STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY BAUGH,

Defendant-Appellant.

UNPUBLISHED
November 18, 2004

No. 249898
Wayne Circuit Court
LC No. 02-000665-04

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant, originally charged with two counts of armed robbery, MCL 750.529, carjacking, MCL 750.529a, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f, appeals as of right his jury trial conviction of receiving and concealing stolen property (as the lesser offense of carjacking), MCL 750.535(2)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to ten to fifty years' imprisonment. We affirm.

On appeal, defendant only raises issues regarding his sentencing. As this offense occurred after January 1, 1999, the legislative sentencing guidelines are applicable. MCL 769.34(1) and (2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000).

This Court reviews for clear error a trial court's factual findings at sentencing. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). However, the proper construction or application of statutory sentencing guidelines presents a question of law that is reviewed de novo. *Id.* A trial court has discretion in scoring the sentencing guidelines. *Id.* This Court will uphold scoring decisions by a trial court if there is any evidence in the record to support the decision. *Id.* This Court reviews a scoring decision to determine whether the trial court properly exercised its discretion and whether the evidence on the record adequately supports a particular score. *Id.* Additionally, this Court is required to affirm a sentence that falls within the guidelines range absent an error in the scoring of the sentencing guidelines or reliance upon inaccurate information. MCL 769.34(10); *People v Libbett*, 251 Mich App 353, 363-364; 650 NW2d 407 (2002).

Defendant first asserts that the trial court erred in assessing fifty points for PRV-1, MCL 777.51, for two prior high severity felony convictions, instead of twenty-five points for one such conviction. Twenty-five points are to be assessed if a defendant, at the time of sentencing, has

one prior high severity felony conviction, and fifty points are assessed if a defendant has two prior high severity felony convictions. MCL 777.51(1)(b) and (c). The prosecution concedes that the trial court improperly classified a 1997 *attempted* breaking and entering conviction as a class D felony offense. Indeed, the attempted breaking and entering conviction constitutes a class E felony offense, MCL 777.19(3)(a), and thus does not qualify as a prior high severity felony conviction under MCL 777.51(2). Accordingly, and without dispute, the trial court should have assessed twenty-five points under PRV-1 because defendant only had one prior high severity felony conviction arising from a 1988 breaking and entering conviction.

Next, defendant generally asserts that the trial court improperly assessed points as if defendant was actually convicted of the crimes for which he was charged, when the jury's verdict reflects the jury's conclusion that defendant was not one of the multiple offenders in the armed robbery or carjacking. Defendant also asserts that the crime for which he was convicted, receiving and concealing stolen property, is not a multiple offender offense and is a crime that occurred subsequent to the armed robbery, and thus, the trial court improperly assessed points on the basis of the conduct of other persons. We disagree. "Permissible factors that may be considered by the court when imposing a sentence include the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses." *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Further, in *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), this Court stated:

> Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), including other criminal activities established even though the defendant was acquitted of the charges, *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994), and the effect of the crime on the victim. *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987).

We now address the particular scoring challenges.

OV-1 and OV-2

OV-1 assesses points for the aggravated use of a weapon. MCL 777.31. Defendant asserts that he should not have been assessed any points under OV-1 because he was not a participant in the armed robbery. In scoring OV-1, MCL 777.31(1)(c) requires an assessment of fifteen points if "[a] firearm was pointed at or toward a victim . . . ."

OV-2 assesses points for the lethal potential of the weapon possessed or used. MCL 777.32. Defendant asserts that he should not have been assessed any points under OV-2. In scoring OV-2, MCL 777.32(1)(d) requires an assessment of five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." Further, MCL 777.31(2)(b) provides that "[i]n multiple offender cases, if one offender is assessed points

for the presence or use of a weapon, all offenders shall be assessed the same number of points." The language in MCL 777.32(2) is nearly identical.

Here, the trial court properly assessed fifteen points for OV-1, and five points for OV-2. Defendant's three codefendants entered plea-bargains where the first codefendant pleaded guilty to two counts of armed robbery, along with carjacking, the second codefendant pleaded guilty to two counts of armed robbery, along with carjacking and *felony-firearm*, and the third codefendant pleaded guilty to two counts of armed robbery and a count of *felony-firearm*. Defendant himself testified that he was at the crime scene, despite twice lying to the police about his presence, and there was additional evidence that he participated in the robbery. Moreover, sufficient testimony was presented indicating that all the robbers, including defendant, had handguns, and multiple gunshots were fired between the two complainants. As such, we conclude that the scoring of OV-1 and OV-2 was supported by the record.

OV-3

OV-3 assesses points for physical injury to a victim. MCL 777.33. Defendant asserts that he should not have been assessed any points under OV-3. In scoring OV-3, MCL 777.33(1)(d) requires an assessment of ten points if "[b]odily injury requiring medical treatment occurred to a victim." Further, MCL 777.33(2)(a) provides that "[i]n multiple offender cases, if one offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." Once again, there was sufficient evidence presented to show that defendant was one of multiple offenders. Complainant Hill testified that during the robbery and carjacking, he was struck repeatedly in the head and body by all of the perpetrators. Further, complainant Hill testified, "They had beat me pretty good . . . ." Additionally, complainant Hill sought medical treatment for a concussion, and he was unable to see out of his right eye because he had a fractured bone. He had self-defense wounds on his hands when he attempted to block the blows to his head. Accordingly, we are persuaded that the record supports the trial court's assessment of ten points for OV-3.

OV-4

Defendant also disputes the trial court's assessment of OV-4. Defendant has not properly presented this issue for appellate review. The appellant must identify the issues in his brief in the statement of questions presented, and this was not done with respect to an OV-4 argument. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Further, a close review of the sentencing transcript reveals that defendant did not challenge the scoring of OV-4 at sentencing.[1] Accordingly, this issue has not been preserved for appellate review. MCR 6.429(C); MCL 769.34(10). Assuming that any alleged error was not waived, we do not find plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[1] The extent of defense counsel's comments about OV-4 was, "I don't know about Offense Variable 4."

OV-9

In defendant's supplemental brief, he argues that the trial court erred in scoring OV-9, MCL 777.39, which addresses the number of victims who were placed in danger of injury or loss of life. The court assessed ten points because two victims were placed in danger. MCL 777.39(1)(c) provides for a score of ten points where there were "2 to 9 victims." Defendant argues that the van was taken from only a single person, and, regardless, no persons were placed in danger by his act of receiving and concealing stolen property. There is sufficient evidence in the record to support the finding that there were two victims of the crime, Hill and Wilson, and that they were placed in danger during the crime, in part, by the actions of defendant.

Defendant also argues in his supplemental brief that the trial court's scoring decisions violate his right to jury trial as enunciated in *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), a majority of the Justices on the Michigan Supreme Court found that *Blakely*, which considered whether facts that increase the penalty for a crime beyond the prescribed statutory maximum sentence must be submitted to the jury, did not affect or impact Michigan's scoring system, which establishes the recommended minimum sentence. Accordingly, defendant's argument is rejected.

In sum, the trial court properly considered all of the circumstances and the offenses committed involving the conversion van, even though defendant was acquitted of the original charged offenses. *Compagnari, supra* at 236. We agree that the trial court erred in scoring PRV-1. However, resentencing is not warranted because defendant's ten-year minimum sentence is still well within the revised minimum guidelines range even with a PRV reduction of twenty-five points. The slight modification in the guidelines range from the incorrect range of 38 months to 152 months to the correct range of 34 months to 134 months does not demand resentencing; the error in scoring PRV-1 was harmless. See *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Accordingly, defendant's due process challenge to the trial court's scoring of the sentencing guidelines fails on appeal. He has not established an egregious factual error that rises to the level of a due process violation. Consequently, we affirm defendant's sentence that was within the guidelines range. MCL 769.34(10); *Libbet, supra* at 363-364.

In defendant's final claim of error, he argues that he is entitled to have specific portions of the agent's description of the offense stricken from the PSIR because he was not convicted of the armed robbery or carjacking charges and, instead, convicted of the lesser offense of receiving and concealing stolen property. We disagree. The trial court's response to a claim of inaccuracies in the PSIR is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

This Court recently recognized the broad scope of the PSIR:

> The presentence investigation report is an information-gathering tool for use by the sentencing court. Therefore, its scope is necessarily broad. A judge preparing to sentence a defendant may consider comments made by the defendant to the probation officer during the presentence interview in addition to evidence adduced at trial, public records, hearsay relevant to the defendant's life and

character, *and other criminal conduct for which the defendant has not been charged or convicted.*

> [MCR 6.425(A)] provide[s] that the presentence investigation report must include "*a complete description of the offense and the circumstances surrounding it*, . . . information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, . . . any statement the defendant wishes to make . . . [and] any other information that may aid the court in sentencing." [*Morales v Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003) (citations omitted; emphasis added; omissions in original).]

Because the PSIR is broad in scope and requires that a description of the offense be included, defendant has not established a basis for appellate relief. The agent's description of the offense was derived from the Detroit Police Department's Investigator's Report. In determining a sentence, a trial court is permitted to consider evidence presented at trial that defendant committed another crime, even if the defendant was acquitted and not convicted of that charge. *Compagnari, supra* at 236. We conclude that resentencing is not warranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff