

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREL DION SMITH,

Defendant-Appellant.

UNPUBLISHED

October 13, 2009

No. 291448

Wayne Circuit Court

LC No. 08-000449-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm, but remand for resentencing.

I. Basic Facts

The underlying facts of this matter involve the non-fatal shooting of defendant's fiancé on December 8, 2007. Sometime early that morning officers were called to a residence, where defendant and three other individuals were discovered. Defendant had blood on his shirt and his boots and the other individuals also had stains on their shoes that may have been blood. A sawed-off Mossberg 12 gauge shotgun was found in the driveway next door.

Later that morning, defendant made a statement to the police after waiving his constitutional rights. Defendant indicated that he had gone to a club and returned to the residence where he started consuming alcohol. He stated that he had obtained the gun from the house and put it in the corner. He admitted that the gun "went off" when his fiancé tried to grab it from him. Defendant also indicated that he put the gun in the driveway next door in order to hide it. Based on these facts, defendant was arrested and convicted as charged.

At sentencing, the trial court calculated defendant's sentence pursuant to the legislative sentencing guidelines. However, the trial court then concluded that the sentencing guidelines are an unconstitutional infringement on the power of the judiciary and sentenced defendant, as a second habitual offender, MCL 769.10, to one to five years' imprisonment for felon in possession and to two years' imprisonment for felony-firearm. This appeal followed.

II. Corpus Delicti

Defendant first argues that the trial court erred by allowing testimony about his statement to police because there was no evidence to satisfy the corpus delicti rule for the crime of felon in possession. We disagree. We review for an abuse of discretion a trial court's decision to admit evidence in satisfaction of the corpus delicti requirement. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002).

“The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur.” *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995); *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). To meet this end, such statements may not be admitted into evidence unless a preponderance of direct or circumstantial evidence, independent of the confession, establishes the occurrence of (1) a specific injury and (2) criminal agency as the source of the injury. *Burns*, *supra* at 438. “Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti.” *Konrad*, *supra* at 270 (citation omitted). Rather, it is sufficient to show that *someone* committed the crime. *Id.*

Here it is clear that a specific injury occurred: Defendant's fiancé suffered a non-fatal gunshot wound. It is also clear that criminal agency is the source of that injury. Evidence establishing that *a* crime occurred is sufficient to satisfy the criminal agency portion of the corpus delicti rule. *People v King*, 271 Mich App 235, 241; 721 NW2d 271 (2006). The evidence presented at trial established that defendant's fiancée was shot in a house and that a sawed-off shotgun that had been fired was found next door. These facts sufficiently show by a preponderance of the evidence that *a* crime occurred. Namely, that someone had committed at least possession of a short-barreled shotgun, MCL 750.224b, intentional discharge of a firearm in an occupied structure, MCL 750.234b(2), and intentional pointing of a firearm at another person causing injury, MCL 750.235. Therefore, because there was evidence that a crime occurred, the corpus delicti rule was satisfied and the trial court did not abuse its discretion by admitting defendant's statement.

III. Double Jeopardy

Defendant next argues his convictions of felony-firearm and felon in possession violate the double jeopardy clause. We disagree. We review an unpreserved double jeopardy challenge for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

In the present matter, there has been no error. This Court and our Supreme Court have previously held that multiple punishments for felon in possession and felony-firearm do not constitute a double jeopardy violation because the Legislature clearly intended to permit a defendant charged with felon in possession to also be charged with felony-firearm. *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Defendant's reliance on a federal district court opinion in support of his position is unavailing, as the decisions of lower federal courts are not binding on Michigan state courts. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325

(2004). Given this Court and our Supreme Court's previous holdings on this same issue, defendant's argument necessary fails.

IV. Sentencing

Finally, defendant argues, and the prosecution agrees, that (1) the trial court erred by declaring that the legislative sentencing guidelines are an unconstitutional encroachment on judicial authority and (2) that the trial court improperly scored the sentencing guidelines, despite the fact that it did not follow them. We agree. Constitutional questions are reviewed de novo. See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2001). Further, we review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

The constitutionality of the legislative sentencing guidelines is firmly established. *People v Garza*, 469 Mich 431, 432-435; 670 NW2d 662 (2003). In *Garza*, *supra*, our Supreme Court held that the legislative sentencing guidelines do not violate the constitutional principle of separation of powers. *Id.* Thus, the trial court's departure from the guidelines for this reason was error that requires resentencing.

We further note that the trial court improperly scored Prior Record Variable 5, which considers a defendant's prior misdemeanor convictions. Under that variable, a sentencing court is to count a prior misdemeanor in the score "only if it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a). The record reflects that defendant was previously convicted of disorderly person and malicious destruction of personal property, only the latter of which is a countable misdemeanor. Accordingly, we direct the trial court at resentencing to properly score the guidelines.

We affirm defendant's convictions and his sentence for felony-firearm, but we vacate his sentence for felon in possession and remand to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald