STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DUANE HEISE,

Defendant-Appellant.

UNPUBLISHED
April 15, 2010

No. 290202
Calhoun Circuit Court
LC No. 2008-002914-FC

Before: Davis, P.J., and Donofrio and Stephens, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, discharge of a firearm in a building, MCL 750.234b, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to serve four terms of imprisonment of two years each for the felony-firearm convictions, concurrent to each other but consecutive to concurrent terms of 30 to 45 years for armed robbery, three to ten years for felon in possession, three to eight years for discharge of a firearm in a building, and three to eight years for felonious assault. Defendant appeals as of right, challenging only the scoring of certain guidelines variables for the calculation of the recommended range for his minimum sentence. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The prosecutor's theory of the case was that, during the early morning hours of May 27, 2008, defendant, wearing a camouflage mask and displaying a firearm, entered a combination gas station and convenience store and threatened to kill the clerk if he did not cooperate. Defendant seized a quantity of cash from one cash register, but as the clerk explained that he was unable to open a second register, defendant's gun fired. The bullet did not strike anyone and defendant left the store. The clerk summoned the police, who later that morning found defendant in the course of a traffic stop. The police also found a mask, a gun, and a quantity of cash in the car.

II. Guidelines Variables

A. Standards of Review

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A scoring decision will not be reversed if any evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). To the extent that a scoring issue calls for statutory interpretation, the review is de novo. *Id.*

B. Offense Variable 1

The trial court initially assessed 15 points for Offense Variable (OV) 1, which MCL 777.31(1)(c) prescribes if a "firearm was pointed at or toward a victim . . .", but at sentencing the prosecuting attorney persuaded the court to raise that score to 25 points, which MCL 777.31(1)(a) prescribes if a "firearm was discharged at or toward a human being . . . ."

The store clerk testified at trial that defendant waived his gun about, occasionally in his direction, without pointing it at him. He stated that defendant placed the gun on the counter. When the gun discharged the clerk noticed dust particles coming down between the two of them. He described the gun as discharging near him and threatening his life.

At sentencing, defense counsel expressed agreement with a score of 15 points for OV 1, but argued that 25 points was inappropriate because the store clerk had not indicated that the gun was ever specifically pointed at him. The trial court decided on 25 points on the ground that the statutory language "discharged at or toward a human being" does not specify aiming at a person and firing, and that the evidence in this case indicated "a shooting of a gun toward the victim in the sense that it was in the immediate vicinity of the victim and in a direction toward the victim as opposed to away from the victim."

We agree with the trial court. The statutory wording indicates that MCL 777.31(1)(a), and thus a score of 25 points, applies to a shooting that occupies a middle ground between a direct attempt to shoot a person and a deliberate attempt to shoot away from that person.

Defendant asserts that the shooting was accidental. Because the evidence shows that defendant brought the gun into the situation, and was the only one who had any control over it the whole time, defendant cannot avoid a score of 25 points for OV 1 on the ground that he was not responsible for its discharge. The victim's description of the gun going off near him and threatening his life, and of seeing residue from the discharge between himself and defendant, supports the trial court's conclusion that the gun was fired "at or toward" the victim.

Because there was evidence to support the score of 25 points for OV 1, we affirm that decision. See *Hornsby*, 251 Mich App at 468.

C. Offense Variable 14

The trial court assessed ten points for OV 14, as prescribed for a defendant who acted as a leader in a multiple-offender situation. MCL 777.44(1)(a). At sentencing, defense counsel protested that no one else was involved in the robbery.

However, the driver of the car in which defendant was a passenger when the police detained him testified that she had stopped at the gasoline station and pumped gas while defendant and another passenger entered the store to pay for the gas and also buy cigarettes. The driver continued that the two returned to the car, upon which she drove to the side of the store to roll a marijuana cigarette. According to the driver, defendant then returned to the store, where he remained for probably less than five minutes, but during which time she heard "a pop, a bang." The driver testified that defendant then returned to the car, with a camouflage ski mask in his hand, and instructed her to "go." The driver added that another passenger said, "'I can't believe he actually did it.'" According to the driver, the party then went to her house, where defendant produced the money and counted it out.

As an initial matter, robbing a store by force of arms while counting on someone else to act as getaway driver seems an unlikely strategy if the robber did not regard the driver as working in concert with him. Accordingly, we regard the discovery of defendant, his camouflage cap, gun, and some of the proceeds of the robbery stashed in a car driven shortly after the crime by another as good circumstantial evidence that that other was acting at least with knowledge of defendant's involvement in the criminal enterprise. See *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) ("because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient").

The fact that the driver and others waited for defendant while he conducted the robbery and that the driver obeyed defendant's command to "go" upon his return, suggests that the driver and perhaps others were then following defendant's lead in the matter. The words ascribed to one the passengers were "I can't believe he *actually* did it." That phrase gives rise to an inference that the passenger had advance knowledge of defendant's criminal intent. Finally, it was defendant who also retained control of the funds and later displayed them to the others who had been waiting in the van. We hold, therefore, that the trial court had a reasonable basis for concluding that defendant acted as the leader in a multiple-offender situation, and thus properly assessed ten points for OV 14.

D. Offense Variable 19

The trial court assessed ten points for OV 19, which MCL 777.49(c) prescribes where the offender "interfered with or attempted to interfere with the administration of justice." As our Supreme Court has noted, "Law enforcement are an integral component in the administration of justice . . . ." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

At sentencing, defense counsel argued that once the police pulled over the vehicle in which defendant was riding on the night in question, defendant and all other occupants were cooperative. In response, the prosecuting attorney reported that defendant was originally charged with resisting or obstructing a police officer,[1] but that that charge was dropped when the affected police officer failed to appear for the preliminary examination. The prosecuting attorney pointed out that police reports indicated that defendant was decidedly uncooperative

[1] See MCL 750.81d(1).

after being interviewed at the police station. According to the prosecuting attorney, one officer reported that, while transporting defendant from the station to the jail, defendant struck a second officer. Another officer confirmed the latter account, and added that, while escorting defendant to her patrol car, defendant said, "'Get your hand off me, bitch,'" and began to pull away, causing the officer in response to push defendant against her vehicle with the assistance of two others.

Defendant asserts that this variable should not be scored absent the offender's intent to influence judicial proceedings, but cites no caselaw relating to this variable in support of that proposition. We decline to read the statute so narrowly. Our Supreme Court has stated that "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Barbee*, 470 Mich at 288.[2] In *Barbee*, the Court upheld application of OV 19 to a circumstance where the defendant merely gave the police a false name. *Id.* By striking an officer, and pulling away from escorting officers and thus requiring them forcibly to regain control over him, defendant obviously interfered with the police in the performance of their duties, and thus interfered with the administration of justice. For these reasons, the trial court correctly assessed defendant ten points for OV 19.

Affirmed.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens

[2] We are cognizant of the Supreme Court's rejection of a transactional approach to the application of sentencing guidelines in a case involving OV 9. *People v McGraw*, 484 Mich 120, 122, 135; 771 NW2d 655 (2009). However, *McGraw* did not explicitly overturn *Barbee*, which specifically addressed the application of OV 19 to conduct occurring after the completion of the charged crime. Therefore, *Barbee* controls the issue on appeal.