

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLE PRICE,

Defendant-Appellant.

UNPUBLISHED

August 16, 2011

No. 298519

Oakland Circuit Court

LC No. 2009-226959-FC

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

At approximately noon on April 23, 2009, someone approached 77-year-old Charles Hoover from behind while he worked on a flower bed in his front yard. That person grabbed Hoover's shoulder and pressed a metallic object into Hoover's neck, leading him to believe that he was being held at gunpoint. The assailant ordered Hoover to empty his pockets, but Hoover was carrying nothing of value. Hoover ultimately was able to knock his assailant away. That person escaped on foot down the otherwise empty residential street and discarded a yellow object along the way. Hoover was able to describe the attire and race of his assailant, and the assailant's approximate route of escape. Officers summoned to the scene promptly stopped defendant on the nearby I-696 service drive.

Defendant does not contest that someone committed an assault with the intent to rob while armed against Hoover, MCL 750.89. Rather, defendant contends that the prosecution presented insufficient legally admissible evidence to establish her identity as Hoover's assailant, thereby undermining her jury trial conviction. Defendant also challenges her sentence of 15 to 40 years' imprisonment as a fourth habitual offender, MCL 769.12, but only based on her score for a single offense variable. We conclude that the prosecution presented sufficient circumstantial evidence to support the jury's judgment of conviction. Moreover, the court properly scored OV 1. Accordingly, we affirm defendant's conviction and sentence.

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the circumstantial evidence presented to the jury does not tend to prove that she, rather than another individual, committed the assault against Hoover. As such, defendant argues that the jury must have improperly relied solely on dog tracking evidence to identify her as the assailant. We disagree.

When reviewing a defendant's challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). A prosecutor need not present direct evidence of a defendant's guilt. Rather, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The prosecutor presented Hoover's testimony that he was assaulted by someone wearing a dark green hooded jacket, baggy blue pants with orange "military" insignias on the hip pockets and square-toed, two-toned brown shoes. Hoover indicated that his assailant was African-American, shorter than his 5-foot-9 stature, and spoke in an alto or tenor voice. Because the person was wearing a hood and spoke in an androgynous voice, Hoover was unable to discern the gender of his assailant but believed the person could be a teen-aged boy. Hoover's basic description of his assailant was corroborated by his neighbor's testimony. Hoover's neighbor saw a person matching defendant's description walking toward Hoover's home, but he did not witness the assault. Shortly after Hoover's attack, officers apprehended defendant in the direction of the assailant's escape route. Defendant was wearing a dark green hooded jacket and baggy jeans with orange insignias on the back.¹ Hoover's neighbor was able to identify defendant, but only when she was wearing her hood. Further, the investigating officers recovered the yellow object that Hoover had witnessed his assailant discard into the street. The object was a metallic and plastic sonic insect-repellant device, which the jury could infer was used as the "pistol" during the attack.

The prosecution also presented evidence that a police canine unit was dispatched to the scene. The dog tracked a scent from Hoover's front yard to the location where defendant was being held on the I-696 service drive. Defendant correctly asserts that such dog-tracking evidence is insufficient standing alone to prove that a particular defendant committed a particular crime and that the evidence may be admitted only after a proper foundation is laid. *People v Stone*, 195 Mich App 600, 603; 491 NW2d 628 (1992); *People v Laidlaw*, 169 Mich App 84, 93-94; 425 NW2d 738 (1988). Defendant does not challenge the foundational basis to admit the evidence, merely the weight placed on the dog-tracking evidence in establishing her guilt. However, the dog-tracking evidence merely corroborated the eyewitness descriptions of Hoover's assailant. Furthermore, the court specifically instructed the jury, "You must consider tracking dog evidence with great care and remember that it has little value as proof. Even if you decide that it is reliable, you must not convict the defendant based only on tracking dog evidence." We presume that the jury followed this instruction. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). As the prosecutor presented sufficient circumstantial evidence from which a jury could reasonably infer that *defendant* committed the charged offense, we affirm.

¹ The prosecution presented photographs of defendant's clothing into evidence. However, those photographs are not part of the electronic record available on appeal.

II. SENTENCING

In relation to her sentence, defendant challenges only her score of 10 points for OV 1 (aggravated use of a weapon). MCL 777.31(1) directs a score of 10 points when “[t]he victim was touched by any other type of weapon” and five points when “[a] weapon was displayed or implied.” Defendant contends that she merited only five points for OV 1 because the assailant merely “implied” that the sonic insect-repellant device was a “weapon.” Defendant’s challenge involves the proper interpretation of MCL 777.31 and our review is therefore de novo. *People v Lange*, 251 Mich App 247, 252-253; 650 NW2d 691 (2002).

Defendant had a total OV score of 51, placing her in OV Level III. Even if this Court were to determine that OV 1 should not have been scored at all, defendant’s amended score would remain in OV Level III. As a fourth habitual offender who committed a Class A felony, defendant’s placement in the F-III cell allows a minimum sentence of 135 to 450 months’ imprisonment. Defendant’s minimum sentence of 15 years falls in the low end of that range. As defendant’s sentence is well within the legislative minimum sentencing guidelines range, we must affirm unless defendant shows that “there was either an error in scoring or defendant’s sentence was based on inaccurate information.” *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010), citing MCL 769.34(10).

This Court has already rejected the argument raised by defendant. In *Lange*, 251 Mich App at 255-257, this Court went to great length to define the term “weapon” as used in MCL 777.31(1). Based on the dictionary definition of “weapon,” the *Lange* Court concluded that “ten points are to be scored when the ‘victim was touched by any other [instrument or device used for attack . . . in a fight or in combat].’” *Id.* at 257. This Court specifically noted the Legislature’s intent to distinguish between “a defendant who uses an instrument as a weapon and actually touches a person with the instrument, as opposed to merely using an object to imply the presence of a weapon.” *Id.* at 257-258.

Keeping in mind this interpretation of the statute, we review for clear error the trial court’s findings of fact to support the score for OV 1. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). “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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2007). Here, defendant used an everyday object as an “instrument or device used for attack.” Defendant did not merely imply that she possessed a firearm; defendant committed an assault with the insect-repellant device by pressing it into Hoover’s neck. From this record, the trial court could determine that the device was actually used as a weapon of assault, not simply to imply the presence of a weapon. As the trial court did not err in scoring OV 1, we must affirm. MCL 769.34(10).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher