STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2005
v	No. 254891 Wayne Circuit Court
ANTOINE DESHAWN COTTO, Defendant-Appellant.	LC No. 03-012021-01

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of carjacking, MCL 750.529a, and third-degree fleeing and eluding, MCL 257.602a(3), entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Complainant testified that at approximately 3:30 a.m. or 4:00 a.m. on October 12, 2003, he parked his green 1997 Chevrolet Tahoe in the parking lot of a motel and entered the lobby to register for a room. His friend, Vicki, remained in the vehicle. As complainant approached his vehicle after registering, defendant appeared, displayed a gun, and then entered the Tahoe and drove it out of the parking lot. Vicki was in the Tahoe when defendant drove it out of the lot. Complainant viewed a line-up and identified defendant as the perpetrator of the incident.

Detroit police officers View and Crisp pursued the Tahoe, activated the patrol car's lights and siren, and eventually gave the vehicle a verbal order to stop. The Tahoe stopped momentarily, but then drove away at a high rate of speed. View identified defendant as the driver of the Tahoe.

Lieutenant Ennis interviewed defendant and advised him of his rights. Defendant waived his rights and agreed to make a statement. Defendant stated that he drove the Tahoe from an intersection at a friend's request. He acknowledged that he knew the vehicle had been stolen.

Defendant testified that he approached the Tahoe, waited for the female passenger to leave the vehicle, and then drove the Tahoe out of the parking lot. Defendant denied that he displayed a gun during the incident. He acknowledged that he fled when the police stopped the Tahoe, and admitted that he lied when he made his statement.

The trial court found defendant guilty of carjacking and third-degree fleeing and eluding. The trial court found complainant's testimony to be credible, and rejected that given by defendant. The trial court sentenced defendant to concurrent terms of eighty-one months to twenty years for carjacking and three to five years for fleeing and eluding. Defendant's minimum term of eighty-one months was within the statutory sentencing guidelines.

II. Analysis

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

In a bench trial, the trial court must make findings of fact and state separately its conclusions of law. MCR 6.403. Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). A finding is considered to be clearly erroneous if, after a review of the entire record, we are left with the firm and definite conviction that a mistake was made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

To establish the offense of carjacking, the prosecutor must prove: (1) that the defendant took a motor vehicle from another person; (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle; and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. MCL 750.529a; *People v Davis*, 250 Mich App 589, 592; 649 NW2d 118 (2002), rev'd in part on other grounds 468 Mich 77 (2003).

The elements of third-degree fleeing and eluding are: (1) that the law enforcement officer was in uniform and performing his lawful duties and his vehicle was adequately identified as a law enforcement vehicle; (2) that the defendant was driving a motor vehicle; (3) that the officer ordered the defendant to stop with his hand, voice, siren, or emergency light; (4) that the defendant was aware that he had been ordered to stop; (5) that the defendant refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by increasing the speed of the vehicle or turning off the lights; and (6) that some portion of the violation occurred in an area with a speed limit of thirty-five miles per hour or less, or that defendant's conduct resulted in an accident. *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).

Defendant argues that the trial court's findings of fact that formed the basis of its decision to convict him were clearly erroneous. We disagree. The trial court was entitled to find the testimony given by complainant to be credible, notwithstanding the fact that some portions of complainant's testimony were inconsistent with other portions. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Complainant's testimony established the elements of carjacking. *Davis*, *supra*. Similarly, the trial court was entitled to accept as credible Officer

View's testimony that defendant stopped momentarily in response to commands, but then drove away from the scene at a high rate of speed. This testimony established the elements of third-degree fleeing and eluding. *Grayer, supra*. Evidence in the record, both direct and circumstantial, supported the trial court's findings. Those findings were not clearly erroneous. *Gistover, supra*.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that 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).

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A sentence within the appropriate guidelines range is subject to review only if challenged at sentencing, in a motion for resentencing, or in a motion to remand, but a sentence outside the range may be challenged on appeal even if the issue is not so raised. *Id*. at 309, 310-311.

Defendant argues that the trial court erred by scoring Offense Variable (OV) 9, MCL 777.39, number of victims, at ten points on the ground that two victims were involved in the incident. He asserts that no evidence showed that he pointed a weapon at or otherwise threatened Vicki, complainant's passenger, and that the trial court did not so find beyond a reasonable doubt as required by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

We disagree. Defendant did not challenge the scoring of OV 9 at sentencing, in a motion for resentencing, or in a motion to remand. Thus, this issue is not preserved for appellate review. *Kimble*, *supra* at 309. Complainant's testimony that Vicki was in the Tahoe when defendant drove the vehicle out of the parking lot after displaying a gun supported the trial court's scoring of OV 9 at ten points. *Hornsby*, *supra*.

Blakely, *supra*, does not apply to Michigan's system of indeterminate sentencing because under that system the maximum term is not set by the sentencing court, but rather is determined by statute. MCL 769.8(1); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). We are bound by *Claypool*, *supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray