

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE LEROY GENTRY,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 278584

Wayne Circuit Court

LC No. 07-003481-02

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant appeals of right his convictions and sentences for four crimes: armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), receiving or concealing a stolen motor vehicle, MCL 750.535(7), and possession of a firearm during the commission of a felony, MCL 750.227b (felony-firearm). The trial court sentenced defendant to 135 months' to 40 years' imprisonment for the armed robbery conviction (at the highest end of the minimum sentence range recommended by the sentencing guidelines, 81 to 135 months), 12 to 20 years' imprisonment for the first-degree home invasion conviction, and 2 to 5 years' imprisonment for the receiving or concealing a stolen motor vehicle conviction, to be served consecutively to 2 years' imprisonment for the felony-firearm conviction.

On appeal, defendant does not dispute his convictions for armed robbery, first-degree home invasion and receiving or concealing a stolen motor vehicle. Defendant also does not challenge his sentences for receiving or concealing a stolen motor vehicle and felony-firearm. Rather, defendant argues that (1) the trial court improperly sentenced him at the top of the sentencing guidelines range for the armed robbery conviction only because he denied being armed during the robbery; (2) that his minimum sentence of 12 years for home invasion (a) violates the sentencing guidelines statute because it is not supported by substantial and compelling reasons; and (b) is disproportional because it exceeded the sentence imposed for a higher-class felony conviction; and (3) there was insufficient evidence to support the felony firearm charge. We affirm defendant's convictions, and his sentences for armed robbery, felony-firearm, and receiving or concealing a stolen motor vehicle, but reverse his sentence for first-degree home invasion, and remand for resentencing on that crime.

I

Mark Bratcher was home alone when he heard a knock at the front door. Bratcher looked out the window and observed a silver minivan, similar to his stepmother's, parked in the

driveway. So thinking his stepmother had arrived he went to the front door and opened it. Instead of his stepmother, defendant and Mario Jackson were at the front door. Jackson had a semi-automatic handgun, which he pointed at Bratcher. After a brief exchange, when Bratcher tried to close the door and call 9-1-1 on the house phone, defendant pushed open the door, and grabbed the phone from Bratcher.

Defendant and Jackson entered the home and demanded that Bratcher take them to one of the bedrooms, from which defendant and Jackson took a video game console and numerous video games, purportedly in satisfaction of a gambling debt.

Next, defendant and Jackson proceeded to Bratcher's bedroom, where Jackson located and took a shotgun belonging to Bratcher. During the prosecutor's direct examination of Bratcher, the following exchange occurred regarding the taking of the shotgun:

Q. Okay. What happened inside of your bedroom?

A. They looked around, looking through all my stuff, Mario Jackson was, and then he grabbed my cell phone off the little night stand. And then *they asked me if I had any guns in the house.* And I told them yeah. And then they took the shotgun that was on the night stand also in a big, black case.

* * *

Q. And you had a shotgun inside your room?

A. Yes.

Q. Now, was this a shotgun out in the open that you could see?

A. No. It was in a case, in a big, giant black case.

Q. Okay. And where was the big, giant black case with the—The shotgun was inside it?

A. Yes.

Q. And where was it sitting inside your room?

A. In the back of my night stand.

Q. Okay. Did you point that out to either of these individuals.

A. *After they had asked me if I had any weapons in the house. Yes.*

Q. Okay. Who grabbed the shot gun?

A. Mario did.

Defendant and Jackson also took many other items of tangible personal property.

After the foregoing crimes, defendant went outside and made a telephone call. About five minutes later, a white van pulled up in front of the house. Four men from the van entered the home and spoke with defendant and Jackson. Defendant then left the house with two garbage bags full of stolen goods, and placed them in the silver van he arrived in. Bratcher's shotgun was still next to the couch, but was later placed in the white van by one of the later-arriving men. Meanwhile, the four late arrivals went upstairs, whereupon Bratcher heard things crashing. These four men came downstairs with a computer belonging to Bratcher's stepmother. Defendant and Jackson left in the silver minivan, and the other four men left in the white van. Bratcher then called the Redford township police.

Bratcher told the police that his cell phone had been stolen, and that its GPS locator was turned on. Sergeant Eric Kapalanski, the officer-in-charge, testified that he contacted the phone company, and they pinpointed the cell phone's location in the area of Homer and Lawrence, in Detroit. Between approximately 5:30 and 6:00 p.m. on December 14, 2006, Sergeant Kapalanski went to the area of Homer and Lawrence and observed a light purple minivan. Sergeant Kapalanski set up surveillance, and later observed two people get inside the van. He notified the Detroit police department.

Officers Kenneth Dale and Kenneth Johnson of the Detroit police department testified that they were working together on December 14, 2006 when dispatch informed them of surveillance on a 1996 Dodge minivan taking place by Redford Police and requested their assistance. Upon arriving at the scene, Officers Dale and Johnson observed a minivan parked on the street. As the police car pulled up to the van, the driver, who had been exiting the vehicle, got back inside and the van sped off. A high-speed chase ensued, ending in an alley. Two individuals ran from the minivan and through the alley, while the police gave chase, in hot pursuit. The passenger of the vehicle dropped a video game console that had been in his hands and then fired a handgun at the police. The officers returned fire, but no one was hit. Officer Johnson caught up with and arrested Jackson, who had been driving the minivan. The passenger was able to escape at that time.

Evidence technician Nathan Johnson testified that he recovered a video game console and a cell phone at the scene where the car chase ended. Defendant was arrested the following day. A warrant for a search of defendant's home was executed, and many stolen items from the Bratcher home were seized. Defendant also made a voluntary statement to the police about his crimes, in which he admitted riding in a purple Dodge van with Jackson, and going to the Bratcher home in search of Mike Bratcher. In regard to the thefts, including the shotgun, defendant stated:

We enter[ed] the house. We [were] all walking around. Mario asked, where [are] the games[?]. . . . [H]e [told] us where we can get a[n] X Box 360, a Playstation II and a[n] X Box. So, Mario grabs all the stuff and put it together. We go upstairs. There [are] presents on the floor and in a little drawer like a closet. So, we [were] opening gifts, Mario and the boy go downstairs. I stay[ed] up[stairs]. When I go downstairs, they had a big case *with a gun in it*. [Emphasis added.]

Defendant also admitted that when the other perpetrators arrived, he and Jackson left and took some stolen items to his aunt's home, and others to his home, and that the police drove to his house as he was about to get out of the van, but instead, he and Jackson fled in the van.

Defendant also admitted that they stopped the van in an alley, and fled on foot. Defendant fled to his aunt's house.

II

Because defendant failed to challenge the proportionality of his sentence for first-degree home invasion, and failed to assert a statutory challenge to that sentence, defendant has failed to properly preserve those issues for appeal.¹ Defendant also failed to preserve his claim that the trial court improperly considered his refusal to admit guilt in fashioning his armed robbery sentence. But a defendant need not take any action in the trial court to preserve for appeal a challenge to the sufficiency of the evidence for a conviction. *People v Wolfe*, 440 Mich 508, 516, n 6; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

III

A defendant asserting an unpreserved claim of error, whether the issue is constitutionally based or not, must show that plain error occurred which affected substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*.

The proper construction or application of the statutory sentencing guidelines is a question of law which this Court reviews de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Constitutional claims, such as a claimed deprivation of liberty without due process of law, because of insufficient evidence, are reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). But the review of a jury verdict, for a sufficiency of evidence claim, is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). When reviewing a challenge to the sufficiency of evidence, this Court must examine the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra* at 515. In reviewing the sufficiency of the evidence, this Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility

¹ Within the body of his brief, defendant also argues that MCL 769.34(10) is unconstitutional, (1) as a violation of the separation of powers in the Michigan government, under the Michigan constitution; (2) because it caused a deprivation of his liberty without due process of law; and (3) because it is in derogation of the state constitutional right to appeal as a matter of right or by leave. Defendant failed to include these issues in the statement of questions presented, and because there is no manifest injustice in our declining to decide these unpreserved issues, see *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001), we consider them waived. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

of witnesses. *Id.* at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence, and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

IV

Defendant first challenges his armed robbery sentence of 135 months to 40 years, on the ground that it was improperly based on defendant's denial that he was armed. We disagree.

While a trial court may not base its sentence in any part on a defendant's refusal to admit guilt, *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006); *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007), a sentencing court may properly consider the defendant's lack of remorse, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *Dobek, supra* at 104. Error can only be found where it is apparent from the record that the trial court based its decision on the defendant's failure to admit guilt, such as where the trial court asked the defendant to admit guilt or offered a reduced sentence to the defendant in exchange for an admission of guilt. *People v Spanke*, 254 Mich App 642, 650, 658 N.W.2d 504 (2003). Here, the trial court sentenced defendant as it did after expressly citing his lack of remorse, and there is insufficient evidence that the trial court based its sentencing decision on defendant's denial that he had been armed. Therefore, we find no error. *Id.*

V

Defendant also argues that his minimum sentence of 12 years for his first-degree home invasion (a) violates the sentencing guidelines statute, because it departs above the 45 to 75 month statutory sentencing guidelines² recommended range, without a substantial and compelling reason, and (b) is disproportionate, because it is longer than the armed robbery sentence, despite being categorized as a lower crime class felony than armed robbery. We disagree with the statutory argument, but agree with the proportionality argument.

A

In *Mack*, the defendant was convicted of a class B felony and a class D felony. *Mack, supra* at 127. The trial court sentenced the defendant to concurrent terms of 15 to 30 years in prison for each offense. *Id.* at 123-124. The defendant argued that, under the version of MCL 771.14 applicable at that time, the 15-year minimum sentence for the class D felony was a departure from the sentencing guidelines, and required a substantial and compelling reason. *Id.* This Court rejected that argument, holding that, under the express terms of the version of MCL 771.14(2) applicable at that time, a presentence investigation report (PSIR) did not have to be prepared for the lesser-class felony, and, as a result, the sentence for the lesser-class felony did not have to be supported by substantial and compelling reasons, although the Court questioned

² The statutory sentencing guidelines apply to any enumerated felony crime committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 769.34(2). Defendant committed his crimes in December 2006.

whether a sentence for a conviction of the lesser-class felony, not scored under the guidelines, could permissibly exceed the sentence imposed for the highest-crime class felony, and remain proportional. *Id.* at 128-129.

Accordingly, under *Mack*, defendant's statutory argument fails. A sentence imposed for a lesser crime class felony can exceed the range that would be recommended by the sentencing guidelines for that felony, without requiring substantial and compelling reasons, because the lesser-class felony did not have to be scored at all. *Mack, supra* at 125-129.³

B

As we earlier noted, defendant also argues that the minimum sentence of 12 years for his first-degree home invasion conviction violates the principle of proportionality, because, despite that offense having a lower crime class, the minimum sentence for that offense is longer than the minimum sentence imposed for the highest-class felony (armed robbery).⁴ We agree.

The principle of proportionality requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107, 110 (2003). Proportional to the circumstances surrounding the offender means proportionality to his prior record. *People v Babcock*, 469 Mich 247, 255, 269; 666 NW2d 231 (2003). All sentences must adhere to the principle of proportionality. *Mack, supra* at 128-129.

The principle of proportionality is closely connected to the rules embodied in the sentencing guidelines. It is settled in Michigan that our Legislature

has subscribed to [the] principle of proportionality in establishing the statutory sentencing guidelines. Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. . . . Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history. [*Babcock, supra* at 263-264 (citation omitted).]

The Court in *Babcock* further emphasized the close connection between proportionality and the existence of a basis for a departure from the guidelines:

In determining whether a sufficient basis exists to justify a departure, the principle of proportionality – that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record – defines the standard against which the allegedly substantial and

³ An amendment to MCL 777.21, by 2006 PA 655, requires that lesser crime class felonies also be scored under the guidelines. However, this amendment became effective on January 9, 2007. The offenses in this case occurred in December 2006.

⁴ Armed robbery is a class A felony under the sentencing guidelines. MCL 777.16y.

compelling reasons to support the departure are to be assessed. [*Id.* at 262 (footnote omitted).]

In other words, the premise of the law “is that, everything else being equal, *the more egregious the offense . . . the greater the punishment.*” *Id.* at 263 (emphasis added). Because first-degree home invasion is a less egregious offense than armed robbery (being a lower crime class felony), the punishment for that crime should have been less than the punishment that for the crime of armed robbery. See *id.*

The Court in *Mack* also affirmed that all sentences must adhere to the principle of proportionality. *Mack, supra* at 128-129. The Court in *Mack* stated:

As the Supreme Court made clear in . . . *Babcock*, . . . the Legislature subscribed to the principle of proportional sentencing both when it established “mandatory sentences as well as minimum and maximum sentences for certain offenses,” citing *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990), and when it established the statutory sentencing guidelines. *Babcock, supra* at 263. [*Id.*]

Adhering to the principle of proportionality articulated in *Babcock* and *Mack*,⁵ we conclude that defendant’s sentence for first degree home invasion is disproportional on its face, because it is longer than defendant’s sentence for armed robbery despite being a lesser-class felony and thus a less serious crime. *Babcock, supra* at 263-264. The trial court made no specific findings to justify giving defendant a longer sentence for a lower-class felony, and therefore, the sentence constitutes plain error. We further find that this error affected defendant’s substantial rights, because a defendant has an established right to proportionality in sentencing. *Id.* Finally, the error seriously affected the fairness of the proceedings, *Carines, supra* at 673, because this sentence violates an established principle of law (proportional sentencing) of this state.⁶ Defendant is entitled to be resentenced for the first-degree home invasion conviction. On remand, the trial court shall impose a sentence for first-degree home invasion that does not exceed the sentence for armed robbery.

⁵ Although defendant did not expressly raise the proportionality issue in his statement of questions presented, we may address an argument in order to address a significant issue, or to correct an error of law. See *Health Care Ass’n Workers Comp Fund v Dep’t of Consumer & Industry Services*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

⁶ Compare *United States v Milan*, 398 F3d 445, (CA 6, 2005) (a sentence that exceeded the maximum authorized sentence, based on facts the defendant admitted in connection with a guilty plea, in violation of the Sixth Amendment, required reversal for resentencing). On issues of state law, this Court is not bound by federal decisions, *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003), but this Court may choose to refer to federal decisions for guidance, see *Duskin v Dep’t of Human Services*, ___ Mich App ___, slip op at p ___ n 3; ___ NW2d ___; 106 Fair Empl Prac Cas 814 (2009).

VI

Defendant next argues that there was insufficient evidence to support the conviction for possession of a firearm during the commission of a felony, and that; accordingly, the conviction violated his due process rights. We disagree.

In reviewing the sufficiency of the evidence presented in a criminal trial, a reviewing court determines whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of an offense. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In determining whether sufficient evidence had been presented to support a conviction, an appellate court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

To support a conviction for felony-firearm, the prosecution must prove the following elements: (1) defendant possessed a firearm, (2) during the commission or attempted commission of a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003); MCL 750.227b. For purposes of this offense, possession encompasses both actual possession (physically touching and holding), and constructive possession, and can be established by circumstantial evidence of either. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Constructive possession of a firearm is established if the defendant knows the location of the weapon, and has reasonable access to it. *Id.* at 438.

Because defendant committed the felony of armed robbery and does not challenge his conviction for this offense, our required deference to the jury, *Robinson*, *supra* at 5, also requires us to conclude that defendant must fail in his challenge of his felony-firearm conviction. In finding the defendant guilty of armed robbery, the jury necessarily also found that defendant possessed a firearm during the commission of a felony.⁷ Indeed, there was evidence that defendant constructively possessed a firearm during the commission of the armed robbery. The evidence is as follows.

Bratcher testified at trial that both defendant and Jackson asked him whether there were any weapons in the house. Bratcher led both defendant and Jackson to his basement bedroom, and after they again asked him if there were any weapons in the house, he pointed to a black case behind his nightstand, which Jackson then took upstairs. This evidence supports the conclusion

⁷ Compare *Dickenson v State*, 75 Wis2d 47, 51; 248 NW2d 447, 449 (1977) (“[t]he jury’s verdict that plaintiff in error was guilty of the crime of armed robbery necessarily also found that plaintiff in error was guilty of unarmed robbery”). On questions of Michigan law, this Court is not bound by foreign decisions, *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), but it may find them persuasive, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

that defendant and Jackson were jointly stealing the gun, and that even if defendant didn't physically possess the shotgun, he constructively possessed it. See *Burgenmeyer, supra* at 437.

In addition, the testimony that the passenger in the van involved in the high-speed chase shot at the Detroit police officers as he fled on foot, also supports the conclusion that defendant possessed a firearm, because there was circumstantial evidence that defendant was the passenger in the van, and direct evidence in the way of defendant's admission to the same. Accordingly, we conclude there was sufficient evidence to allow the jury to find that defendant possessed a firearm during the commission of a felony.

VII

Defendant's argument that the trial court improperly sentenced him at the top of the sentencing guidelines range for the armed robbery conviction, based on the fact that he denied being armed during the robbery, is rejected. Defendant's argument that the minimum sentence for first-degree home invasion violated the sentencing guidelines statute is rejected. However, we hold that a sentence of incarceration for a lesser-class felony crime that exceeds the sentence of incarceration imposed on the highest-class felony crime, for which the offender is receiving a concurrent sentence, is disproportional on its face, and absent specific findings by the trial court justifying such a discrepancy, cannot stand. Finally, we hold that there was sufficient evidence for the felony-firearm conviction.

Defendant's convictions are affirmed, as are his sentences for armed robbery, receiving or concealing a stolen motor vehicle, and possession of a firearm during the commission of a felony. Defendant's sentence for first-degree home invasion is reversed, and this case is remanded to the trial court for resentencing on that offense. We do not retain jurisdiction.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens