

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA M. FOX,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 229777

Wayne Circuit Court

LC No. 00-000916

Before: Whitbeck, C.J., and O’Connell and Meter, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Joshua M. Fox of assault with intent to do great bodily harm less than murder¹ and possessing a firearm during the commission of a felony (felony-firearm).² The trial court sentenced him to a prison term of nineteen months to ten years for the assault offense, to be served consecutively to the mandatory two-year prison term for felony-firearm. Fox appeals as of right, challenging the sufficiency of the evidence and his sentence for assault. We affirm.

I. Basic Facts And Procedural History

On the morning of June 4, 1999, Larry Walker and Donald Chapman were at a gasoline station at Seven Mile and Ryan in Detroit when they saw a black van. Walker and Chapman believed that the van belonged to Fox because of the distinctive rims on the vehicle. Though Walker did not see Fox in the van, Chapman saw Fox driving it past the gasoline station. When Chapman and Walker left the gasoline station, Chapman rode in a car belonging to his friend, Shannon McPherson, with Walker following in his own car. As they were driving along Harned, the black van approached Walker’s car from behind and flashed its lights, prompting Walker to stop on the left side of Harned. McPherson turned right onto Emery and stopped when Walker did. The van stopped beside the passenger side of Walker’s car, Fox said, “What’s up,” drew a gun, and fired six shots at Walker, striking him in the stomach and left leg. Fox then drove away at a high rate of speed.

¹ MCL 750.84.

² MCL 750.227b.

Following the shooting, McPherson took Walker to the hospital while Chapman took care of Walker's car. Walker had a temporary colostomy and was in the hospital for about one month as a result of his gunshot wounds. While in the hospital, Walker told his family that Fox had shot him.

At trial, Walker again identified Fox as the person who shot him. Testimony also revealed a history between Walker and Fox that started before January 1998, which was when Fox's girlfriend gave birth to Walker's baby. This development reportedly did not cause any animosity between the two men. Similarly, Chapman had no "bad blood" with Fox. The prosecutor introduced the eyewitness testimony describing the shooting, but had no physical evidence linking Fox to the crime. For instance, there was no gun powder residue test demonstrating that Fox had fired a gun at around the time of the shooting. Nor did the police recover the firearm that was used in the shooting, which precluded using fingerprint evidence to tie Fox to the crime.

Despite the eyewitness testimony, Fox's mother provided her son with an alibi, saying that he was at home sleeping at the time Walker was shot, although she did not actually see him at that time. Fox's mother added that, to her knowledge, Fox did not own a black van with the distinctive gold and chrome rims Walker and Chapman remembered, although he may have had access to a gray van.

Fox denied any part in the shooting, claiming that he was sleeping at home at the time and had not heard about the shooting until his mother told him of it. He also said that he did not have access to a black van. Fox admitted that he had once owned a powder blue and gray van, which he had sold to his girlfriend's daughter on June 1, 1999, but claimed not to have keys or access to the gray van on June 4, 1999.

II. Sufficiency Of The Evidence

A. Standard Of Review

Fox argues that the evidence was insufficient to prove that he was the person who shot Walker. We review the evidence in the light most favorable to the prosecutor to resolve whether the prosecutor proved Fox's guilt beyond a reasonable doubt.³ Despite this preferential perspective on the inferences that can be drawn from the evidence, this review is *de novo* because it entails examining the evidence on the record.

B. Physical Evidence

The crux of Fox's argument is that, in light of his alibi and without any physical evidence proving that he was the person who shot Walker, there was a reasonable doubt regarding his guilt. Notably, however, Fox fails to provide any authority that suggests that conflicting evidence is insufficient to support a conviction. Nor does he provide any authority for his proposition that physical evidence is an indispensable component to resolving conflicts in the

³ See *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); see also *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

evidence. To the contrary, a factfinder's very purpose is to confront conflicting evidence, relying on the ability to view the evidence and witnesses firsthand to determine what, or who, to believe.⁴ We defer to the trial court's decision to believe the prosecution witnesses in this case. To the extent that Fox also claims that the trial court erred in convicting him because the prosecutor had no proof of his motive for committing the shooting, he is incorrect because motive is not an element of either offense.⁵

III. Sentencing

A. Standard Of Review

Fox does not challenge his mandatory sentence for felony-firearm. Rather, Fox contends that, with respect to his sentence for assault, the legislative sentencing guidelines provided a sentence range of zero to five years, from which the trial court departed when erroneously considering his juvenile record. Additionally, Fox claims that the trial court failed to articulate the substantial and compelling factors that supported this upward departure from the guidelines. The critical question that this issue presents is whether, in fact, the trial court departed from the sentencing guidelines. As a question of law requiring us to examine and apply the legislative sentencing guidelines, we apply review de novo.⁶

B. Departure

If Fox means to argue that the legislative sentencing guidelines would have limited his *maximum* sentence to five years in prison, he provides no support for this proposition. The legislative sentencing guidelines set the appropriate range for *minimum* sentences.⁷ The record reflects that the trial court imposed a minimum sentence at the low end of the range identified within the legislative guidelines, just as defense counsel asked the trial court to do. The trial court simply relied on MCL 750.84, the statute prohibiting assault with intent to do great bodily harm less than murder, to set the maximum sentence for this offense at ten years in prison. Because this sentence was not a departure, the trial court did not need to articulate substantial and compelling reasons for the sentence.⁸

With respect to Fox's argument that the trial court erroneously considered his juvenile history when imposing his sentence, he fails to point to any authority barring a trial court from considering a recent⁹ juvenile criminal record. In any event, he is unlikely to find any such authority barring this consideration in sentencing given that the Legislature incorporated a

⁴ See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

⁵ See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); see also *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992).

⁶ See *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

⁷ See MCL 769.34(2).

⁸ See MCL 769.34(3).

⁹ See MCL 777.50.

defendant's recent juvenile criminal history in the prior record variables.¹⁰ In fact, he does not challenge the trial court's decision to assess him two points under prior record variable four for having a prior low severity juvenile adjudication, nor would we see any basis for him to do so.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

¹⁰ See, e.g., MCL 777.53; MCL 777.54.