STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2007
v LAYLA WELLINGTON, Defendant-Appellant.	No. 269570 Wayne Circuit Court LC No. 05-011786-02

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and was sentenced to 16 ½ to 30 years' imprisonment. Defendant appeals as of right. We affirm but remand for corrections to the presentence investigation report ("PSIR") and sentencing information report ("SIR").

This case arose out of a shooting death of Reginald Tidmore on July 17, 2005, involving defendant, her former boyfriend and a female friend. According to statements offered by defendant's former boyfriend, Melvin Baker, who in exchange for his cooperation at trial was allowed to plead guilty to second-degree murder, defendant, Baker and Annette Fulton went looking for someone named "T" in the evening hours of July 17, 2005. According to defendant's statements to police, "T" had hired defendant as a prostitute and sent her to see a man who beat her. At some point during that evening all three of the individuals set up a meeting with "T" and when he arrived, according to defendant, Baker came out from the bushes where he was hiding and shot the victim twice in the head. Baker also wounded defendant and her girlfriend in the melee. According to defendant, she did not know that Baker would "kill" the victim, she assumed he was just there to "…Like beat him up, or shoot him, or something."

Defendant argues on appeal that there was insufficient evidence to convict her of second-degree murder. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The required elements of second-degree murder, MCL 750.317, are a death caused by an act of the defendant, with the intent to kill, to do great bodily harm or with willful and wanton disregard of the natural tendency of such actions undertaken to cause death or great bodily harm.

People v Aldrich, 246 Mich App 101, 123-125; 631 NW2d 67 (2001). The elements necessary to convict under the aiding and abetting statute, MCL 767.39, 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 the aid and encouragement." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

Defendant does not contest the first element of aiding and abetting, namely, that Melvin Baker murdered Reginald Tidmore. Furthermore, she does not contest that she assisted in the commission of the crime when she dropped Baker off so he could hide and parked her car in advance of the crime so that it could be used as a getaway car. In her statement to police, she admitted that she knew Baker's intent was to shoot or beat up the victim, but she contends on appeal that there was insufficient evidence that she had the intent to kill Tidmore or cause him great bodily harm resulting in death. Defendant points to Annette Fulton's testimony that there was no plan between defendant and Baker to hurt or kill Tidmore. However, Fulton testified only that she was not aware of such a plan. Regardless, the finder of fact is responsible for determining whom to believe. *People v Chavies*, 234 Mich App 274, 290; 593 NW2d 655 (1999), overruled on other grounds 475 Mich 245 (2006).

Evidence presented at trial clearly indicates that defendant and Fulton drove Baker to a hiding place so Baker could ambush and assault the victim; defendant gave Baker the advantage over the victim by telling Baker that the victim had a gun, and defendant admits that she knew that Baker was going to beat up or shoot the victim. Consequently, defendant's intent to aid or abet Baker so he could shoot Tidmore was more than sufficient to sustain her conviction of second-degree murder. The natural and probable consequence of shooting is death or great bodily harm. We therefore find that in viewing the evidence in the light most favorable to the prosecution, there was more than sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of second-degree murder.

Next, defendant argues on appeal that the sentencing court agreed with her objections to inaccurate information in the PSIR but failed to make the corrections, and therefore, she is entitled to have a corrected PSIR sent to the MDOC. We were unable to determine the court's actions regarding defendant's issues, but agree that defendant is entitled to have a corrected PSIR sent to the MDOC. This Court reviews preserved claims of inaccurate presentencing information for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). If a sentencing court determines that information contested by a defendant was in fact inaccurate, it must strike the disputed or incorrect information before sending the PSIR to the MDOC. *Spanke*, *supra* at 649; MCL 771.14(6); MCR 6.425(E)(2). If the court fails to make the agreed-upon correction, then upon direction from this Court, the sentencing court must make the correction and send an amended PSIR to the MDOC. *People v Dilling*, 222 Mich App 44, 53-54; 564 NW2d 56 (1997).

At sentencing, defendant contended that her narcotics possession case was dismissed pursuant to MCL 333.7411 and she requested that the PSIR be corrected from an "unknown" discharge date to reflect the dismissal. Defendant pointed out that the change would have an impact on the sentencing guidelines. The sentencing court responded, saying, "All right."

Defendant also objected to a statement incorrectly attributed to her under "Defendant's Description of the Offense" in the PSIR, namely, that "[defendant] further stated that Mr. Baker was supposed to rob the victim." The trial court indicated its agreement by stating, "Oh, right." Then defendant asserted that the statement should be stricken, and the trial court answered, "Okay." Defendant further asserted that the statement should be attributed to Baker, and the court answered, "Okay."

We note that the PSIR included in the lower court record does not match the PSIR the prosecutor submitted on appeal, and the prosecutor's version appears to have been faxed to the prosecutor from the Scott Correctional Facility. The PSIR with the lower court record contains lines drawn through both items defendant contested at sentencing, and the court did not sign the SIR attached to that PSIR. The prosecutor's version of the PSIR does not contain any strikethroughs of the allegedly inaccurate information, and the SIR attached to this PSIR was signed by the court.

Given the discrepancies between these two PSIRs, we are unable to determine the trial court's action regarding defendant's alleged discrepancies on pages three and four of the Presentence Investigation Report. Therefore, we remand to the sentencing court for clarification of the sentencing court's position and direct it to submit a corrected and signed PSIR to the MDOC.

Defendant next argues on appeal that the trial court incorrectly scored PRV-5 at two points and OV-9 at ten points. Unfortunately, we were unable to determine the sentencing court's scores for these variables. Generally, this Court reviews a preserved challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. This Court will uphold the trial court's scoring if there is any evidence in the record to support it. *Spanke*, *supra* at 647. The interpretation of the statutory sentencing guidelines and legal questions presented by application of the guidelines are reviewed de novo.

Defendant asserted at sentencing that PRV-5 should have been scored at zero points rather than two points. Points are scored under PRV-5 if a defendant has one or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications. MCL 777.55(1); *People v Endres*, 269 Mich App 414, 418; 711 NW2d 398 (2006). A misdemeanor conviction or adjudication is counted when scoring PRV-5 "only if it is an offense against a person or property, a controlled substances offense, or a weapon offense." *Id.*; MCL 777.55(2)(a); *Endres*, *supra* at 418.

The issue here is whether defendant had a prior misdemeanor conviction. If so, then the court properly scored PRV-5 at two points, MCL 777.55(1)(e). At sentencing, defendant argued that the PSIR was incorrect because the discharge date for her narcotics possession case was recorded as "unknown." She claimed that the narcotics possession case was dismissed pursuant to MCL 333.7411. The sentencing court's only response was, "All right." On appeal, defendant claims that the court agreed with her and put a line through the word "unknown," and therefore, the court abused its discretion by scoring PRV-5 at two points.

However, as discussed *infra*, the PSIR included with the lower court record does not match the PSIR the prosecutor submitted on appeal. In the PSIR with the lower court record, the trial court drew a line through "unknown" under Discharge Date for the possession of narcotics offense, and added "Successfully completed under 7411." However, the PSIR faxed from the MDOC to the prosecutor does not have a line drawn through "unknown" for the prior offense. On the other hand, the SIR attached to the PSIR included with the lower court record and the SIR attached to the prosecution's appeal both specify PRV-5 at two points.

If the sentencing court agrees that defendant's prior offense was successfully completed under MCL 333.7411, then PRV-5 should have been zero points, and defendant's PRV Level should change from Level B to Level A. MCL 777.61. Defendant's corresponding minimum sentencing guidelines range will change from 180 to 300 months to 162 to 270 months. *Id*. Thus, defendant is entitled to resentencing if the sentencing court determines PRV-5 is zero points. MCL 769.34(10); *Babcock*, *supra* at 272-273. We remand to the sentencing court for clarification of its PRV-5 scoring and direct the sentencing court to send an amended SIR to the MDOC. In addition, if the trial court determines that PRV-5 is zero points then defendant is entitled to resentencing.

Next, defendant argues that the trial court abused its discretion by scoring OV-9 at ten points. Between 10 and 100 points are scored under OV-9, number of victims, if there was more than one victim. MCL 777.39(1); *People v Wilkens*, 267 Mich App 728, 741; 705 NW2d 728 (2005). Ten points are scored if there was more than one but fewer than ten victims. *Id*. A victim is someone "who was placed in danger of injury or loss of life." *Id.*; MCL 777.39(2)(a).

Defendant contends that the court should not count Fulton as a victim since she was an uncharged coconspirator. However, a trial court may use facts that were found by only a preponderance of the evidence to determine a defendant's minimum sentence. *People v Drohan*, 475 Mich 140, 161; 715 NW2d 778 (2006); MCL 769.34(2)(b). Here, since Fulton testified that she was not involved in the plan to injure the victim, and Baker shot Fulton in the course of killing the victim, the court could find by a preponderance of the evidence that Baker placed Fulton in danger of injury or loss of life.

However, the unsigned SIR attached to the PSIR included with the lower court record specifies OV-9 at ten points, while the signed SIR attached to the PSIR included with the prosecutor's brief specifies OV-9 at zero points. Therefore, we remand to the sentencing court for clarification of its OV-9 scoring, noting that defendant's OV Level will not change regardless of whether OV-9 is zero or ten points.

We affirm defendant's conviction but remand to the sentencing court for clarification of its findings regarding the PSIR and SIR, and for possible resentencing, and direct the sentencing court to submit the corrected PSIR to the MDOC. We do not retain jurisdiction.

/s/ William C. Whitbeck, C.J.
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello