

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER ANDREW FOSTER,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 263091

Mecosta Circuit Court

LC No. 04-005368-FC

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84, breaking and entering without the owner's permission, MCL 750.115, assaulting/resisting/obstructing a police officer (two counts), MCL 750.81d(1), and disarming a police officer, MCL 750.479b(2). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On August 27, 2004, defendant was found sleeping inside a building without the owner's permission. After arrest and upon leaving the building with the police, defendant broke free and ran. Officers apprehended defendant, who grabbed onto a chain link fence and refused to go to the ground as ordered. Trooper Travis House attempted to pull defendant off the fence. Defendant fell on his back and Trooper House fell on top of defendant. Trooper House then felt a pull on and a click from his holster and discovered that defendant had removed his gun. Trooper House grabbed hold of the gun by the hammer and the slide in an attempt to prevent its discharge and pointed the gun into the ground. The trooper and defendant engaged in a forceful struggle for control over the gun. Defendant had his hands wrapped around the gun with his finger on the trigger and briefly pointed the gun upward towards the trooper. Defendant tried to bring the gun up towards Trooper House and himself. An officer had to use a taser gun on defendant several times before he ceased struggling and released the gun.

Defendant testified at trial that he slept in the building after being told by a friend that it looked abandoned. Defendant explained that he pulled the gun out of Trooper House's holster in an effort to shoot himself and not the officers because he was on parole at the time and did not want to return to prison.

Defendant first argues on appeal that there was insufficient evidence to establish that he possessed the intent necessary to commit assault with intent to do great bodily harm less than murder.

This Court reviews sufficiency of the evidence challenges in a criminal trial *de novo*. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). Under *de novo* review, a court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

In reviewing the sufficiency of the evidence presented in a criminal trial, an appellate court reviews the evidence to determine whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault); and (2) an intent to do great bodily harm less than murder. MCL 750.84; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

The requisite intent can be proven by inferences from any fact in evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The law takes into consideration the difficulty of proving an actor's state of mind; therefore, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

The prosecution presented circumstantial evidence that defendant had the intent necessary to commit assault with intent to do great bodily harm less than murder. Three officers testified that defendant grabbed Trooper House's gun and at one time pointed it at Trooper House, who thereafter struggled with defendant for control over the weapon. Sergeant Brochette and Trooper House stated that defendant had his finger on the trigger and at one time had the gun pointed at Trooper House. Although defendant testified that he grabbed Trooper House's gun in an effort to kill himself, the evidence when viewed in a light most favorable to the prosecution was sufficient for a rational trier of fact to find that defendant intended to assault Trooper House with an intent to do great bodily harm less than murder.

Defendant next argues that the trial court erroneously sentenced him as fourth habitual offender because he only had one or possibly two prior relevant felony convictions.

Defendant did not challenge the accuracy of the habitual offender notice given to him in the criminal information or the accuracy of the prior convictions listed in that notice in either a written motion to the court or at sentencing. Therefore, this issue was not properly preserved for appeal. Appellate review is limited to determining whether there was plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A person who has been previously convicted of three or more felonies is subject to an increased sentence if convicted of a subsequent felony. MCL 769.12. Multiple convictions

arising out of a single transaction count as a single prior conviction for purposes of the habitual offender statute. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714, 717, 737; 461 NW2d 703 (1990).

Before sentencing a defendant as a habitual offender, the existence of the defendant's prior convictions must be determined by the court at sentencing or at a separate hearing before sentencing. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). The prior conviction may be established by any evidence that is relevant, including information contained in the presentence report. *Id.*

Defendant contends that because the information regarding his three prior felony convictions listed each date of conviction as September 22, 2003, he should only be sentenced as a second habitual offender, MCL 769.10. However, the Presentence Investigation Report included the actual dates on which defendant's prior felony convictions occurred.<sup>1</sup> Thus, the Presentence Investigation Report corrected the conviction dates as listed in the criminal information. In addition, prior convictions for purpose of the habitual offender statute need not be separated by intervening convictions and sentences, and therefore may occur on the same day. *Preuss, supra*, 436 Mich at 731. Consequently, defendant's argument that he was wrongly charged as a fourth habitual offender because his convictions were listed on the same day in the information does not have merit.

Defendant also alleges that two of his three previous felony convictions for breaking and entering were committed on the same day, and therefore constituted a single criminal transaction for purposes of the habitual offender statute. Thus, defendant argues that at most he should have been sentenced as a third habitual offender, MCL 769.11.

The *Preuss* Court discussed the legislative history of the habitual offender statute, suggesting that it was directed at the "repeat" or "persistent" offender—"repeat" suggesting that there is some time interval between crimes and "persistent" suggesting a criminal who continues in his criminal pursuits after some time interval. 436 Mich at 738.

The Presentence Investigation Report states that defendant broke into two separate businesses on January 20, 2002, but does not state the time interval between the two criminal transactions. Defendant presented no evidence to suggest that he committed two acts of the breaking and entering as part of the same criminal transaction. Therefore, the trial court did not err in sentencing defendant as a fourth habitual offender.

Defendant's final argument is that the trial court erroneously scored offense variables 13 and 19, resulting in a higher guidelines range.

The proper interpretation and application of the legislative sentencing guidelines are legal questions that are reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203

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<sup>1</sup> The Presentence Investigation Report listed defendant's date of prior felony convictions as follows: September 24, 2001; September 22, 2003; and September 22, 2003.

(2004). Under de novo review, a court gives no deference to the trial court. *Howard, supra*, 233 Mich App at 54. However, a sentencing court has discretion in determining the number of points to be scored, provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Sentences within the guidelines range shall be affirmed absent an error in scoring the guidelines or inaccurate information relied on in determining the defendant's sentence. *Cox, supra*, 268 Mich App at 454; MCL 769.34(10).

Under MCL 777.49, fifteen points are to be assessed for OV 19 if “[t]he offender used force or the threat of force against another person ... to interfere with, attempt to interfere with, or that results in the interference with the administration of justice...” MCL 777.49(b).

Defendant argues that the Legislature did not intend for a defendant convicted of resisting and obstructing a police officer to be scored under OV 19 for the “interference with the administration of justice” because it would amount to counting behavior inherent in the conviction offense a second time under the offense variables.

The primary goal in construing a statute is to give effect to the intent of the Legislature. *People v Anstey*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2006). The first step is to examine the plain language of the statute. *Id.* If the language of the statute is unambiguous, it is enforced as plainly written. *People v Miller*, 238 Mich App 168, 170; 604 NW2d 781 (1999). The judiciary may not write into a statute a provision not included in its clear language. *People v Burton*, 252 Mich App 130, 135; 651 NW2d 143 (2002). The omission of language from a statutory provision must be considered purposeful. *Id.* at 138. MCL 777.49 contains no instructions on how many points are to be scored if the defendant is convicted of resisting and obstructing a police officer. Had the Legislature intended to issue zero points for situations in which the defendant is convicted of resisting and obstructing a police officer, it could have easily written the statute in this manner. The Legislature did not take that approach, and therefore this Court is without authority to interpret the statute as defendant suggests. The trial court properly scored OV 19 at fifteen points based on evidence that defendant interfered with the administration of justice.

Defendant also contends that OV 13, entitled “continuing pattern of criminal behavior,” was erroneously scored. See MCL 777.43. Because defendant failed to preserve his claim that the sentencing guidelines were incorrectly scored by not raising the issue at sentencing, he must show plain error affecting his substantial rights to avoid forfeiture of this issue. MCR 6.429(C); MCL 769.34(10); *Carines, supra*, 460 Mich at 763.

Twenty-five points are to be scored under OV 13 where “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). “[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Defendant contends that, although he was being sentenced on four counts, they arose from a single transaction and cannot be counted separately.

In *People v Harmon*, 248 Mich App 522, 524, 527-528; 640 NW2d 314 (2001), this Court held that the defendant was properly assessed twenty-five under OV 13 for the defendant's

four concurrent convictions resulting from criminal activity occurring on the same day, pointing to the evidentiary specificity given with regard to each criminal charge. As in *Harmon*, defendant in this case received four concurrent convictions resulting from criminal activity occurring on the same day. Similarly, the prosecution in this case presented specific evidence to support each of four criminal charges brought against defendant. The evidence presented at trial suggested that each criminal charge arose from a separate criminal transaction. The trial court did not err in scoring OV 13 at twenty-five points.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens