STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
V	No. 293565 Wayne Circuit Court
DERRICK LAMAR PETERSON, Defendant-Appellant.	LC No. 08-017961-FC

Before: K. F. KELLY, P.J., AND GLEICHER AND STEPHENS, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of carjacking, MCL 750.529a, and was sentenced to 42 to 180 months' imprisonment. He appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first argues on appeal that there was insufficient evidence presented at trial to convict him of carjacking. Specifically, defendant argues that the prosecution failed to establish either the identity of the alleged assailant or that he was at the scene of the crime when it occurred. We disagree.

Challenges to the sufficiency of the evidence at a bench trial are reviewed de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006). This Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that essential elements of the crime were proven beyond a reasonable doubt. *Id.* But it is the fact finder's role to determine the weight of evidence and the credibility of witnesses, and the court should not interfere with that role. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

The evidence established that the complainant's vehicle was stolen while she was outside the vehicle, pumping air into the front passenger tire at a gas station. When she exited the car, she left the keys in the ignition and the doors unlocked. As she was bent down putting air in the tire, she heard the driver's-side door close. She looked up and saw a man whom she later identified as defendant sitting in the driver's seat. The complainant opened the passenger door and pleaded with the man not to take the car. The man looked at the complainant and motioned to his side. The complainant testified that she saw what appeared to her to be the bulge and butt of a gun. The complainant let go of the car door and the man drove away. Defendant was

arrested several days later and was identified as the carjacker by the complainant from a corporal line-up.

The evidence presented at trial was sufficient to establish defendant's identity as the person who took the complainant's vehicle. When complainant reported her car stolen to the police, she stated that the perpetrator had strong facial features. Several days after the carjacking, the complainant picked defendant out of a line-up. Although she was initially uncertain if any of the individuals in the line-up was the person who took her car, she picked out defendant immediately after he turned to his side. The complainant testified that she recognized defendant at the line-up as the person who took her car because of his strong facial features and the right side of his face was facing her while he was in her driver's seat. At trial, the complainant again identified defendant as the person who took her car.

Defendant argues that the identification evidence was insufficient to establish that he committed the carjacking because it was dark inside the car and because the perpetrator's head was covered by a hat and skullcap. That argument essentially invites this Court to make a determination regarding the credibility of the complainant's testimony. Such determinations are reserved for the finder of fact. Consequently, when viewed most favorably to the prosecution, the evidence was more than sufficient to establish that defendant was the person who took complainant's vehicle.

Defendant next argues there was insufficient evidence to prove that he committed the carjacking because of the strength of the alibi evidence he proffered. Defendant bases this argument on the trial testimony of two defense witnesses who testified that defendant was at their house the night of November 15, 2008. Both witnesses live in the same home and are friends of defendant. Based on the inconsistencies in their testimony, the trial court found the witnesses to not be credible. We defer to the trial court's determination of witness credibility and will not interfere with its rejection of the witnesses' claim that defendant was at their home when the carjacking occurred. *Harrison*, 283 Mich App at 378; *Passage*, 277 Mich App at 177; see also *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant argues alternatively that there was insufficient evidence to prove beyond a reasonable doubt that the carjacker took the complainant's vehicle "either by force or violence, by threat of force or violence, or by putting [her] in fear." MCL 750.529a(1). Defendant bases this argument on the trial court's finding that the proofs were insufficient to establish that he was guilty of armed robbery and possession of a firearm during the commission of a felony and on the court's reasoning that what complainant saw on his side was not a gun.

Viewing the evidence in a light most favorable to the prosecution, we hold that sufficient evidence existed to establish that defendant took the complainant's car "by force or violence, by threat[ening] force or violence, or by putting [her] in fear." MCL 750.529a(1). While the complainant was holding onto her car door and pleading with defendant to not steal her car, defendant gestured to his side. The complainant let go of the car door after seeing what she believed was a gun. This is sufficient evidence to show either that there was a "threat of force or violence" by defendant or that he placed the complainant in fear. *Id.*; see also MCL 750.529a(1). Therefore, the trial court properly found that the essential elements of carjacking were proven beyond a reasonable doubt. *Allay*, 171 Mich App at 605.

Next, defendant argues that the trial court incorrectly scored his Prior Record Variables (PRV) and an Offense Variable (OV), and that his sentence should be vacated and the case remanded for resentencing. Specifically, defendant argues that PRV 7 should be scored at zero, as opposed to ten points, and OV 1 should also be scored at zero, as opposed to five points. If rescored, the guidelines would place defendant in the B-I grid, with a recommended minimum sentence range of 27 to 45 months, instead of 42 to 70 months. We agree with defendant that PRV 7 should have been scored at zero points.

A trial court's findings on the existence of particular sentencing factors are reviewed for clear error. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). Clear error does not exist if there is any evidence to support the trial court's finding. *Id.*; *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Where a scoring error occurs, resentencing is required if the sentencing guidelines will change under the corrected score. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). But if the guidelines range is not altered after correcting an incorrect score, resentencing is not required. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008); *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Defendant's total PRV score was 15 points (with PRV 2 scored at five points and PRV 7 scored at ten points) and his total OV score was five points (with OV 1 scored at five points), making his PRV Level C, and his OV Level I. The recommended sentencing range for the C-1 level was 42 to 70 months. MCL 777.62. Defendant was sentenced to 42 to 180 months' imprisonment.

Defendant argues that PRV 7 should be scored at zero points because he was not convicted of a subsequent or concurrent felony. MCL 777.57(1)(b). On appeal, the prosecution concedes that the trial court erred in scoring ten points for PRV 7. Therefore, defendant's total PRV score should be five points.

The prosecution argues that the trial court should have scored PRV 6 at ten points because defendant was allegedly on probation for carrying a concealed weapon at the time of the carjacking. MCL 777.56(1)(c). But defendant did not commit the carrying a concealed weapon offense until November 20, 2008, which was after he committed the carjacking. Therefore, the trial court correctly scored PRV 6 at zero points.

Defendant also argues that OV 1 should be scored at zero points because a weapon was not actual or implied during the commission of the carjacking. MCL 777.31(1)(e). This argument is based on the trial court's finding defendant not guilty of armed robbery or felony-firearm because the court found that the proofs did not establish beyond a reasonable doubt that what complainant saw on defendant's side was a gun. Therefore, defendant claims that five points should not have been assessed for the display or implication of a weapon. But a score does not have to be consistent with the verdict as long as the evidence supports it. *People v Perez*, 255 Mich App 703, 713; 622 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). The complainant testified that she saw defendant look at her and grab something on his side that appeared to her to be the butt of a gun. Because the court found the complainant to be credible, there was some evidence to support the score of OV 1 for at least implying the existence of a weapon. *Id*. Therefore, OV 1, and the total OV score, was properly scored at five points.

Changing the total PRV score to five points and keeping the total OV score at five points puts defendant in the B-I grid and changes the sentencing guidelines to 27 to 45 months. MCL 777.62. Because the correct scoring of the guidelines would change the minimum sentence range, defendant is entitled to resentencing. *Francisco*, 474 Mich at 89-91.

Defendant's conviction is affirmed but his sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens