STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEE ELLIS,

Defendant-Appellant.

UNPUBLISHED
August 13, 2013

No. 311005
Grand Traverse Circuit Court
LC No. 11-011316-FH

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84.[1] He was sentenced to 3 to 10 years' imprisonment. Defendant appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first contends that the prosecution produced insufficient evidence that he intended to inflict great bodily harm and insufficient evidence to disprove he acted in self-defense. We disagree.

When reviewing a claim of insufficient evidence, this Court must determine whether the evidence, when viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find that all of the elements of the charged crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (emphasis and citations omitted). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d

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[1] Defendant was tried with Christopher Lee Hildreth, whose conviction is before this Court in Docket No. 310553.

499 (2003) (citations and quotations omitted). Moreover, the credibility of witnesses' testimony is a question for the trier of fact that this Court does not resolve anew. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000) (citations omitted). The "jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) (citations omitted).

Once evidence of self-defense is introduced, the prosecution must disprove self-defense beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). Self-defense requires a finding that the defendant "acted intentionally, but that the circumstances justified his actions." *Id*. at 707 (citations omitted). MCL 780.972(2) provides:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

The evidence established that the victim had a verbal altercation with defendant and his codefendant that escalated into a physical fight. The victim threw some punches, but was eventually knocked to the ground. While he was on the ground, both defendant and codefendant punched him multiple times in the face, causing multiple fractures and lacerations. The evidence established that the victim was unconscious or motionless while defendant and codefendant repeatedly punched him. An employee of the bar also testified that codefendant pinned the victim at one point so that he could not defend himself while the assault continued. As a result of the assault, the victim underwent multiple facial reconstructive surgeries in order to avoid life-threatening consequences. A rational jury could have reasonably determined that defendant did not have an honest and reasonable belief that he was in danger of serious injury after the victim was no longer conscious. Accordingly, the evidence was sufficient to enable the jury to reject defendant's claim of self-defense and convict him as charged.

The same evidence also supported a finding that defendant acted with an intent to cause great bodily harm less than murder. Defendant's argument that a fistfight is not the type of act that is expected to result in great bodily harm less than murder is without merit. Although assault with a weapon of some sort might be more likely to result in great bodily harm, a fistfight could also clearly result is such harm. In this case, given the extent of the victim's injuries, it is apparent that a fistfight can result in great bodily harm. That defendant did not say anything while he punched the victim in the face while codefendant prevented the victim from defending himself and while the victim was unconscious demonstrated defendant's intent to inflict great bodily harm.

II. SENTENCING GUIDELINES

Next, defendant challenges the scoring of several sentencing guidelines offense variables (OVs). "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 Harveson*, 291 Mich App 171, 179; 804 NW2d 757 (2010) (citations omitted). "A trial court determines the

sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (citations omitted).

A. OV 3

Defendant first argues that OV 3 was improperly scored. We disagree.

The court must assess 25 points for OV 3 if "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The victim suffered severe injuries. His nose was broken in multiple places and he had fractures to his jaw, cheek bones, nasal bones, and to both the anterior and posterior wall of his front sinus area. He sustained a complete cranial disassociation, i.e., any movement to his face moved his entire facial structure. The victim's plastic surgeon testified that the fracture to the frontal bone exposed the underlying brain structure. The surgeon testified that it was necessary to close the frontal sinus area so that an infection would not move from the victim's nose to his brain. The victim's frontal skull needed to be reconstructed, his anterior jaw and both sides of his face needed to be stabilized and several teeth had to be extracted. Multiple titanium plates and screws were implanted to maintain adequate stabilization while the victim healed. As of the time of trial, there were no plans to remove the titanium plates, and that the repairs were not finished. The court did not err in scoring 25 points for OV 3.

B. OV 4

Next, defendant argues OV 4 was improperly scored at ten points. We agree.

OV 4 addresses psychological injury to a victim. MCL 777.34(1). Under OV 4, the court must assess ten points if "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2). However, "[t]he trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury *occurred* to a victim," and there must be record evidence to support such finding. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012).

The record established that the victim's mental processes have been significantly disturbed in that he cannot remember the assault. However, the disturbance of memory can be considered a symptom of his physical injuries, which were accounted for when the trial court scored OV 3. Further, his victim impact statement did not indicate that he was fearful or angry. It indicated that his life was ruined, but it focused on the physical and financial ramifications of the assault, and the impact it has had on his family and friends. Given the lack of clarifying evidence regarding the victim's memory loss, we conclude that there was not a preponderance of evidence in the record to justify a score of ten points for OV 4. *Osantowski*, 481 Mich 103 at 111. Accordingly, the trial court abused its discretion when it scored OV 4. *Harveson*, 291 Mich App 171 at 179.

C. OV 7

Defendant next argues that OV 7 was improperly scored at 50 points. We disagree.

OV 7 addresses aggravated physical abuse. MCL 777.37(1). Under OV 7, the court must assess 50 points if "a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). To have been subjected to excessive brutality, a victim need not have experienced the abuse; the focus of the variable is on the defendant's conduct, and the infliction of brutality upon an unconscious victim can support an assessment of points for excessive brutality. *People v Kegler*, 268 Mich App 187, 191-192; 706 NW2d 744 (2005).

There is evidence that defendant used excessive brutality. While the victim was on the ground, he was struck repeatedly in the face by defendant and codefendant. At one point, codefendant physically restrained the victim to prevent him from defending himself. The two men continued to strike the victim even after he was unconscious. As a result of the assault, the victim lost several teeth and sustained multiple facial fractures requiring reconstructive surgeries. The titanium plates inserted to stabilize his face are likely permanently and his own tissue was used to cover his brain. This evidence supports a finding that defendant was excessively brutal during the assault. MCL 777.37(1)(a). Accordingly, we detect no error in the trial court's 50 point score for OV 7.

D. OV 10

Finally, we also reject defendant challenge to the scoring of five points for OV 10. OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40(1). Under OV 10, the court must assess five points if "the offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). To "exploit" is to manipulate a victim for selfish or unethical purposes. MCL 777.40(3)(b). "Vulnerability" is the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). In *People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008), our Supreme Court held:

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious.

The mere existence of one or more of the factors described does not automatically establish victim vulnerability, MCL 777.40(2), nor does the absence of a factor preclude a finding of vulnerability. *People v Huston*, 489 Mich 451, 466; 802 NW2d 261 (2011).

In this case, the court concluded that defendant and codefendant "used [the victim's] unconsciousness in order to accomplish this crime." The evidence established that the victim was rendered unconscious during the assault and that defendant and codefendant continued the brutal assault while he was lying helpless on the ground. A bar employee testified that defendant struck the victim probably more than ten times while he was unconscious and that both he and codefendant "were . . . going to work on him." At this point, the victim was completely

vulnerable to attack. Accordingly, the trial court did not err in scoring OV 10.

E. OV 4 ERROR DOES NOT JUSTIFY RESENTENCING

Where 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). Defendant's original OV total was 90 points, placing him in level VI. The removal of ten points for the erroneous OV 4 score reduces the OV total to 80 points, which is still within level VI. See MCL 777.65 (OV level VI is any OV score totaling 75 points or higher). Accordingly, even though the trial court erred when it assessed 10 points for OV 4, resentencing is not required.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra