STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY SCALES,

Defendant-Appellant.

UNPUBLISHED
August 15, 1997

No. 188492
Genesee Circuit Court
LC No. 95-052117 FC

Before: Corrigan, C.J., and Young and M.J. Talbot*, JJ.

MEMORANDUM.

After a jury found him guilty of three counts of armed robbery, MCL 750.529; MSA 28.797, and one count of first degree home invasion, MCL 750.110a; MSA 28.305(a), defendant appeals by right, challenging only the trial court's scoring of the sentencing guidelines. We affirm.

Defendant first argues that the court erred in scoring offense variable (OV) 1, aggravated use of a weapon. Under "Instruction A," *Michigan Sentencing Guidelines*, (2d ed, 1988), p. 26, the trial court correctly scored OV 1 at 15 points. It is undisputed that one of the robbers pointed a gun at one of the victims, although that robber had not been apprehended when the court sentenced defendant. The codefendant, whom the prosecution originally had charged with pointing the gun at the victim, interposed an alibi defense and was acquitted, apparently on grounds of misidentification. Defendant directly testified that another man, "Low Key," forced him to assist in the crime and pointed the gun during the episode. The jury rejected defendant's claim of duress. The identity of the person who held the weapon is not critical where the testimony established that a firearm was used. *People v Mooney*, 216 Mich App 367, 379-380; 549 NW2d 65 (1996).

Defendant next argues that the court improperly scored OV 2, physical attack or injury. Similarly, under Instruction A, *Michigan Sentencing Guidelines, supra*, the trial court correctly scored OV 2 at 50 points because one robber kicked and beat the victims. This scoring is appropriate even though at the time of defendant's sentencing, that robber had not been identified or apprehended. Again, defendant alleges that he did not perpetrate the physical attack on the victims. The record

* Circuit judge, sitting on the Court of Appeals by assignment.

establishes that the victims were physically attacked and injured. The identity of the attacking party does not bear on the scoring of the defendant's sentence. *Mooney, supra*.

Because errors in scoring either of the other two challenged offense variables would not affect the guidelines scoring, but would be harmless errors, *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993), the remaining issues raised in defendant's brief are moot. Further, under these circumstances, any error in scoring the guidelines would not furnish a cognizable basis for appellate relief. The trial court's scoring decisions are, in this respect, not reviewable. *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997).

Defendant's sentence accordingly is within the guidelines, and defendant has failed to overcome the presumption that a sentence within the guidelines range is proportionate to the offense and the offender. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994).

Affirmed.

/s/ Maura D. Corrigan
/s/ Robert P. Young, Jr.
/s/ Michael J. Talbot