

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LAMONT COLLINS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 249661

Saginaw Circuit Court

LC No. 02-022466-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals by right his second habitual offender sentence of two to seven years for his conviction of felon in possession of a firearm, MCL 750.224f; MCL 769.10, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with felonious assault, MCL 750.82, felon in possession of a firearm, and two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b, as the result of an altercation at a club. The club manager observed a tall man matching defendant's description wearing an orange shirt and holding a gun. Another man took the gun and fatally shot a man on the floor. Several witnesses testified that a tall man wearing an orange shirt stood outside the club and fired shots in the direction of patrons as they were running to their vehicles. One witness identified defendant as the person who fired the shots. The jury acquitted defendant of felonious assault and one count of felony-firearm, second offense, but convicted him of felon in possession of a firearm and the second count of felony-firearm, second offense. The trial court rejected defendant's objections to the scoring of the statutory sentencing guidelines and imposed consecutive terms of two to seven years and five years for felon in possession of a firearm and felony-firearm, second offense, respectively.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense Variable (OV) 1, MCL 777.31, aggravated use of weapon, provides that twenty-five points should be scored if a firearm was discharged at or toward a person. Offense Variable 3, MCL 777.33, physical injury to victim, provides that 100 points should be scored if a victim

was killed and homicide is not the sentencing offense. Offense Variable 9, MCL 777.39, number of victims, provides that twenty-five points should be scored if ten or more victims were involved in the incident.

Defendant argues that he is entitled to resentencing for his conviction of felon in possession of a firearm because the trial court misscored OV 1, 3, and 9 at twenty-five, 100, and twenty-five points, respectively. We disagree and affirm defendant's sentence. A man matching defendant's description was observed holding a gun inside the club. Another man grabbed the gun and fatally shot a third man, who was lying on the floor. Defendant was charged with felonious assault based on allegations that he fired a weapon in the direction of patrons who were leaving the club. The jury acquitted him of that charge; nevertheless, the trial court concluded that a preponderance of the evidence established that he committed the offense. Consequently, the court considered the facts underlying the acquittal when scoring the guidelines and fashioning a sentence. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994); *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). The evidence supported a finding that defendant stood outside the club and discharged a gun in the direction of numerous persons (far more than ten, according to several witnesses), and that those persons were put at risk of injury or death as a result of defendant's actions. MCL 777.31(2)(a) (OV 1); MCL 777.39(2)(a) (OV 9). The evidence supported the trial court's scoring of both OV 1 and OV 9 at twenty-five points. *Hornsby, supra*. Furthermore, defendant possessed a gun inside the club and as a result, a person was shot and killed. This evidence supported the trial court's scoring of OV 3 at 100 points because the victim's death resulted from a crime, but homicide was not the sentencing offense. MCL 777.33(2)(b); *Hornsby, supra*. Defendant is not entitled to resentencing.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens