

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE ROBINSON, a/k/a MARCUS HILL,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2005

No. 254385

Wayne Circuit Court

LC No. 03-010161-01

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

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of armed robbery, MCL 750.529. He was sentenced to two concurrent terms of fifty-one months to sixteen years in prison. We affirm defendant's convictions, but remand for resentencing.

The two robbery victims testified that defendant approached them in their car and robbed them at gunpoint. One victim testified that she was certain that defendant had a real gun, while the other victim acknowledged the possibility that the gun might have been a toy. A defense witness testified that defendant had only a toy gun on the day of the robbery. The trial court found defendant guilty of two counts of armed robbery, but acquitted him of the additional charge of possessing a firearm during the commission of a felony, MCL 750.227b.

Defendant challenges the trial court's decision to allow a police officer to testify that he was riding in the back seat of a stolen vehicle when he was arrested. Defendant asserts that this evidence was inadmissible under MRE 404(b). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). MRE 404(b) prohibits evidence of prior bad acts to prove a person's character, but permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. The evidence must be offered under something other than a character or propensity theory, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Here, the evidence that defendant was riding in a stolen vehicle was not offered to prove his character or propensity, but to explain why officers in a different city apprehended him and searched the vehicle. Further, because the evidence showed only that defendant was riding in the

vehicle, not that he knew it was stolen or was involved in its theft, it was not unduly prejudicial under MRE 403. Any risk of unfair prejudice was also minimized because this was a bench trial. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (holding that a judge's understanding of the law enables him to ignore errors and decide a case solely on the properly admitted evidence). The trial court did not abuse its discretion in allowing the evidence.

Defendant next argues that the trial court erred in scoring offense variables 1 and 2 of the sentencing guidelines. We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring error is harmless if it does not affect the applicable sentencing guidelines range. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

At trial, the trial court acquitted defendant of the felony-firearm charge because it was not persuaded that he used a real gun during the robbery. At sentencing, however, the trial court scored ten points for OV 1 (aggravated use of a weapon), relying on the testimony of one of the victims that defendant touched her temple with a "gun." Ten points are to be scored where "[t]he victim was touched by any other type of weapon." MCL 777.31(1)(d). Conversely, fifteen points are to be scored if a firearm was pointed at or toward a victim. MCL 777.31(1)(c). The statute also provides that five points are to be scored if a weapon was displayed or implied, MCL 777.31(1)(e), or if the defendant "used an object to suggest the presence of a weapon," MCL 777.31(2)(c), but that five points are not to be scored where armed robbery is the sentencing offense, MCL 777.31(2)(e). Because defendant was being sentenced for armed robbery, zero points should have been scored for OV 1 if defendant only suggested the presence of a weapon by using a fake gun during the robbery. Conversely, fifteen points would have been the appropriate score if defendant pointed an actual gun at the victim's temple.

For OV 2 (lethal potential of a weapon), the trial court scored five points, which is the proper score where the defendant possessed or used "a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). The terms "pistol," "rifle," and "shotgun" are defined to include "a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition." MCL 777.32(2)(c). If defendant only possessed a fake gun, which is not a potentially lethal weapon, the appropriate score for OV 2 would be zero.

Neither statute defines "firearm," but MCL 8.3t provides that the word "firearm," unless otherwise defined in a statute, "shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion," except for certain BB guns. Thus, a fake gun would not qualify as a firearm for purposes of OV 1 or OV 2.

Defendant argues that the trial court's scoring decisions for OV 1 and OV 2 are inconsistent with its finding that he was not guilty of felony-firearm. But this argument ignores that a trial court's factual findings for purposes of sentencing are not subject to the same beyond a reasonable doubt standard required for a conviction. Rather, factual support for a guidelines scoring decision need only be established by a preponderance of the evidence. *People v Perez*,

255 Mich App 703, 713; 662 NW2d 446, vacated in part on other grounds 469 Mich 415, 421; 670 NW2d 655 (2003). In this case, however, the trial court's scoring decisions for OV 1 and OV 2 are inconsistent, and the factual basis for its decisions is not clear. The trial court's scoring of five points for OV 2 indicates that it found that defendant possessed a pistol or other firearm that fires fixed ammunition. Conversely, the trial court's scoring of OV 1 suggests that it did not find that defendant pointed an actual firearm at the victim, otherwise the appropriate score would have been fifteen points.

If the trial court found by a preponderance of the evidence that defendant possessed or used an actual firearm during the robberies, OV 2 properly would be scored at five points, notwithstanding defendant's acquittal of felony-firearm. Additionally, fifteen points would be the appropriate score for OV 1, given the court's finding that defendant pointed the gun at the victim's temple. On the other hand, if the trial court failed to find by a preponderance of the evidence that defendant possessed or used an actual firearm, but instead only used a fake gun to suggest a firearm, it should have scored zero points for both OV 1 and OV 2.

Because it is unclear whether the trial court, using the appropriate standard of proof, found that defendant used a real gun or a fake gun, and because a scoring error involving both OV 1 and OV 2 would affect defendant's applicable sentencing guidelines range, we remand for resentencing in accordance with this opinion. On resentencing, the trial court shall determine by a preponderance of the evidence whether defendant used a real gun or a fake gun during the offense and score both OV 1 and OV 2 consistent with this determination.

Defendant also argues that the trial court erred in scoring five points for OV 10 (exploitation of vulnerable victim). We disagree. Five points are scored for this variable when the defendant exploits a victim by his difference in strength. MCL 777.40(1)(c). The trial court cited the victims' testimony that defendant wrestled open the car door when one of the victims tried to shut it. This was sufficient to support the trial court's determination that defendant exploited a physically weaker victim.

We affirm in part and remand for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Janet T. Neff  
/s/ Pat M. Donofrio