

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY L. COLEMAN,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 234927

Wayne Circuit Court

LC No. 00-008784

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and was sentenced to 45 months' to 15 years' imprisonment. Defendant appeals as of right. We affirm.

On March 25, 2000, the complainant was working as a cashier at a K-Mart in Detroit when defendant brought a case of pop and a bag of nuts to her lane. After leaving to pick up a third item, defendant returned to the complainant's lane, but approached her on the wrong side. Defendant gave her a dollar to buy a bag of porkrinds. As the complainant opened the register, defendant showed her a gun which was tucked inside a magazine he was carrying. The complainant promptly walked away. A fingerprint lifted from the case of pop matched defendant's left ring finger.

A security tape recorded the incident, and showed defendant robbing the cash register. Defendant was located in the parking lot by a security employee and was seen getting into a car. The employee wrote down the car's description and license plate number. This information and the security videotape were turned over to the police. The owner of the car was located and when the police went to the residence, they observed a car in the garage. The license plate number of the car in the garage matched the one given to the police by the security employee. When the police knocked on the door to the residence, defendant answered. Defendant was arrested, and charged with armed robbery and felony firearm, but was only convicted of armed robbery.

Defendant argues that the evidence was insufficient to support the charge of felony firearm, and the trial court's failure to direct a verdict of acquittal upon its own motion, allowing the jury to consider this charge, was error requiring reversal. We disagree because, even if a motion for directed verdict had been made, the charge was properly before the jury.

When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The offense felony firearm is committed when a defendant possesses a firearm while committing or attempting to commit a felony. MCL 750.227b. The complainant testified that defendant opened a magazine he was carrying and in it she saw a gun. When questioned further, she stated she was certain the object was a gun. Immediately thereafter, defendant robbed the cash register. Viewing this evidence in the light most favorable to the prosecution, we hold that a reasonable trier of fact could conclude beyond a reasonable doubt that defendant possessed a gun in the commission of a felony.

Defendant also argues that he is entitled to resentencing because the trial court erred in scoring offense variables 1 and 2. Again, we disagree. This Court will uphold a trial court's scoring of the statutory sentencing guidelines variables if there is any evidence to support it. *People v Elliott*, 215 Mich App 259, 261-262; 544 NW2d 748 (1996).

In scoring fifteen points on OV 1, aggravated use of a weapon, the trial court stated, "Remembering the [security] video and the way that the object was displayed, it was pointed towards her, at or towards her." Our Supreme Court has indicated that the appellant bears the burden of presenting the reviewing court with a record that allows proper review. See *Kailimai v Firestone Tire & Rubber Co*, 398 Mich 230, 233; 247 NW2d 295 (1976). Also, the party seeking reversal on appeal has the burden of providing the reviewing court with a record which establishes the factual basis underlying his argument. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). While defendant provided this Court with the trial transcripts, defendant failed to include the security videotape in the appellate record. We hold that because the record before us provides no basis to determine if the trial court erred, defendant has waived review of this issue.

OV 2, lethal potential of weapon possessed, provides in pertinent part that five points should be scored when "[t]he offender possess a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(c). Defendant asserts that because he was acquitted of felony firearm, the jury decided there was no weapon and therefore, the trial court could not consider any evidence that indicated that he had a weapon. However, the jury did find defendant guilty of armed robbery. One element of this crime is that the defendant is armed with a weapon. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Therefore, the jury did determine that defendant had a weapon.

Regardless, this point is irrelevant because a trial court may consider the facts underlying uncharged offenses, pending charges, and acquittals. *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). The complainant testified to

defendant's possession of a gun. Therefore, we hold that there was evidence to support defendant's OV 2 score.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder