁸³ Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization."⁸⁴ Exploit is defined as "to manipulate a victim for selfish or unethical purposes."⁸⁵ Vulnerability is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation."⁸⁶

"'[P]redatory conduct' under the statute is behavior that is predatory in nature, 'precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action . . .'"⁸⁷ The Michigan Supreme Court has held that "*only* genuinely predatory conduct, such as lying in wait and stalking, can justify assessing 15 points for OV 10."⁸⁸ In *Huston*, the Court explained:

⁸¹ See *Lockett*, __ Mich App at __ (slip op at 7-8); *Elliott*, 215 Mich App at 260.

⁸² MCL 777.40(1).

⁸³ MCL 777.40(1)(a).

⁸⁴ MCL 777.40(3)(a).

⁸⁵ MCL 777.40(3)(b).

⁸⁶ MCL 777.40(3)(c).

⁸⁷ *People v Huston*, 489 Mich 451, 463; 802 NW2d 261 (2011), quoting *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008).

⁸⁸ *Huston*, 489 Mich at 462 n 7.

[T]o assess 15 points for OV 10, a court must find that an offender engaged in predatory conduct and exploited a vulnerable victim, using only the statutory definition of “vulnerability.” Again, MCL 777.40(3)(c) defines “vulnerability” as the “readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation,” and such vulnerability may or may not arise from the explicitly listed characteristics, relationships, and circumstances set forth in subdivisions (b) and (c). The statute does not mandate that this “susceptibility” be *inherent* in the victim. Rather, the statutory language allows for susceptibility arising from external circumstances as well.

In the instant case, the victim was alone in the dark, and defendant and his cohort outnumbered her. Moreover, a key fact that greatly increased the “vulnerability” of the victim in these specific circumstances was that defendant and his cohort were lying in wait for her, armed and hidden from her view. By lying in wait for a victim in the manner that defendant did here, he made the victim more “susceptib[le] . . . to injury [or] physical restraint,” i.e., more “vulnerable.” MCL 777.40(3)(c). That is, just as the defendant in [*Apgar*] enhanced the victim’s “vulnerability” by forcing her to smoke marijuana before he sexually assaulted her; and the defendant in [*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), *aff’d* 470 Mich 305 2004)], enhanced the victim’s “vulnerability” by following her and waiting until she pulled into her driveway before striking; and the defendant in [*People v Mahon*, 485 Mich 971; 774 NW2d 691 (2009) (Corrigan, J., concurring)], enhanced the victim’s “vulnerability” by waiting for the bar to close and the victim to exit the bar before he assaulted her, the defendant in the instant case enhanced the victim’s “vulnerability” by lying in wait while armed and hidden from view before he robbed her.^[89]

Leonard contends that not even Lewis’s testimony implicated him as engaging in predatory conduct. At sentencing, Leonard suggested that only Sanford, who spoke with Locke at Cheetah’s, engaged in predatory conduct. However, there was evidence to support the trial court’s scoring 15 points for OV 10. Lewis testified that Leonard called him to come pick him up to “hit this lick,” or rob someone. When Leonard got into Lewis’s car, Lewis also saw Lester, Holt, and Sanford, who had tried to find out where Locke lived. Leonard said they were about to “hit a lick on a stripper.” The individuals in the other vehicle waited for Locke to exit the club and followed her. All of the individuals followed Locke to her house. By targeting Locke, waiting for her, and following her for the purpose of eventually causing her to suffer from an injurious action, the individuals engaged in predatory conduct.⁹⁰

Similar to the victim in *Huston*, Locke was outnumbered by Leonard and the other individuals.⁹¹ The individuals in this case were similarly “lying in wait for her, armed and

⁸⁹ *Id.* at 466-467.

⁹⁰ See *id.* at 463-464.

⁹¹ See *id.* at 466.

hidden from her view.”⁹² By lying in wait for Locke and following her, the individuals increased Locke’s vulnerability.⁹³ Thus, Locke was a vulnerable victim, and Leonard and the other individuals exploited her because they manipulated her for selfish or unethical purposes by lying in wait, following her, and breaking into her house to rob her.⁹⁴ Moreover, “‘predatory conduct’ ‘inherently involves some level of exploitation,’ and thus ‘points may be assessed under OV 10 for exploitation of a vulnerable victim when the defendant has engaged in conduct that is considered predatory under the statute.’”⁹⁵

3. OV 13

“Offense variable 13 is continuing pattern of criminal behavior.”⁹⁶ Under MCL 777.43(1)(c), 25 points are scored if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(2)(a) provides: “For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.”

Leonard contends that the trial court erred in scoring 25 points for OV 13 because the only offense, other than the multiple counts of the subject offense, was assault with intent to do great bodily harm, which was not part of a pattern of felonious criminal activity involving three or more crimes against a person within a period of five years. However, OV 13 expressly provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted.”⁹⁷ It is not entirely clear which crimes the trial court relied on in scoring OV 13, but the assault with intent to commit great bodily harm was mentioned at sentencing.

There was evidence to support the scoring of 25 points for OV 13. Here, Leonard was convicted of assault with intent to rob while armed, first-degree home invasion, conspiracy to commit armed robbery, and conspiracy to commit first-degree home invasion. Assault with intent to rob while armed and first-degree home invasion are crimes against a person.⁹⁸ However, conspiracy is a crime against public safety.⁹⁹ In *People v Pearson*, the Michigan Supreme Court stated that, “this Court recently held for purposes of scoring OV 13, a ‘crime against public safety,’ may not be transformed into a ‘crime against a person,’ in order to

⁹² *Id.*

⁹³ See *id.* at 466-467.

⁹⁴ See *id.* at 467-468.

⁹⁵ *Id.* at 468, quoting *Cannon*, 481 Mich at 159.

⁹⁶ MCL 777.43(1).

⁹⁷ MCL 777.43(2)(a).

⁹⁸ MCL 777.16d; MCL 777.16f.

⁹⁹ *People v Pearson*, 490 Mich 984, 984; 807 NW2d 45 (2012), citing MCL 777.18.

establish a continuing pattern of criminal behavior under OV 13.”¹⁰⁰ Therefore, only Leonard’s assault with intent to rob while armed and first-degree home invasion convictions can be counted to score OV 13.

However, Leonard’s PSIR indicates that he was convicted of assault with intent to do great bodily harm less than murder¹⁰¹ in 2009.¹⁰² Leonard argues that the prosecution failed to provide any evidence of a valid guilty plea to a probation violation and failed to submit a certified copy of Leonard’s conviction for the alleged assault with intent to commit great bodily harm. However, the prosecution has argued only that the assault with intent to commit greatly bodily harm should be counted, not the probation violation. The prosecution appeared to note that Leonard pleaded guilty to a probation violation to suggest that an adjudication of guilt would be entered in Leonard’s assault with intent to commit great bodily harm case. However, OV 13 expressly provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.”¹⁰³ Assault with intent to do great bodily harm is a crime against a person.¹⁰⁴ Therefore, because there were three crimes against a person within a five-year period, OV 13 was properly scored at 25 points, and Leonard is not entitled to resentencing.¹⁰⁵

4. INFORMATION IN PRESENTENCE INVESTIGATION REPORT

MCL 771.14(6) provides:

(6) At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

¹⁰⁰ *Id.*, citing *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011).

¹⁰¹ MCL 750.84.

¹⁰² The “Evaluation and Plan” indicates that Leonard was actually on probation under the Holmes Youthful Trainee Act (HYTA). However, all crimes, regardless of whether the offense resulted in a conviction, are to be counted. MCL 777.43(2)(a).

¹⁰³ MCL 777.43(2)(a).

¹⁰⁴ MCL 777.16d.

¹⁰⁵ See MCL 777.43(1)(c); *Francisco*, 474 Mich at 90 n 8. Leonard’s PSIR also indicates that in 2010 he pleaded to a charge of larceny from a person, MCL 777.357, which is also a crime against a person, MCL 777.16r. The offense was committed in 2009.

At sentencing, Leonard objected to a paragraph in the PSIR indicating that Locke had reported witnessing a triple shooting at Cheetah’s, arguing that there was no testimony tying that incident to this case, arguing that it was prejudicial to Leonard, and asking that the paragraph be stricken. After discussion, defense counsel requested, if the paragraph was included, that “there be something that follows that paragraph that indicates that that had—was not testified to, or related to in any way in this case.” The trial court stated, “I can add that.” The prosecutor interjected, “You can add . . . that the Defendant has not been charged.” The trial court then stated, “I’ll add that.” Leonard claims that the trial court did not have this reference stricken from his PSIR. However, the trial court did not indicate that it would strike the paragraph or reference. Rather, it indicated that it would add something.

The Presentence Investigation New Conviction Update Report, part of the PSIR received by this Court, includes a handwritten note under the paragraph discussing how Locke reported witnessing a triple shooting at Cheetah’s stating, “D has not been charged in that case.” Therefore, the trial court did amend, at least in part, the PSIR to reflect its ruling. However, although the trial court’s ruling is not clear, it appears from the transcript of sentencing that the trial court may have also agreed that it would add to the report that there was no testimony relating that case to this case.

This Court has noted that “[t]he Department of Corrections relies on the information contained in the PSIR to make critical decisions regarding a defendant’s status.”¹⁰⁶ “Therefore, it is imperative that the PSIR accurately reflect the sentencing judge’s determination regarding the information contained in the report.”¹⁰⁷ Because it is unclear whether the PSIR accurately reflects the trial court’s determination,¹⁰⁸ we remand to the trial court to amend the PSIR consistent with its ruling and the amended PSIR should be forwarded to the Department of Corrections.

Leonard, however, is not entitled to resentencing on this ground. “The failure to strike disregarded information can be harmless error.”¹⁰⁹ In this case, the trial court acknowledged that the triple shooting had nothing to do with this case, and explained that Locke was describing why she may have been even more fearful. Thus, it appears from the record that the trial court did not take into account any inaccurate information during sentencing. Because the failure to amend the report did not affect sentencing, any error was harmless.

¹⁰⁶ *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009).

¹⁰⁷ *Id.* at 706.

¹⁰⁸ This is so both because the trial court’s ruling was not clear and because the parties’ arguments suggest that all versions or copies of the PSIR may not have been corrected.

¹⁰⁹ *People v Waclawski*, 286 Mich App 634, 690; 780 NW2d 321 (2009).

D. LESTER'S APPEAL

At sentencing, Lester objected to the scoring of OV 1. Lester also objected to the scoring of OV 10. The trial court appeared to overrule both objections. Lester objected to the scoring of OV 13. The trial court found that OV 13 was properly scored. The trial court also stated that Lester's sentencing guidelines range was 108 to 180 months. The trial court sentenced Lester to 10 to 20 years in prison for each count of which he was convicted.

After filing his appeal with this Court, Lester then moved to remand for resentencing on the grounds that the trial court improperly scored prior record variable (PRV) 6 at 10 points and that his trial counsel was ineffective in failing to object to that scoring. Lester argued that if PRV 6 had been properly scored at zero points, the sentencing guidelines range would have been 81 to 135 months rather than 109 to 180 months.¹¹⁰ The prosecution responded, arguing that Lester was not entitled to resentencing because the PSIR indicated that Lester was on bond for a case in California involving grand larceny and burglary and that the judge in that case had issued a bench warrant for Lester's failure to appear. The prosecution denied that Lester's counsel was ineffective because PRV was properly scored. The prosecution also argued that even if PRV 6 were reduced to zero points, OV 13 could be elevated to 25 points and the sentencing guidelines range would remain the same. This Court denied Lester's motion to remand.¹¹¹

1. INEFFECTIVE ASSISTANCE OF COUNSEL AND PRV 6

Lester contends that his trial counsel was ineffective in failing to object to the trial court's improper scoring of PRV 6 at 10 points.

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing."¹¹² Lester failed to move in the trial court for a new trial or for an evidentiary hearing, although he did file a motion to remand with this Court.¹¹³ Therefore, the issue is not preserved. However, to the extent that this issue involves the scoring of PRV 6, the issue is preserved because Lester raised the issue of the scoring of PRV 6 in his motion to remand.¹¹⁴

¹¹⁰ As noted, according to the trial court, Lester's sentencing guidelines range was 108 to 180 months.

¹¹¹ *People v Lester*, unpublished order of the Court of Appeals, entered May 2, 2011 (Docket No. 301211).

¹¹² *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

¹¹³ This Court denied Lester's motion to remand. *People v Lester*, unpublished order of the Court of Appeals, entered May 2, 2011 (Docket No. 301211).

¹¹⁴ See *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10); MCR 6.429(C).

“Prior record variable 6 is relationship to the criminal justice system.”¹¹⁵ Under PRV 6, 10 points are scored if “[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony.”¹¹⁶

The trial court scored PRV 6 at 10 points. The presentence investigation report (PSIR) indicates that, at the time of the offense, Lester had charges pending for grand theft and burglary in Alumas County Court in California.¹¹⁷ The report specifically indicates that the status at the time of the offense was “On Bond.” Subsequently, the Evaluation and Plan indicates that, with regard to the grand theft and burglary charges, a bench warrant was issued on June 12, 2009, for contempt of court.

Lester contends that his “legal status is not mentioned” in PRV 6. It is clear from the language of PRV 6 that if the defendant is “on bond awaiting adjudication or sentencing for a felony,” then 10 points are scored.¹¹⁸ Thus, Lester apparently contends that a warrant was issued for his arrest for his failure to appear in the case, but he was not “on bond.” However, while challenging the scoring of PRV 6, Lester has not argued that the PSIR is inaccurate. A defendant may challenge the validity of the information contained in the PSIR in a proper motion to remand.¹¹⁹ “There is a presumption that the information contained in the PSIR is accurate unless the defendant raises an effective challenge.”¹²⁰ “When a defendant challenges the accuracy of the information, the defendant bears the burden of going forward with an effective challenge.”¹²¹ Because Lester failed to effectively challenge the accuracy of the information, he failed to overcome the presumption. Accordingly, the PSIR, which states that Lester was “On Bond” for grand theft and burglary, supports the scoring of PRV 6.¹²²

¹¹⁵ MCL 777.56(1).

¹¹⁶ MCL 777.56(1)(c).

¹¹⁷ However, the Evaluation and Plan, part of Lester’s PSIR, subsequently indicates that the arresting agency was the “Plumas County Sheriff Department.”

¹¹⁸ MCL 777.56(1)(c).

¹¹⁹ *People v Lloyd*, 284 Mich App 703, 706; 774 NW2d 347 (2009), citing MCL 777.34(10).

¹²⁰ *Id.* at 705.

¹²¹ *Id.*

¹²² Grand theft is generally punishable as either a misdemeanor or felony. *People v Crossdale*, 27 Cal 4th 408, 410; 39 P3d 1115 (2002). The PSIR does not indicate whether Lester was charged with first or second-degree burglary. First-degree burglary is a felony, while second-degree burglary is punishable as either a felony or misdemeanor. See *People v Thorn*, 176 Cal App 4th 255, 258; 97 Cal Rptr 3d 605 (2009); *People v Moomey*, 194 Cal App 4th 850, 857; 123 Cal Rptr 3d 749 (2011). With regard to grand theft and second-degree burglary, known as “wobblers,” they are felonies when committed and remain felonies unless the defendant is convicted and sentenced to something less than imprisonment in state prison or the crime is otherwise characterized as a misdemeanor. *Moomey*, 194 Cal App 4th at 857.

For the same reasons, Lester has failed to establish a claim of ineffective assistance of counsel. Trial counsel did not object to the scoring of PRV 6. However, presuming the accuracy of the information in the PSIR,¹²³ trial counsel's performance was not deficient in failing to object to the scoring of PRV 6 because the scoring of 10 points was supported by the information in the PSIR. Lester has failed to present any evidence that trial counsel was aware that the PSIR was inaccurate. Moreover, Lester has failed to show that, had trial counsel objected, there is a reasonable probability that the outcome would have been different because Lester has failed to show that the PSIR was inaccurate.

2. OV 13

Lester contends that OV 13 was erroneously scored. However, Lester failed to discuss the issue in his brief, other than in the "Statement of Questions Involved" and heading. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue."¹²⁴ Therefore, this issue is abandoned.

We nevertheless note that OV 13 was not properly scored at 10 points. However, the error did not affect the sentencing guidelines range. As stated, "[o]ffense variable 13 is continuing pattern of criminal behavior."¹²⁵ Under MCL 777.43(1)(d), 10 points are scored if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(2)(a) provides: "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

Here, Lester was convicted of assault with intent to rob while armed, first-degree home invasion, conspiracy to commit armed robbery, and conspiracy to commit first-degree home invasion. It appears that OV 13 was scored based on three of the four offenses in this case. As stated, assault with intent to rob while armed and first-degree home invasion are crimes against a person.¹²⁶ Conspiracy is a crime against public safety.¹²⁷ And the Michigan Supreme Court "recently held for purposes of scoring OV 13, a 'crime against public safety,' may not be transformed into a 'crime against a person,' in order to establish a continuing pattern of criminal behavior under OV 13."¹²⁸ Therefore, only Lester's assault with intent to rob while armed and first-degree home invasion convictions could be counted in scoring OV 13. However, if OV 13 had been scored at zero points, Lester's OV level would have remained the same and Lester's

¹²³ See *Lloyd*, 284 Mich App at 705.

¹²⁴ *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

¹²⁵ MCL 777.43(1).

¹²⁶ MCL 777.16d; MCL 777.16f.

¹²⁷ *Pearson*, 490 Mich at 984, citing MCL 777.18.

¹²⁸ *Id.*

sentencing guidelines range would not have changed.¹²⁹ Therefore, Lester is not entitled to resentencing.¹³⁰

IV. ADDITIONAL ISSUES RAISED IN LEONARD'S APPEAL

A. MOTION TO QUASH

Before trial, Leonard filed a motion to quash the information. In his brief in support of his motion to quash, Leonard argued that there was no testimony that he entered Locke's home or that he participated or assisted in the crimes. In its brief in support of its response, the prosecution argued that a question of fact existed to be decided by a jury and that the magistrate did not abuse its discretion in binding Leonard over as charged. After a hearing, the trial court denied Leonard's motion.

Leonard contends that the trial court erred in denying his motion to quash the information because the prosecution failed to establish a prima facie case for a bindover and the trial court failed to provide a reason for denying Leonard's motion. However, "the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless."¹³¹ As discussed above, there was sufficient evidence to support Leonard's convictions. Therefore, any error in the bindover was harmless.¹³²

Moreover, "[w]hile defendant argues that the trial court committed error by failing to quash the information, where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict."¹³³ "In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'"¹³⁴ The standard for a directed verdict,¹³⁵ mirrors that for the sufficiency of the evidence.¹³⁶ As

¹²⁹ See MCL 777.62. According to the prosecution, Lester's PRV total was 30. It appears that Lester's OV total was 55 points (this is consistent with the unsigned copy of the Sentencing Information Report contained in Lester's PSIR and with a sentencing guidelines range of 108 to 180 months). See MCL 777.62. Therefore, even if reduced by 10 points, Lester's OV total would be 45 points, his OV level would remain at III, and his sentencing guidelines range would remain 108 to 180 months. See MCL 777.62.

¹³⁰ See *Francisco*, 474 Mich at 90 n 8.

¹³¹ *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

¹³² See *id.*

¹³³ *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

¹³⁴ *Id.*, quoting *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

¹³⁵ See *id.*

¹³⁶ See *Akins*, 259 Mich App at 554.

discussed above, a rational trier of fact could have found that the elements of the crimes charged were proved beyond a reasonable doubt. Therefore, the trial court did not err in denying Leonard's motion for a directed verdict on the assault with intent to rob while armed charge or failing to sua sponte direct a verdict of acquittal on the other crimes charged.

B. ADMISSION OF AUDIOTAPE

1. STANDARD OF REVIEW

At trial, Leonard stipulated to the admissibility of Locke's 911 calls without requiring witness testimony to authenticate the tapes. However, later, Leonard's counsel noted that although he did not object to the foundational admissibility of the tape, he objected to its admission under MRE 403. The trial court overruled the objection. The 911 tapes were subsequently played for the jury.

Leonard now contends that the trial court erred in admitting the 911 calls because the probative value of the calls was outweighed by the danger of unfair prejudice. This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion.¹³⁷ "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."¹³⁸

2. LEGAL STANDARDS

MRE 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹³⁹ However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."¹⁴⁰ Prejudice means "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one."¹⁴¹

¹³⁷ *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002).

¹³⁸ *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26.

¹³⁹ MRE 401.

¹⁴⁰ MRE 403.

¹⁴¹ *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

3. APPLYING THE LEGAL STANDARDS

The 911 calls were relevant because they had a tendency to make more probable that the incident occurred in the manner that the witnesses testified by corroborating their testimony. The evidence also had a tendency to make it more probable that an assault occurred by showing Locke's fear.

Although Locke displayed fear during the calls, the probative value of the 911 calls was not substantially outweighed by the danger of unfair prejudice.¹⁴² The danger of unfair prejudice was minimal because the calls did not have a tendency to make the jury decide the case on an improper emotional basis.¹⁴³ There was already testimony regarding the incident and the 911 calls corroborated that testimony and helped establish the element of assault. Therefore, the trial court did not abuse its discretion in admitting the 911 calls. Moreover, even if the trial court abused its discretion in admitting the calls, reversal is not warranted because it is not more probable than not that the error was outcome determinative.¹⁴⁴

C. JURY INSTRUCTION ON ACCESSORY AFTER THE FACT

1. STANDARD OF REVIEW

Leonard contends that the trial court erred in refusing to charge the jury on accessory after the fact. Specifically, Leonard wanted a "separate verdict" on accessory after the fact, which the trial court refused to give. "A claim of instructional error is reviewed de novo."¹⁴⁵ Whether an offense is a necessarily included lesser offense of another offense is a question of law that this Court reviews de novo.¹⁴⁶

2. ANALYSIS

A jury may only be instructed on necessarily included lesser offenses, in which the elements of the lesser offense are completely subsumed in the greater offense that are supported by a rational view of the evidence.¹⁴⁷ A jury may not be instructed on cognate lesser offenses, which are of the same class or category as the greater offense, but contain one or more elements not found in the greater offense.¹⁴⁸

¹⁴² See MRE 403.

¹⁴³ See *Vasher*, 449 Mich at 501.

¹⁴⁴ See *Lukity*, 460 Mich at 495-496.

¹⁴⁵ *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

¹⁴⁶ *Wilder*, 485 Mich at 40.

¹⁴⁷ *People v Brown*, 267 Mich App 141, 146, 146 n 2; 703 NW2d 230 (2005).

¹⁴⁸ *Id.* at 146 n 1.

“An accessory after the fact is one who, with knowledge of the principal’s guilt, renders assistance to hinder the detection, arrest, trial, or punishment of the principal.”¹⁴⁹ Accessory after the fact is not a necessarily included lesser offense of any of the charged offenses in this case because the elements of accessory after the fact are not completely subsumed in any of the charged offenses.¹⁵⁰ Thus, the jury could not be instructed on accessory after the fact.¹⁵¹

Nevertheless, Leonard argues that while accessory after the fact is not a lesser included offense, an instruction on it is not expressly precluded because the rule regarding lesser offenses was designed to protect defendants against surprise charges and, in this case, Leonard requested the charge. However, the Michigan Supreme Court has stated that the end of the cognate regime “returned the charging power to the executive branch.”¹⁵² The Court stated that “[t]he defendant has a right to notice of the charge, while the prosecutor has the right to select the charge and avoid verdicts on extraneous lesser offenses preferred by the defendant.”¹⁵³ Moreover, the rule has been applied where the defendant requested the instruction.¹⁵⁴

Therefore, the trial court did not err in refusing to charge the jury on accessory after the fact.

V. CONCLUSION

There was sufficient evidence to convict Sanford, Leonard, and Lester of assault with intent to rob while armed. Further, there was sufficient evidence to convict Leonard and Lester of first-degree home invasion, conspiracy to commit armed robbery, and conspiracy to commit first-degree home invasion.

The trial court did not err in denying Leonard’s motion for a directed verdict on the assault with intent to rob while armed charge or failing to sua sponte direct a verdict of acquittal on the other crimes charged. The trial court did not abuse its discretion in admitting the 911 calls. And the trial court did not err in refusing to charge the jury on accessory after the fact.

None of the three defendants are entitled to resentencing on any of their sentence scoring challenges. But because it is unclear whether the PSIR accurately reflects the trial court’s determination with respect to Leonard’s challenge to its accuracy, we remand to the trial court to amend the PSIR consistent with its ruling and forward that amended PSIR to the Department of Corrections.

¹⁴⁹ *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006).

¹⁵⁰ See *Brown*, 267 Mich App at 146 n 2.

¹⁵¹ See *id.* at 146.

¹⁵² *People v Nyx*, 479 Mich 112, 124; 734 NW2d 548 (2007).

¹⁵³ *Id.* at 125 n 36, quoting *People v Perry*, 460 Mich 55, 63 n 19; 594 NW2d 477 (1999).

¹⁵⁴ See *Lowery*, 258 Mich App at 172-174.

We affirm Sanford's convictions and sentencing in Docket No. 300852. We also affirm Lester's convictions and sentencing in Docket No. 301211. And we affirm Leonard's convictions and sentencing in Docket No. 301192, but remand for correction of the PSIR. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly