

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO MICHAEL ANTHONY,

Defendant-Appellant.

UNPUBLISHED

December 16, 2010

No. 293180

Oakland Circuit Court

LC No. 2009-225796-FC

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. He was acquitted of an additional charge of assault with intent to commit murder. He was sentenced to concurrent prison terms of 20 to 40 years for each conviction. He appeals as of right. We affirm in part and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant raises several challenges to the scoring of the sentencing guidelines. To the extent a challenge to the scoring of the guidelines involves a question of statutory interpretation, this Court reviews the issue de novo. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). To the extent the challenge involves the trial court's findings of fact, this Court reviews the court's findings for clear error. *Id.* at 111. This Court reviews a trial 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 Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation and internal quotation marks omitted). "A trial court's scoring decision for which there is any evidence in support will be upheld." *Id.* (citation and internal quotation marks omitted).

Defendant argues that because his accomplice fired the shots that struck the victim and the jury acquitted him of the assault charge, offense variable (OV) 1 should have been scored at 15 points, not 25 points for a firearm being discharged at a human being, and OV 3 should not have been scored at 25 points for a life-threatening injury to a victim. MCL 777.31; MCL 777.33. The instructions for these variables both require that in a "multiple offender" situation, all offenders must be assessed the same number of points. MCL 777.31(2)(b); MCL 777.33(2)(a). We disagree with defendant's contention that this command does not apply when the sentencing offenses are different. Defendant's reliance on *People v Johnston*, 478 Mich 903;

732 NW2d 531 (2007), is misplaced. In that case, the defendant did not have any convictions in common with the other offenders. In this case, defendant and two other codefendants were both convicted of armed robbery and conspiracy. Because this was a multiple offender situation in which all offenders were convicted of common offenses, the trial court was required to score the same number of points for all offenders for OV 1 and OV 3. Accordingly, the trial court did not err in scoring those variables.

We also reject defendant's challenge to the scoring of ten points for OV 4. MCL 777.34(1)(a). The victim's statements at sentencing concerning the psychological effects of the attack support the trial court's decision to score ten points for OV 4. The fact that the victim had not sought treatment was not controlling. MCL 777.34(2).

With respect to defendant's challenge to the scoring of 50 points for OV 7, MCL 777.37, this Court recently held in *People v Hunt*, ___ Mich App ___, ___ NW2d ___ (2010), that "only the defendant's actual participation should be scored." The trial court's explanation of its scoring for OV 7 indicates that the scoring was principally based on conduct by codefendant Tolbert, which included his shooting of a vehicle's window and his shooting of the victim, without regard to whether defendant participated in that conduct. That analysis is not compatible with *Hunt*. Where a trial court fails to properly apply an offense variable to the facts of the case, remand for reconsideration of the trial court's scoring decision in light of the applicable law, and for resentencing if the court determines that the variable should not have been scored, is appropriate. See, e.g., *People v Cannon*, 481 Mich 152, 163; 749 NW2d 257 (2008). Accordingly, we remand this case to the trial court for reconsideration of whether points may be scored for OV 7 as construed in *Hunt* and, if not, for resentencing.¹

Lastly, there is no merit to defendant's argument that under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he was entitled to have a jury decide the facts and circumstances necessary for the scoring of the sentencing guidelines. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. However, it is well established that *Blakely* does not apply to Michigan's indeterminate sentencing scheme in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

¹ Because a reduction of 50 points for OV 7 would affect the appropriate guidelines range, defendant would be entitled to resentencing if OV 7 was improperly scored. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto