

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TARALE SHANTE DUNCAN,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2004

No. 247617

Ingham Circuit Court

LC No. 02-001190-FC

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of armed robbery, MCL 750.529, and felonious assault, MCL 750.82. Defendant was sentenced to concurrent sentences of twelve to eighteen years' imprisonment for the armed robbery conviction and two to four years' imprisonment for the felonious assault conviction. We affirm.

I

This case stems from an armed robbery in November 2002 in which defendant allegedly approached a female as she left a Lansing Township convenience store and took her purse at gunpoint. Another male customer heard the commotion and heard the victim scream that she had been robbed. He chased after defendant, who turned around, made a threatening remark, and pointed a pistol at the pursuer. A female who was in the store parking lot also witnessed the robbery, saw the male customer pursue defendant, and then return to the parking lot. She drove on the nearby streets in her car, encountered defendant, who ran in front of her car, and then asked her whether she had reported him to the police. The female witness also saw a gun in defendant's hand. Defendant was later tracked to a vacant house where he was hiding in the attic and was apprehended.

Police officers recovered the robbery victim's social security card and a telephone calling card from her purse in the attic where they found defendant. Articles of clothing found in the house included a hat identified by witnesses as matching the hat defendant wore the day of the robbery. After defendant was apprehended, the police found a car loaned to defendant by his girlfriend, parked in the convenience store lot.

## II

Defendant argues that the trial court committed error requiring reversal when, during jury deliberations, the court responded to a jury question by rereading the instruction for felonious assault rather than answering the jury's question.<sup>1</sup> Defendant affirmatively agreed to a rereading of the jury instruction in response to the jury's question and therefore waived any claim of error on this issue. *People v Carter*, 462 Mich 206, 215-216, 219; 612 NW2d 144 (2000); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Because defendant waived this issue, there is no error to review. *Id.*

Defendant is incorrect that the plain error standard of review, generally applied to forfeited issues, applies in this circumstance. Defendant did not merely fail to object to the instruction. Defendant initially requested that the instruction be reread in response to the jury's question. The trial court considered whether the question should be answered directly, but subsequently decided merely to reread the instruction. Defendant agreed with the court's decision. The issue is therefore one of waiver, rather than forfeiture. *Carter, supra* at 215-216; *Hall, supra* at 678 n 1.

## III

Defendant argues that he is entitled to resentencing because the court improperly factored the use of a gun into the scoring, contrary to the jury's determination that defendant did not have a gun, in that the jury acquitted defendant of the felony-firearm<sup>2</sup> charge. Specifically, defendant argues that the court improperly scored OV 1, "aggravated use of a weapon," and OV 2, "lethal potential of weapon possessed," which resulted in a substantial increase in the sentencing guidelines range and likely increased defendant's sentence.

The sentencing court has discretion in determining the number of points to be scored under the guidelines provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring decision will be upheld if there is any evidence to support it. *Hornsby, supra* at 468.

We find no error to warrant resentencing. The record supports the court's consideration of the use of a gun. The armed robbery victim testified that she was familiar with guns, that defendant had a black handgun, that she saw only approximately two inches of the barrel because the gun was covered with a white cloth, and that the inside of the barrel appeared to be round. An eyewitness testified that she saw the robbery, that defendant ran in front of her car and talked with her, and that he had a gun covered with a white cloth, which exposed three to four inches of

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<sup>1</sup> The jury asked whether an item resembling a gun meets the definition of handgun under the felonious assault instruction, if perceived as real by the victim.

<sup>2</sup> Possession of a firearm during commission of a felony, MCL 750.227b.

a black barrel. The felonious assault victim testified that defendant pointed a pistol at his chest and that he saw only the black barrel because the pistol was covered with a white cloth.

The evidence supported the court's scoring decision. Contrary to defendant's argument, the court did not make an independent finding of guilt on the felony-firearm charge and sentence defendant on the basis of that finding. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995); *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). The scoring of the guidelines need not be consistent with the jury verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grds 469 Mich 415; 670 NW2d 655 (2003). The court properly considered evidence of the gun presented at trial. *Shavers, supra* at 393-394; *Perez, supra* at 712.

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio