

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
June 26, 2012

v

FRANK DARRELL SHIVLEY,  
Defendant-Appellant.

No. 303323  
Huron Circuit Court  
LC No. 10-004876-FH

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Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted of second-degree home invasion, MCL 750.110a(3), for which the trial court sentenced defendant to serve two to fifteen years' imprisonment, with credit for two days served. He now appeals and we affirm.

Defendant's conviction stems from an incident that arose from a family dispute. Defendant's daughters were angry at Jason Hunt, defendant's ex-wife's boyfriend. Defendant conspired with at least two others to go to Hunt's home, take his gun away, and assault him. Defendant arrived at Hunt's residence in the early morning hours of June 22, 2010. It is undisputed that defendant entered Hunt's dwelling, battered Hunt, and left quickly with Hunt's shotgun.

On appeal, defendant first argues that the trial court erred in refusing to give defendant's requested jury instruction as to the lesser included offense of entering without permission. We disagree.

A trial court's determination as to whether a jury instruction is applicable to the facts of a particular case is reviewed under the abuse of discretion standard. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). In order for reversal to be warranted, a "defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict." *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

Under MCL 768.32(1), a jury instruction may be given with regard to only necessarily lesser included offenses, not with regard to cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be

impossible to commit the greater offense without first having committed the lesser offense.” *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004), judgment vacated on other grounds 479 Mich 853 (2007). Thus, “[a] requested instruction on a necessarily included lesser offense is appropriate ‘if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.’” *Apgar*, 264 Mich App at 326-327, quoting *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Under MCL 750.110a(3), a person is guilty of second-degree home invasion if he or she breaks and enters a dwelling with intent to commit an assault, or commits an assault at any time while entering, present in, or exiting the dwelling. Our Supreme Court has held that entering without permission is a necessarily lesser included offense to first-degree home invasion. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). Similarly, entering without permission must be a lesser included offense to second-degree home invasion, because all elements of entering without permission “are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense.” *Apgar*, 264 Mich App at 326.

Defendant argues that the requested instruction should have been given on the ground that a rational view of the evidence supported it. Defendant argues that the evidence shows that he acted in self-defense, and, therefore, he did not actually commit an assault. However, no rational view of the evidence supports the assertion that defendant did not assault Hunt. “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). “[T]he affirmative defense of self-defense justifies otherwise punishable criminal conduct, usually the killing of another person, ‘if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.’” *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). Further, where the steps taken to defend oneself are reasonable, a defendant has a complete defense to assault. *Dupree*, 486 Mich at 707.

In this case, no rational view of the evidence supports defendant’s argument that he entered the dwelling without intent to commit an assault or did not actually commit one inside. Text message records from the night of the incident show that defendant went to Hunt’s house with the intention of assaulting him, knowing that Hunt possessed a gun he might use against defendant. Defendant taunted Hunt and threatened him in the hours leading up to the confrontation. Defendant enlisted the help of others, purportedly to help take Hunt’s gun away from him. It is undisputed that defendant shoved Hunt into the house, fell on top of him, and repeatedly hit and kicked Hunt while inside. Even if we took at face value defendant’s account that he grabbed the gun and attacked Hunt in self-defense, we note that defendant admitted that he may have hit Hunt once or twice even after the gun was taken away from Hunt and secured. No rational view of the evidence supports the claim that defendant was acting purely in self-defense when he entered the house, beat up Hunt, and left with his gun. The trial court’s decision to refuse to give the requested lesser-included offense instruction was not an abuse of discretion.

Defendant also argues that the trial court erred in scoring offense variable (OV) 2 and prior record variable (PRV) 5. We disagree.

“This Court reviews de novo the application of the sentencing guidelines but reviews a trial court’s scoring of a sentencing variable for an abuse of discretion.” *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010). Further, “this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 2 must be scored at five points where “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). See also *People v Young*, 276 Mich App 446, 451-452; 740 NW2d 347 (2007). Defendant admitted to possessing Hunt’s shotgun as he battered Hunt. Defendant’s brother also testified that defendant possessed the shotgun. Thus, there was evidence supporting the trial court’s finding that defendant possessed the shotgun for purposes of scoring OV 2. The court did not abuse its discretion in scoring OV 2 at five points.

Defendant also argues that the trial court erred in scoring PRV 5, because defendant had only one prior misdemeanor that could be scored. However, assuming without deciding the merit behind this claim, changing the PRV 5 score from five points to two points would not affect the sentencing guidelines range. MCL 777.64. It is well-established that “[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), citing *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Thus, this Court need not address the merits of defendant’s PRV 5 challenge. Defendant is not entitled to resentencing.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ David H. Sawyer  
/s/ Amy Ronayne Krause