STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 283210 Wayne Circuit Court
MARQUEZ MAURICE GOINS, Defendant-Appellant.	LC No. 07-014043-FC

Before: Whitbeck, P.J., and O'Connell and Owens JJ.

PER CURIAM.

A jury convicted defendant Marquez Goins of armed robbery,[1] assault with a dangerous weapon,[2] and possession of a firearm during the commission of a felony.[3] The trial court sentenced Goins to serve a term of imprisonment of two years for the felony-firearm conviction, consecutive to concurrent terms of 11 to 25 years' imprisonment for armed robbery and 18 months to four years' imprisonment for felonious assault. Goins appeals as of right. We decide this appeal without oral argument pursuant to MCR 7.214(E), and we affirm.

I. Basic Facts And Procedural History

This case arises from events taking place in a parking lot in Detroit in August 2007. Goins and a companion approached a parked car, in which a driver and two passengers were seated. Goins threatened the occupants with a gun, and Goins and his companion took a cellular telephone and various pieces of jewelry from the driver.

The driver shortly thereafter spotted an image on the Internet of Goins wearing some of the driver's jewelry. Another image showed Goins displaying what appeared to be the same weapon that had been used in the robbery. A police witness testified that Goins offered a statement substantially admitting his role in the crime.

[1] MCL 750.529.

[2] MCL 750.82.

[3] MCL 750.227b.

Goins was charged with armed robbery in connection with the driver, and felonious assault in connection with one of the passengers. A charge relating to the other passenger was dropped because that person was not available to testify. Goins now appeals.

II. Jury Instructions

A. Standard Of Review

Goins argues that the trial court erred in sua sponte providing certain jury instructions. We review jury instructions that involve questions of law de novo, but we review a trial court's determination whether an instruction is applicable to the facts of the case for an abuse of discretion.[4] However, defense counsel did not object when the instructions at issue were given, leaving this issue unpreserved. Our review is thus limited to ascertaining whether there was plain error affecting substantial rights.[5] Concerning the latter, this Court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[6]

B. The Language Of The Instruction

Goins takes issue with the following instructions:

> The lawyers['] opening statement was to tell you what they thought the evidence was going to be. And their closing statements were supposed to be what the evidence showed.
>
> Some of their closings was about something that wasn't even admitted into evidence. One such statement was, you know, just so that you don't get confused so that, you know the difference between pontification and evidence. He signed it because he wanted to get out of jail. You didn't hear any testimony about [defendant] signing anything for the purpose of getting out of jail.
>
> And so that's an example of why you don't use what lawyers say. He bought . . . a watch that had been recently stolen. You didn't hear any evidence of that.
>
> So please, you know, lawyers can argue inferences, but what they say isn't evidence and shouldn't be used as evidence. The evidence comes from [the] witness stand, or from the exhibits that have been offered and admitted.

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[4] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[5] *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001), citing *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

[6] *Id*. at 763.

Goins asserts that the challenged instruction was provided in response to defense counsel's closing argument, where counsel spoke of Goins having appeared on the Internet wearing "these particular items that were bought or purchased" from his companion, reminded the jury that the testimony indicated that Goins had not written any part of the police statement attributed to him, and then asserted that Goins had merely signed the statement in hopes of getting out of jail.

C. Supplementing The Standard Instructions

Goins identifies no part of the challenged instruction as an inaccurate statement of the law. Goins protests that the jury had already received the standard instruction to the effect that the comments of the attorneys are not evidence, but cites no authority for the proposition that a trial court must refrain from supplementing standard instructions.

A trial court need not confine itself to standard jury instructions.[7] Further, the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. Accordingly, trial judges may scrutinize them carefully to ensure their accuracy and appropriateness in a given case.[8]

Goins further suggests that the trial court showed some bias, having taken it upon itself to rebut certain argument from the defense. We reject that characterization.

The trial court's decision to emphasize the distinction between evidence and mere commentary did not constitute plain error. Nor did it result in the conviction of an innocent man or throw the integrity of the proceedings into doubt. For these reasons, we reject this claim of error.

III. Guidelines Scoring

A. Standard Of Review

Goins argues that the trial court, over his objection, erroneously assessed 25 points for offense variable (OV) 13 for purposes of sentencing. We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score.[9] We review de novo issues of statutory interpretation.[10]

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[7] *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

[8] *Id.*

[9] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[10] *Id.*

B. Aggravated Assault

Scoring of 25 points under OV 13 is authorized where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[11] The trial court based its scoring decision on the two instant convictions involving two separate victims and on an earlier conviction of aggravated assault. The trial court reasoned that aggravated assault fell within the definition of "felonious criminal activity." However, Goins argues that, because aggravated assault is statutorily described as a misdemeanor,[12] the trial court erred in counting that crime for purposes of OV 13.

MCL 750.81a(1) states:

> Except as otherwise provided in this section, a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a *misdemeanor punishable by imprisonment for not more than 1 year* or a fine of not more than $1,000.00, or both. [Emphasis added.]

The Sentencing Guidelines,[13] including OV 13, are part of the Code of Criminal Procedure.[14] MCL 761.1(g) defines a "felony" for purposes of the Code of Criminal Procedure as a crime "for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year . . . ." Therefore, aggravated assault, the punishment for which is "imprisonment for not more than 1 year," is clearly not a felony as the Code of Criminal Procedure defines it. However, OV 13 does not refer specifically to prior *felonies*, rather it refers to "a pattern of *felonious criminal activity* involving 3 or more crimes against a person." While there is no statutory definition for "felonious criminal activity," Black's Law Dictionary defines "felonious" as, "Of, relating to, or involving a felony."[15] We therefore conclude that the trial court erred in concluding that the misdemeanor offense of aggravated assault fell within the definition of "felonious criminal activity."[16]

Despite the trial court's erroneous interpretation of OV 13, we nevertheless conclude that the trial court did not err in scoring 25 points based on Goins' "pattern of felonious criminal activity involving 3 or more crimes against a person." Here, Goins was charged and convicted of

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[11] MCL 777.43(1)(b).

[12] MCL 750.81a.

[13] MCL 777.11 *et seq*.

[14] MCL 760.1 *et seq*.

[15] Black's Law Dictionary (8th ed), p 651. See *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000) (stating that a court may refer to dictionary definitions to ascertain the precise meaning of a particular undefined term).

[16] We note that the prosecution even admits that there is no "precedential support for the trial court's reading of MCL 777.43 that prior misdemeanor convictions can be counted when determining whether 'a pattern of felonious criminal activity' exists."

two felonies involving two separate victims, the driver and one passenger. However, Goins was also charged with a third felony, assault with a dangerous weapon,[17] against the second passenger who was unavailable to testify.

Under MCL 777.43(2)(a), for purposes of scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction*." (Emphasis added). Therefore, the fact that the third felony charge was dismissed does not necessarily affect its ability to be counted for the purpose of scoring. There need only be record evidence to adequately support the score.[18] The testimony supported that Goins pointed a gun at the second passenger while instructing him to tell the driver to get out of the car. The second passenger also identified Goins from a photo line-up. And, notably, Goins does not dispute any of this testimony. Therefore, we conclude that there was evidence sufficient to support the trial court's scoring of OV 13 at 25 points.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Donald S. Owens

[17] MCL 750.82.

[18] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006); *McLaughlin*, *supra* at 671.