

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN LESLIE HORTON, JR.,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2007

No. 271904

Ingham Circuit Court

LC No. 06-000142-FH

Before: Zahra, P.J. and White and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence of 2 ½ to ten years in prison imposed on his jury conviction of felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant was charged with two counts of felonious assault, MCL 750.82, one count of felon in possession of a firearm, and one count of possession of a firearm during the commission of a felony, MCL 750.227b, in connection with an incident in which he entered an apartment occupied by Robin Gallagher and Danielle Newsom. The women testified that defendant, who was an acquaintance of Newsom, pointed a gun at them during and after the time he attempted to sexually assault Newsom. The jury acquitted defendant of the felonious assault charges, but convicted him of felon in possession of a firearm and felony-firearm.

The sentencing guidelines for the offense of felon in possession of a firearm, as initially scored, provided for a minimum term range of nineteen to seventy-six months. At sentencing, defendant objected to the scoring of Offense Variable (OV) 1, MCL 777.31, aggravated use of weapon, at 15 points for pointing a firearm at a victim. Defendant argued that this scoring was improper because he had been acquitted of both counts of felonious assault. The trial court rejected the challenge, noting that both Gallagher and Newsom testified that defendant displayed a firearm and pointed it at them. The revised sentencing guidelines recommended a minimum term range of 14 to 58 months.<sup>1</sup> The trial court sentenced defendant as a fourth habitual

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<sup>1</sup> The trial court reduced the scoring of OV 12, MCL 777.42, contemporaneous felonious criminal acts, from five points to one point at defendant's request.

offender, MCL 769.12, to two and one-half to ten years in prison for felon in possession of a firearm, and to a consecutive two-year term for felony-firearm.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether the court properly exercised its discretion and whether the evidence supports the scoring decisions. We review the trial court's findings of fact for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399; 702 NW2d 530 (2005).

Defendant argues that the trial court abused its discretion by scoring OV 1 at 15 points. Defendant emphasizes that he was acquitted of the charges of felonious assault, and contends that the trial court's use of evidence that the jury rejected deprived him of the right to due process. We disagree.

The scoring of OV 1 at 15 points is proper if the evidence established that the defendant pointed a firearm "at or toward" the victim. MCL 777.31(1)(c). A fact can be established for the purposes of guidelines calculation by a preponderance of the evidence, and need not be established at trial beyond a reasonable doubt. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446, vacated in part on other grounds 469 Mich 415; 670 NW2d 655 (2003). The fact that a defendant was not convicted by proof beyond a reasonable doubt does not mean that he cannot be found by a preponderance of the evidence to have committed the same conduct. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). The trial court did not clearly err in finding that the testimony given by Gallagher and Newsom established by a preponderance of the evidence that defendant pointed a firearm at them. *Houston, supra*. The trial court did not abuse its discretion by scoring OV 1 at 15 points. *Hornsby, supra*. Defendant is not entitled to resentencing. MCL 769.34(10).

Affirmed.

/s/ Brian K. Zahra  
/s/ Helene N. White  
/s/ Peter D. O'Connell