

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMANUEL PITTMAN,

Defendant-Appellant.

UNPUBLISHED

April 15, 1997

No. 188432

Oakland Circuit Court

LC No. 94-135731

Before: Reilly, P.J., and Wahls and N.O. Holowka*,JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, breaking and entering of an occupied dwelling with intent to commit murder and/or armed robbery, MCL 750.110; MSA 28.305, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and ineligible felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. According to the amended judgment of sentence, the trial court vacated defendant's sentences for assault with intent to murder and breaking and entering and imposed a sentence of ten to twenty years' imprisonment. The trial court also sentenced defendant to two to five years' imprisonment for the felon in possession conviction and to a consecutive sentence of two years' imprisonment for each felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions arose out of a shooting incident that occurred on the night of September 30, 1994. On that night, a man kicked in the front door of a house in Pontiac and fired shots into the house from the inside of the doorway. The victim returned fire on the perpetrator and saw him exit the house. More shots were fired from the side of the house, and the victim again returned fire. Police officers in the area heard rapid gunfire and proceeded in the direction of the victim's house. They observed a man, later identified as defendant, standing in the vicinity of the house. He began running in an eastbound direction. The police pursued him to an apartment building and saw him enter a rear

* Circuit judge, sitting on the Court of Appeals by assignment.

stairwell. Eventually the police apprehended defendant and discovered a nine millimeter gun in close proximity to the rear of the apartment building. A police officer opined that the gun's position and condition was consistent with having been thrown from a height. While in custody, defendant confessed his involvement in the shooting incident to two police officers. He told the first officer that they went to the house to steal drugs, but he did not shoot his gun and only acted as "a look-out man." Later, while seated in the patrol car, defendant attracted another officer's attention and again admitted to acting as a "look-out" in the incident. He also confessed to the second officer that he ran and threw away his gun upon seeing the police.

Defendant first argues that the evidence presented at trial was legally insufficient to support his convictions. We disagree.

Defendant only challenges his involvement in the crime, not whether the prosecution proved the elements of the crimes. Defendant contends that the only evidence linking him to the crime was the testimony of the officers, which was incredible given the circumstances. Two police officers testified that defendant confessed his involvement in the crime after he was apprehended. This Court will rarely overturn a conviction on the ground that the witnesses' testimony was not credible, *People v Crump*, 216 Mich App 210, 215-216; 549 NW2d 36 (1996), and we decline to do so here. In addition to defendant's confessions to the police, there was other evidence which could give rise to a reasonable inference that defendant was involved in the crime. Defendant was observed running from the area of the crime, was pursued by the police, and a gun was discovered near the apartment building where defendant was apprehended. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a reasonable jury could find that defendant knowingly acted as a "look-out," and that this assisted in the commission of the crimes of assault with intent to murder and breaking and entering an occupied dwelling with intent to commit a felony. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Therefore, we find that there was sufficient evidence to support defendant's convictions.

Next, defendant argues that because the trial court erred when it scored offense variables one and seven, defendant's sentence was based on an improper sentencing guidelines' range. We find that defendant's argument is without merit. It is inappropriate to consider the sentencing guidelines when reviewing defendant's sentence because he was sentenced as an habitual offender. *People v Haacke*, 217 Mich App 434, 437; 553 NW2d 15 (1996). Therefore, any error was harmless.

Finally, defendant argues that his sentences violate the principle of proportionality. This Court reviews the trial court's sentencing decision for an abuse of discretion. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). When defendant has been sentenced as an habitual offender, this Court still uses the abuse of discretion standard of review, but the sentencing guidelines do not play any role in determining whether the trial court abused its discretion. *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996).

Before imposing sentence, the trial court indicated that it was considering the nature of defendant's previous contacts with the criminal justice system, including the fact that defendant was on

probation at the time of the instant offense, and the fact that it was “necessary to punish [defendant] and to protect society.” We believe that defendant’s ten- to twenty-year sentence was proportionate to the serious, violent offenses for which he was convicted and also to defendant’s criminal history. Therefore, the trial court did not abuse its discretion.

Furthermore, the trial court did not abuse its discretion in imposing two two-year sentences on defendant for his felony-firearm convictions and the two- to five-year sentence for the felon in possession conviction. The felony-firearm statute imposes a mandatory two-year sentence. MCL 750.227b; MSA 28.424(2). Moreover, the trial court did not exceed the five-year sentence provided in the felon in possession statute. MCL 750.224f(3); MSA 28.421(6)(3). Because each of the sentences imposed was proportionate, the fact that the sentences are to be served consecutively has no effect on proportionality. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994).

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick O. Holowka