STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL H. EWALD,

Defendant-Appellant.

UNPUBLISHED
June 3, 1997

No. 188183
Oakland Circuit Court
LC No. 93-129925

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), felonious assault, MCL 750.82; MSA 28.277, possession of a loaded firearm in or upon a vehicle in a non-game area, MCL 750.227c; MSA 28.424(3), assault and battery, MCL 750.81; MSA 28.276, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). He pleaded guilty to three counts of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to respective concurrent terms of imprisonment of 3 to 7-1/2 years; 3 to 6 years; 1-1/2 to 3 years; and 90 days, and to a consecutive term of 2 years for felony firearm. Defendant now appeals as of right. We affirm.

I.

Defendant first argues that the trial court erred in denying his motion for a directed verdict as to the felony-firearm charge because there was not sufficient evidence that the weapon found in his car was greater than .17 caliber. We disagree.

The rifle taken from defendant's car was admitted into evidence without objection. A deputy testified that it was a .22 caliber weapon based on the stamping on the rifle and his experience as a certified range officer. Defendant argued that the officer's conclusion as to the rifle's caliber was hearsay because he performed no independent tests, and therefore there was no competent evidence of the rifle's caliber. This argument is without merit. Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the firearm was a .22 caliber based on opinion testimony. MRE 702. Thus, the trial court properly denied defendant's motion for a directed verdict. *People v Hampton*,

407 Mich 354; 285 NW2d 284 (1979).

II.

Defendant next argues that the trial court erred in not ruling on defendant's requested jury instructions on specific intent and his intoxication defense. Pursuant to MCR 6.414(F), the trial court must give the parties a reasonable opportunity to submit written requests for jury instructions. The court must inform the parties of its proposed action on the requests before their closing arguments. *Id*.

Although the trial court did not expressly inform the parties of its proposed action on defendant's jury instruction requests, no prejudice resulted. As to the instruction regarding felonious assault, before the defense counsel finished his argument, the trial court stated that it had made a change to the instruction. The trial court did not respond again when defendant finished his argument. The trial court's ruling that it had made a change to the instruction was sufficient to address defendant's objection. Moreover, the court's instruction to the jury included the defendant's requested weapon language. *People v Haggai*, 332 Mich 467, 474; 52 NW2d 186 (1952).

Likewise, as to defendant's objection to the jury instruction regarding intent, this Court has held that the felony-firearm statute does not require a nexus between the felony and the possession of the firearm. *People v Perry*, 119 Mich App 98, 101; 326 NW2d 437 (1982). Thus, defendant's intent regarding the possession of the firearm during the commission of the felony was irrelevant. Because the trial court should not give a jury instruction unsupported by law, *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994), defendant was not prejudiced by the court's failure to respond to his request.

For reasons discussed in section III, we also find no error in the court's treatment of defendant's requests for intoxication instructions.

III.

Defendant next argues that the trial court incorrectly charged the jury on specific intent and the intoxication defense. We disagree.

This Court reviews jury instructions in their entirety to determine whether there is reversible error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions "must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id.* An imperfection in the instructions will not constitute error if the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

Reading the jury instructions as a whole, we find that the trial court charged the jury that it could find defendant not guilty if he was so overcome by alcohol that he could not have formed the requisite intent. Further, the trial court's instructions to the jury included all of the elements of the crimes charged, and did not exclude from consideration by the jury any material issues, defenses, or theories supported

by the evidence.

IV.

Defendant next argues that ten points were improperly scored under Offense Variable 6. Under *People v Mitchell*, 454 Mich 145, 175; __ NW2d __ (1997), a "claim of a miscalculated variable is not in itself a claim of legal error" which would entitle defendant to relief.

Even if we were to review the issue, we would find no error. A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. A scoring of an offense variable is to be upheld if there is "any evidence" supporting it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986). The instructions to OV 6 provide that the trial court is to "count each person who was placed in danger of injury or loss of life as a victim." Defendant's friend was placed in danger when he stepped between defendant and the bar manager while defendant was pointing the rifle. See *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988).

V.

Finally, defendant argues that the trial court abused its discretion in sentencing defendant as an habitual offender because it did not give the proper weight to his background. We disagree. Defendant's sentences were proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell