

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDUARDO PELLOTT,

Defendant-Appellant.

UNPUBLISHED

October 23, 2007

No. 272250

Wayne Circuit Court

LC No. 06-000475-01

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). He was acquitted of additional charges of felon in possession of a firearm, MCL 750.224f, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 81 to 180 months for the armed robbery conviction and 81 months to 20 years for the home invasion conviction. He appeals as of right. We affirm defendant's convictions and sentences but remand for further proceedings regarding correction of the presentence investigation report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court impermissibly rendered an inconsistent verdict by convicting him of armed robbery while acquitting him of other charges, including felony-firearm and felon in possession of a firearm.

A jury may render apparently illogical or inconsistent verdicts, including convicting a defendant of felony-firearm while acquitting him of the underlying felony. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983); *People v Lewis*, 415 Mich 443, 452-453; 330 NW2d 16 (1982). However, a trial court sitting as the finder of fact may not enter an inconsistent verdict. *People v Ellis*, 468 Mich 25; 658 NW2d 142 (2003). If the trial court's findings support a conviction and the trial court nevertheless acquits, the improper acquittal cannot be corrected on appeal because of double jeopardy principles. *Id.* However, this Court will not set aside other convictions for which the defendant was found guilty beyond a reasonable doubt and for which there is no factual inconsistency. *Id.*; *People v Smith*, 231 Mich App 50; 585 NW2d 755 (1998).

The trial court's verdict is not factually inconsistent. Felony-firearm and felon in possession of a firearm both require possession of a "firearm," which is defined as a weapon of the type that is designed or intended to propel a dangerous projectile, although it need not be operable. *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006). Felonious assault requires a gun, revolver, pistol, or other dangerous weapon. MCL 750.82. Armed robbery does not require an actual dangerous weapon or firearm; it may be founded on a feigned weapon if the robber simulated a weapon so as to induce the victim to reasonably believe that the robber was armed. MCL 750.529; *People v Taylor*, 245 Mich App 293; 628 NW2d 55 (2001). First-degree home invasion does not require use of a dangerous weapon. The offense requires *either* that "[t]he person is armed with a dangerous weapon" or "[a]nother person is lawfully present in the dwelling." MCL 750.110a. In this case, the information referred to both bases and the evidence at trial showed that another person was lawfully present in the dwelling when the crime was committed. Thus, the trial court could consistently acquit defendant of the offenses that required a firearm or a dangerous weapon, i.e., felony-firearm, felonious assault, and felon in possession, yet still conclude that defendant possessed a feigned weapon that reasonably led the victim to believe that defendant was armed. There is no factual inconsistency, and we will not disturb the verdicts.

Defendant also argues that although the trial court agreed to make several requested corrections to the presentence investigation report (PSIR) at sentencing, those corrections were never made. Defendant does not seek resentencing, but only correction of the PSIR.

MCR 6.425(E)(2) addresses the resolution of challenges to information in the PSIR:

If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

Plaintiff has presented an affidavit and a letter from the Department of Corrections Records Administrator to the prosecutor's office indicating that the PSIR on file with the DOC includes several handwritten corrections, which the letter sets forth. However, these corrections are not reflected in the copy of the PSIR that was provided to appellate defense counsel and which has been submitted on appeal. Even if this Court considers the letter,¹ MCR 6.425(E)(2)(b) states that defendant's attorney must be provided with an opportunity to review

¹ In general, it is impermissible to expand the record on appeal. MCR 7.210(A); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

the corrected report before it is sent to the Department of Corrections. It appears that this procedure was not followed in this case. Accordingly, we direct that a copy of the corrected presentence report that is on file with the Department of Corrections be provided to defense counsel in accordance with MCR 6.425(E)(2), without prejudice to defendant filing an appropriate motion with the trial court if he believes that the corrections do not appropriately resolve the matters challenged at sentencing.

Defendant's convictions are affirmed and the matter is remanded for further proceedings regarding the presentence investigation report. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis