STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 283240 Berrien Circuit Court
QUAN M. COLE, Defendant-Appellant.	LC No. 2007-403353-FH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of marijuana, MCL 333.7403(2)(d). He was acquitted of unlawful restraint, MCL 750.349b, assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 24 to 90 months in prison for the firearm possession conviction, and to a 30-day jail term for the marijuana conviction. Defendant appeals as of right, challenging only the scoring of certain offense variables. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On June 24, 2007, Jenny Thomason and her family were driving along Red Arrow Highway in Berrien County when they observed a woman, who appeared to be "horrified," walking naked along the side of the road. The woman was trembling and trying to cover herself up. There was a minivan parked nearby with a tall man standing between the van and an open driver's side door. The Thomason family ultimately decided to report the matter to the police, and Officer John Chase responded to the call.

According to Officer Chase's trial testimony, when he arrived at the scene, complainant was sitting in the front seat of a minivan, fully clothed, but seemingly in shock. Complainant started responding to questions very quietly but stopped when defendant approached, and she appeared to be in fear. Defendant then became very emotional, "started yelling and screaming, throwing his arms in the hair [sic], I know what I did, I'm going to jail, take me, let's go, let's go, I'm ready to go." Defendant was willingly handcuffed and put in the back of the cruiser, and allegedly consented to a search of the vehicle. Complainant then reported that defendant was her boyfriend and the father of her child, and that they had driven around for hours talking and arguing about their relationship. She stated that at one point defendant was yelling and screaming, pulled over, pointed a revolver at her, and told her to take off her clothes and that he

was going to leave her there. She said she did so, and then got out of the vehicle and started walking. She claimed that he then ordered her back into the car at gunpoint, that she got in and got dressed, and that she saw him put the gun under the floorboard.[1] Officer Chase retrieved a loaded revolver from the van.

At trial, complainant retracted her statement. She claimed that she and defendant had decided to end their relationship, and that defendant asked for the return of all the things he had given her. She said she was angry, high, and had been drinking, and asked defendant to pull over. Complainant claimed she then got out and started walking when defendant again mentioned "his stuff," at which time she removed all of the clothes and jewelry that defendant had given her and threw them at him. She denied that defendant had pointed a gun at her, and claimed she had lied to Officer Chase about defendant having pointed a gun at her because she was upset with him.

Defendant argues that the trial court erred in scoring Offense Variable (OV) 1, MCL 777.31, at 15 points based on a finding that a firearm was pointed at or toward the victim. Further, he argues that OV 12, MCL 777.42, was erroneously scored at ten points for two contemporaneous felonious criminal acts against a person. More particularly, defendant avers that the acts scored were the acts for which he was acquitted.

A trial court's factual findings pertaining to a sentencing determination are reviewed for clear error. MCR 2.613(C). In determining the minimum term of an indeterminate sentence, the trial court may consider facts and circumstances not proven beyond a reasonable doubt. *People v Drohan*, 475 Mich 140, 156; 715 NW2d 778 (2006). Rather, the standard is a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The rules of evidence do not apply, but the defendant must be afforded an adequate opportunity to rebut any matter he believes to be inaccurate. *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008). Moreover, the court may take into account facts underlying an acquittal. *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995). Challenges to the scoring of offense variables are reviewed for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will be upheld if there exists any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

The trial court found it incredible that an adult woman would voluntarily remove all of her clothing and step out of a vehicle on a busy road. Accordingly, the trial court believed that there had been aggravated use of a weapon--pointing a gun at or toward the victim such that she was in fear of an immediate battery. Further, the court found two contemporaneous felonies--unlawful imprisonment and assault with a dangerous weapon. The evidence at trial supported these facts. In finding that these facts were established by complainant's initial statement, which it found credible, despite complainant's retraction at trial, which the trial court found incredible, the trial court did not clearly err in finding that a preponderance of the evidence supported facts

[1] Complainant's hearsay statements were admitted for substantive consideration at trial under MCL 768.27c.

justifying the scoring of these variables. Coextensively, the trial court did not abuse its discretion in scoring these offense variables.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering