STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2010
v	No. 291592 Wayne Circuit Court
FRANKLIN EDWARD IVEY, Defendant-Appellant.	LC No. 08-012499-FC

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant was found guilty by a jury of one count of felon in possession of a firearm (felon-in-possession), MCL 750.224f, but was acquitted of first-degree murder and possession of a firearm during the commission of a felony. Defendant was sentenced to three years' probation, with 12 months of jail confinement. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in scoring offense variable (OV) 1 at 25 points and OV 3 at 100 points. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

> "[A] sentencing court may consider all record evidence before it when calculating the . . . guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial" [*People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008) (internal citation and quotation marks omitted).]

"Scoring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. The Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.*

Defendant was found guilty of felon-in-possession. Felon-in-possession is a crime against public safety. MCL 777.16m. When a defendant is convicted of a crime against public safety, a trial court is to score OV 1 and OV 3, among other OVs. MCL 777.22(5). Defendants

are to be sentenced according to accurately scored guidelines. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

MCL 777.31 provides:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon[:] 25 points

MCL 777.33 provides:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was killed[:] 100 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 3:
>
> * * *
>
> (b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

As noted in the statute, the trial court is required to apply the highest number of points possible to OV 3. *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005).

Defendant essentially argues that because the jury acquitted him of the murder charge, the jury accepted his claim of self-defense, and therefore, he should not be sentenced as if he shot a "victim" or caused a "victim's" death.[1] The prosecutor argues that even if the jury's

[1] However, the jury merely found that the prosecution had failed to prove that defendant was guilty of murder beyond a reasonable doubt. A trial court makes findings for sentencing purposes by a preponderance of the evidence, as opposed to a higher standard of proof. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). There is evidence in the record that defendant was not acting in self-defense. There were six spent bullet cartridges found in the decedent's car. The decedent was shot five times: twice in the head, once in the back, once in the buttocks, and once in the thigh. No blood was found on the outside of the decedent's car, but only on the inside. Likewise, brain matter was found inside of the decedent's car on the center console. The location of the cartridges, blood, and brain matter was inconsistent with defendant's testimony that the decedent attacked him and that defendant shot the decedent while both men were outside of the decedent's car. Thus, there was evidence that would clearly allow

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verdict necessitated a determination that defendant acted in self-defense, the trial court's decision was correct. We agree.

When interpreting statutes, a court's goal is to give effect to the intent of the Legislature by applying the plain language of the statute. *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009). The trial court is to score OV 1 if there was an "aggravated use of a weapon." MCL 777.31(1). The statute provides that OV 1 should be scored at zero if "[n]o aggravated use of a weapon occurred[.]" MCL 777.31(1)(f). By implication, the acts enumerated in MCL 777.31(1)(a)-(e) constitute "aggravated use of a weapon." MCL 777.31(1)(a) provides that the trial court is to score OV 1 at 25 points if a defendant discharged a firearm "at or toward a human being[.]" Nothing in the statute indicates that the trial court should take the possibility of self-defense into consideration. The statute uses the term "human being." The statute does not require that the human being must be a "victim." The decedent was clearly a human being, and defendant clearly discharged a firearm at the decedent. The score for OV 1 was proper.

Regarding OV 3, the statute requires that the trial court assess 100 points if a "victim was killed," homicide is not the sentencing offense, and the crime did not involve the operation of a motor vehicle or related items. MCL 777.33(1)(a) and (2). The term "victim" is not defined in MCL 777.33. *People v Albers*, 258 Mich App 578, 592; 672 NW2d 336 (2003). Nothing in the statute limits the application of OV 3 to the victim of the charged offense. *Id*. at 592-593. Thus, for purposes of OV 3, a victim includes "any person harmed by the criminal actions of the charged party." *Id*. Defendant was convicted of felon-in-possession, and the decedent died as a result of defendant's possession of a firearm. Therefore, we find that there was sufficient evidence that the decedent was a "victim" for purposes of OV 3. Moreover, MCL 777.33(2)(b) indicates that OV 3 is to be scored at 100 points if "death results from the commission of a crime and homicide is not the sentencing offense." By using the phrase "results from," and not "caused by," the Legislature signaled that the prosecution need only establish factual causation, and not proximate causation, with regard to the death. See, generally, *People v Wood*, 276 Mich App 669, 672; 741 NW2d 574 (2007). There is no question here that defendant factually caused the decedent's death, regardless of whether the specific act of killing was in self-defense. Again, "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. There was sufficient evidence that a victim died as a result of defendant's possession of a firearm, and we refuse to speculate regarding whether the jury meant to excuse defendant's possession of a firearm at the time of the killing. We find that the trial court did not commit an error requiring reversal in its scoring assessment.

Defendant also claims, in a poorly developed argument, that the trial court erred in giving instructions in response to notes from the jury. We disagree.

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the trial court to find that defendant discharged a firearm at a human being and that the decedent died, without self-defense being involved at all. Again, "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Nevertheless, we note that the trial court did not explicitly rely on a lack of self-defense in scoring the OVs.

> A party may assign as error the giving of or the failing to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations) . . . . [MCR 2.516(C).]

A party "waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). A defense attorney's approval of jury instructions waives any claim of error with regard to them. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). This Court reviews de novo preserved claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). The Court also reviews questions of law de novo. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997).

Although his briefing is less than clear, defendant evidently challenges the jury instructions given in response to two notes that the jury passed to the trial court. Regarding the first note, the jury asked: "how many years after committing a felony does it take to be allowed to take a gun from someone who is attempting to do you bodily harm before the law says you are allowed to use it to defend yourself[?]" The trial court told the parties that the jury had "blurred two different concepts." The trial court stated that it planned to tell the parties that the law allows a felon to take a gun from an assailant and temporarily possess the firearm for self-defense, but for purposes of carrying or transporting the firearm, there are limitations placed by the law. Defense counsel stated that such an instruction would be acceptable to defendant. In addition, after the trial court instructed the jury to this effect, the trial court excused the jury and asked the parties if the instructions were acceptable. Again, defense counsel stated that he had no objection. Therefore, defendant's right to appellate review of the instruction regarding the first note is waived.

The second note the trial court received from the jury said:

> juror number 10 wants to know as this applies to the felon possessing a firearm, since it's okay to use a firearm in defense of yourself, is it similarly okay to transport the gun due to an Adrenalin [sic] rush slash unclear thinking. After such an incident, Mr. Ivey disposed of the gun once he came to his senses[.]"

The trial court told the parties that it intended to respond by essentially stating that while a felon may temporarily possess a firearm for purposes of self-defense, he may not transport it. The trial court delivered instructions to that effect, telling the jury that it was not "okay" for a felon to transport a firearm.

The trial court's instructions were correct in light of this Court's decision in *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009), lv gtd 485 Mich 916 (2009). In *Dupree*, this Court ruled that a felon may temporarily possess a firearm if the possession is immediately necessary to protect the defendant or another from death or serious bodily harm. *Id*. at 106 (KELLY, J.), 112 (GLEICHER, J.). This would be an affirmative defense to a charge of felon-in-possession. *Id*. at 104, 112-113. However, the defendant's possession of the firearm must end as

soon as the immediacy of the threatened harm has passed. *Id*. at 106-107, 113-114. In light of *Dupree*, the trial court gave the correct instruction.[2]

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto

[2] Generally, decisions are given retroactive effect unless the decisions are unexpected or indefensible. *People v Maxson*, 482 Mich 385, 411; 759 NW2d 817 (2008). We note that defendant would not be prejudiced by an application of *Dupree*, given the dearth of pertinent case law preceding it. Moreover, even if a rule that defendant had relied upon were overruled, the new rule is to be applied to cases pending appeal in which the issue was raised and preserved. *People v Williams*, 475 Mich 245, 255, 259; 716 NW2d 208 (2006). *Dupree* was issued while the present appeal was pending.