

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARON TERMAIN BROWN,

Defendant-Appellant.

UNPUBLISHED

June 15, 2010

No. 291185

Wayne Circuit Court

LC No. 08-012794-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant appeals by right the sentences imposed following his convictions of armed robbery, MCL 750.529, and third-degree fleeing and eluding, MCL 257.602a(3).¹ We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court misscored offense variable (OV) 1 (aggravated use of a weapon) at 15 points, and OV 2 (lethal potential of weapon) at five points. Defendant maintains that insufficient evidence supported these scoring decisions where there was a lack of evidence that he possessed or pointed a real firearm at victim, and where the trial court acquitted defendant of the charge of felony-firearm.

When scoring the guidelines, “[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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence.” *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). See also *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). We review scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Any statutory interpretation concerning the application of the sentencing guidelines presents a question of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

¹ The trial court found defendant not guilty of receiving or concealing stolen property and possession of a firearm during the commission of a felony (felony-firearm).

MCL 777.31(1)(c) requires a trial court to score 15 points for OV 1 if “[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.” MCL 777.32(1)(d) requires a trial court to score five points for OV 2 if “the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” For the scoring of OV 2, “[p]istol’, ‘rifle’, or ‘shotgun’ includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle.” MCL 777.32(3)(c). Defendant argues that because MCL 777.31 does not contain its own definition of firearm, the general definition in MCL 8.3t should be used.²

To the extent the definition of “firearm” in MCL 8.3t applies to OV 1, we conclude that the trial court did not abuse its discretion when it determined that defendant’s possession of a firearm was shown at least by a preponderance of the evidence. Victim specifically testified that defendant pointed a handgun at him during the robbery. Victim, who also testified that he was familiar with guns, was unequivocal in his assertion that defendant pointed an actual handgun at him during the robbery and provided specific details about the weapon to support the trial court’s decision that the object defendant used was an actual firearm. No evidence suggested that the gun was not real. We find defendant’s reliance on the trial court’s decision to give defendant the benefit of the doubt concerning the felony-firearm charge unpersuasive given the different standards of proof involved in a finding of guilt versus a factual decision concerning sentencing variables.

In a separate argument, defendant maintains that the trial court appeared confused about the proper legal standard to use when reaching its scoring decision and may have improperly relied on a “probable cause” or “directed verdict” standard. But, defendant has pointed to nothing in the trial court’s statements to support this contention. The trial court’s discussion of these offense variables does not support defendant’s claim of error. It appears clear to this Court that the trial court was well aware of the correct standard, and used it.

We affirm.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis

² MCL 8.3t provides: “The word ‘firearm’, except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB’s not exceeding .177 calibre by means of spring, gas or air.”