STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2008
v	No. 279741 Macomb Circuit Court
EDDIE LEE FLOYD, Defendant-Appellant.	LC No. 2006-004926-FC

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of 12 to 30 years for the robbery conviction, one to six years each for the assault convictions, and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but vacate the portion of the judgment ordering defendant to pay $2,250 in attorney fees and remand for consideration of defendant's ability to pay attorney fees.

I. Basic Facts

Defendant was convicted of robbing a Murray's Discount Auto store in Warren on the evening of October 12, 2006. A the time of the robbery, the manager and employee DW were stocking and cleaning, while employee ES was in the "cash office" "counting out her till." The manager observed defendant "constantly pacing the back wall." Shortly thereafter, defendant brought a can of WD 40 and other items to the register and asked the manager about ratchets. After walking to the ratchets and having a brief exchange, the manager and defendant returned to the register. As the manager totaled defendant's items, defendant reached into his waistband, brandished a stainless steel semiautomatic gun, pointed it "right in [the manager's] face," and said "you know what this is - - let's start moving." Defendant and the manager walked toward DW and defendant ordered both men to proceed to the office. The manager unlocked the office door with his key and the three men entered. Defendant "shoved" DW to the floor. Defendant told ES not to look at him, pointed the gun at her chest, "grabbed" her shirt, and "threw her onto the floor." Defendant "moved" the gun back to the manager and ordered him to transfer the money from the safe into the two bags defendant had provided. While the manager filled the bags with approximately $3,000, defendant continued to hold the gun and watch all three victims

to ensure they did not move. After the manager gave defendant the bags, defendant ordered the manager to the floor. Defendant asked for the manager's wallet and cell phone, and the manager gave defendant his phone battery. Defendant took the tape from the store's video camera and pulled out the phone.

The police subsequently matched prints taken from a can of WD 40 found at the register and from a phone with defendant's fingerprints. The manager and DW identified defendant from a photo array.

The defense presented a defense of alibi. Defendant presented his girlfriend and sister, who testified that at the time of the robbery, defendant was with them at his mother's house.

II. Motion to Quash the Information

Defendant first argues that the district court abused its discretion in binding him over for trial on two counts of felonious assault. He argues that the evidence presented at the preliminary examination was insufficient to establish that he had the requisite intent because only the store manager testified, and therefore he did not have an opportunity to cross-examine DW and ES. Defendant's motion to quash the information in the circuit court was denied. The circuit court concluded that testimony that defendant pointed a gun at ES and DW three times and ordered them "to stay down" was "enough" to establish probable cause.

Generally, this Court reviews a circuit court's decision to deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). But "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). Here, defendant's argument fails because he does not argue on appeal that the prosecutor presented insufficient evidence at trial to sustain his convictions, and there is no indication that he was otherwise prejudiced by the claimed error. *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). We nonetheless note that, viewed in a light most favorable to the prosecution, sufficient evidence was presented at trial to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the crimes. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). An assault is "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998), lv den 459 Mich 866 (1998).

Defendant's felonious assault convictions arise from his assaults of DW and ES. Evidence was presented that defendant drew a gun, pointed it at the manager's head, and ordered the manager and DW to the cash office. DW testified that as they walked to the office, he was

"afraid" because defendant "had a gun on [him]." While standing behind DW in the office, defendant "told [him] to get on the floor, [and] shoved [him] to the floor." Upon seeing ES in the office, defendant said, "Don't look at me, bitch." Defendant pointed the gun "[r]ight at her chest," "grabbed" her shirt, and "threw [her] to the floor" "[b]y the hair and shoulder." ES "hit the cabinet first, then she landed on the floor." ES testified that she was "fearful because [she] thought [she] was going to die." The manager and DW described ES as "absolutely hysterical," "broke down," crying, "screaming," and "petrified." ES pleaded with defendant not to kill her. Defendant then ordered the manager to withdraw the money from the safe. While the manager followed defendant's order, defendant continued to watch ES and DW while holding the gun. As defendant left, he cautioned the victims not to move and pulled out the phone. This evidence was sufficient to sustain defendant's convictions of felonious assault. Because sufficient evidence at trial supported defendant's convictions and there is no indication that he was otherwise prejudiced by the claimed error, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination.

III. Sentence

A. Scoring of Offense Variables

Defendant also argues that the trial court abused its discretion in scoring offense variables 4 and 9 of the sentencing guidelines. Defendant did not object below to the scoring of OV 4 and 9. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines unless the party raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). However, plain error in the scoring of the guidelines can be raised and corrected on appeal where "the trial court's error resulted in a sentence that was not within the appropriate legislative guidelines range." *People v Kimble*, 252 Mich App 269, 276-277 n 5; 651 NW2d 798 (2002), aff'd 470 Mich 305 (2004).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

The trial court scored ten points for OV 4. Ten points should be scored for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). In the victim's impact statement, ES stated that she "was greatly affected" by the crime, "no longer feels safe at work, nor any place she shops or visits," "is constantly looking over her shoulder and does not leave the house as much[.]" She is no longer employed at Murray's "because she felt uncomfortable and was unable to perform her duties," and "it is a struggle to provide for her to provide for her family." She "is still enrolled in counseling." Because this evidence supports a score of ten points for OV 4, the trial court did not abuse its discretion in scoring OV 4.

The trial court scored ten points for OV 9. MCL 777.39 directs a score of zero points for OV 9 if there are fewer than two victims, and a score of ten points if there are two to nine victims. MCL 777.39(1) and (2). The instructions state that "each person who was placed in danger of physical injury or loss of life or property" is to be counted as a victim. MCL

777.39(2)(a). The evidence showed that the store manager, ES, and DW were present when defendant, armed with a dangerous weapon, robbed the store. Because there were three persons placed in danger of injury, OV 9 was properly scored at ten points.

B. Proportionality

Defendant further argues that he is entitled to resentencing because his sentences for armed robbery and felonious assault are disproportionate. Defendant's sentences of 12 to 30 years' imprisonment for the robbery conviction and one to six years' imprisonment for the felonious assault convictions are at the lower end of the sentencing guidelines ranges of 126 to 262 months and 10 to 23 months, respectively. This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *Kimble*, *supra* at 310-311. On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Therefore, we must affirm his sentences.

C. *Blakely v Washington*

Defendant also argues that he must be resentenced because the facts supporting the trial court's scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

IV. Attorney Fees

Defendant argues that the trial court erroneously ordered him to pay $2,250 in attorney fees without inquiring into his current or future ability to pay. Because defendant failed to challenge the imposition of attorney fees below, we review this unpreserved claim for plain error affecting substantial rights. *Kimble, supra* at 312.

In *People v Dunbar*, 264 Mich App 240, 251-252; 690 NW2d 476 (2004), lv den 473 Mich 881 (2005), the defendant complained that the trial court failed to consider his ability to pay attorney fees before entering an order imposing those costs. The *Dunbar* Court explained:

> The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does

> need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (internal citations omitted; emphasis in original).]

Because defendant failed to challenge the imposition of attorney fees, the sentencing court was not required to make formal findings of fact regarding defendant's financial situation. However, the sentencing court failed to indicate whether it considered defendant's ability to pay. At the sentencing hearing, the court did not refer to the employment and financial sections of defendant's presentence investigation report and made no mention of defendant's potential future ability to pay. Rather, the trial court merely imposed the fees without any discussion. We therefore vacate the portion of the judgment of sentence ordering defendant to pay $2,250 in attorney fees and remand for consideration of defendant's present and future financial circumstances. *Id.* at 255-256. The sentencing court has the discretion to base its decision to award attorney fees on record evidence only and need not conduct a formal evidentiary hearing. *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter