STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2010
v	No. 289673 Ingham Circuit Court
GEORGE EDWARD WHITFIELD, Defendant-Appellant.	LC No. 07-001565-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of two years for felony-firearm, and five to ten years for CCW. We affirm.

Defendant argues that there was insufficient evidence for the jury to convict him of the felony-firearm charge because he was acquitted of the underlying felony charges of assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84. We disagree.

We review a claim of insufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002); *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). The elements of felony-firearm are that the defendant (1) possessed a firearm, (2) during the commission or attempted commission of a felony. MCL 750.227b; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Plainly, conviction of the underlying felony is not an element of felony-firearm. Therefore, the defendant need not actually be convicted of the underlying felony to be found guilty of felony-firearm. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982).

Here, two eyewitnesses testified that defendant shot the victim. First, the victim testified that defendant shot at him at least four times, striking him in the left ribs. Second, an onlooker testified that she witnessed a man on the sidewalk argue with, and shoot, a man who was slowly driving down the street. A third individual corroborated these accounts, indicating that she was

with defendant, walking down the sidewalk, when the victim drove up, that she "took off" when the victim began to get out of his car and that, as she ran, she heard gunshots.

The jury convicted defendant of felony-firearm, while finding him not guilty of assault with intent to murder or assault with intent to commit great bodily harm. This was within the jury's purview; a jury may convict a defendant of felony-firearm while acquitting him of the underlying felony. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983). It is unclear how the jury reached its verdict; however, it is possible that the jury chose to be lenient with its convictions. As our Supreme Court has explained:

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).]

Viewing the evidence in the light most favorable to plaintiff, a rational trier of fact could have concluded, beyond a reasonable doubt, that defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *Akins*, 259 Mich App at, 554; *Lueth*, 253 Mich App at 680; *Harmon*, 248 Mich App at 524. Therefore, there was sufficient evidence presented at trial for the jury to find defendant guilty of felony-firearm, even if it chose to acquit defendant of the underlying felony.

Defendant next argues that plaintiff did not meet its burden of proving beyond a reasonable doubt that defendant actually concealed the weapon, as required by MCL 750.227 to convict him of the offense of carrying a concealed weapon. We disagree.

Defendant points out that no witness concretely testified that defendant concealed the gun. However, the victim testified that when he first saw defendant, he did not see any type of weapon, but then he saw defendant pull a handgun out of the front of his pants. An eyewitness stated that she saw two men arguing on the street and witnessed the man on the sidewalk, defendant, pull out a gun from his person after moving his shirt. And, defendant's companion, with whom he was walking before the shooting, testified that she did not see him with a weapon at that time.

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from that evidence can constitute sufficient proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Viewing the evidence in the light most favorable to the prosecution, we find that the evidence was sufficient to enable a rational trier of fact to find that defendant was carrying a concealed weapon on the date of the

incident. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000); *Lueth*, 253 Mich App at 680; *Harmon*, 248 Mich App at 524.

Defendant also argues that the trial court abused its discretion by refusing to remove a statement in the "Agent's Description of the Offense" within the presentence investigation report (PSIR) indicating that defendant shot the victim, because defendant was found not guilty of assault with intent to murder and assault with intent to do great bodily harm. We disagree.

We review a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion. *People v Uphaus* (*On Remand*), 278 Mich App 174, 181; 748 NW2d 899 (2008). A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *Id.*

A trial court must respond to a defendant's challenge to the accuracy of the information contained in his PSIR; however, it has wide latitude in its response. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). The court may determine whether the information is accurate, accept the defendant's version, or disregard the challenged information. *Id*. If the court elects to determine the accuracy of the information, the prosecutor "must prove by a preponderance of the evidence that the facts are as asserted." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008) (citation omitted).

Here, the trial court considered defendant's challenge to the statement that the defendant shot the victim, concluding that the statement was fair, and that it was "pretty much of a conclusion from all the police work that was done and everything." The trial court's conclusion that the evidence presented at trial established by a preponderance of the evidence that defendant shot the victim was not an abuse of discretion. Eyewitness testimony indicated that defendant shot the victim, and direct and circumstantial evidence placed defendant at the scene with a weapon. Therefore, the trial court properly responded to defendant's challenge to the statement included in the PSIR by determining that the information was accurate.

Defendant next asserts that the court's decision to exceed the sentencing guidelines in order to account for the assaultive nature of defendant's previous convictions was improper because defendant's previous crimes were already accounted for under PRV 2. We disagree.

We review a trial court's decision to depart from the sentencing guidelines for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008) (citation omitted); *Babcock*, 469 Mich at 269. We review the trial court's decision to depart from the guidelines recognizing that the trial court was in the better position to determine whether a departure is warranted and giving the trial court's determination appropriate deference, acknowledging the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. *Id*. at 270.

A trial court must state its reason for imposing a sentence at the time of sentencing. A trial court may depart from sentencing guidelines if it has a substantial and compelling reason to do so, and it articulates on the record the reason for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Only factors that are "objective and verifiable may be used to judge whether substantial and compelling reasons exist." *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). Moreover, the reasons for departure should "keenly or irresistibly" grab the court's attention, and should be "of considerable worth in deciding the length of a sentence." *Id.* at 67.

The parties agreed below that the PRV score of 40 was correct. That score included 30 points for PRV 2. After addressing defendant's challenges to the offense variable (OV) scoring, the parties agreed that defendant's OV score was 36. As a result, the sentence guideline range was 12 to 48 months for the CCW conviction, with a suggested minimum of four years for an habitual fourth offender. MCL 777.21(3)(c); MCL 777.66. The trial court departed from the sentencing guidelines and imposed a minimum sentence of five years, indicating that it did not believe that the continuous assaultive nature of defendant's criminal history was adequately reflected by his PRV score.

Specifically, PRV 2 addresses a defendant's prior low severity felony convictions, with a range of zero to 30 points allocated depending on the number of prior convictions. The maximum points are scored if the defendant has four or more prior low severity convictions. This PRV does not take into account the nature of the conviction, but merely considers all convictions that are listed in class E, F, G, or H, or convictions that are punishable by a maximum term of imprisonment of less than 10 years. MCL 777.52.

Defendant has a total of seven prior low severity felony convictions and three misdemeanor convictions, and, consequently, was allocated the maximum of 30 points under PRV 2. A number of the prior convictions were assaultive in nature.

As required by MCL 769.34(3), the court stated on the record its substantial and compelling reason for departing from the sentencing guidelines. See *Buehler*, 477 Mich at 24. Furthermore, the fact that defendant's prior convictions were assaultive in nature is a factor that is objective and verifiable by viewing defendant's extensive record; it is also a factor that was not taken into consideration under PRV 2 which does not take into account the nature of prior offenses. Therefore, the trial court's conclusion that the sheer number and nature of defendant's prior convictions was substantial and compelling is not clear error. The upward departure of one year is within the range of reasonable and principled outcomes based on defendant's assault-related crimes, and is proportionate in light of defendant's criminal record. See *Babcock*, 469 Mich at 262; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 201 (2003).

Next, defendant argues that his sentence for CCW should not have been enhanced because plaintiff failed to file a notice of enhancement within 21 days of arraignment. This argument is without merit. Each complaint and information in the lower court file includes the habitual offender notice. MCL 769.13(1).

Finally, defendant argues that the trial court erred by failing to remove two statements from the PSIR that it had agreed to strike. We agree.

During sentencing, defense counsel requested that information in the PSIR, relative to whether defendant said he likes guns, be stricken. Specifically, the section titled "Evaluation and Plan" within the PSIR states: "When this writer asked the defendant why he had a gun at that time, he stated 'I like guns.'" A second statement in the report: "[Defendant] informed this writer that he 'liked guns' and is clearly not opposed to using them." The court responded that the information was not pertinent to sentencing, and agreed that it should be stricken. However, despite the trial court's agreement that the information would be stricken, the statements were not removed from the PSIR.

Because the trial court found that the challenged information in the PSIR was irrelevant, it was required to strike the information before sending the report to the Department of Corrections. See *Spanke*, 254 Mich App at 649. The trial court's failure to strike the information was an abuse of discretion. Therefore, we remand this case to the trial court with instructions to remove the subject sentences from the PSIR and to forward the updated PSIR to the Department of Corrections. *Id.*, citing *Harmon*, 248 Mich App at 533-534.

We affirm and remand for entry of a corrected PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis