

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY NEWBY,

Defendant-Appellant.

UNPUBLISHED

December 16, 2021

No. 356196

Wayne Circuit Court

LC No. 15-003085-01-FC

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his resentencing after remand by this Court. A jury convicted defendant of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court initially sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 40 to 60 months' imprisonment for his felon-in-possession conviction and 60 months' imprisonment for his felony-firearm conviction. Although originally charged with second-degree murder, MCL 750.317, the jury acquitted defendant of that charge and the lesser included offense of voluntary manslaughter, MCL 750.321. Defendant appealed. This Court affirmed his convictions but vacated his sentence for the felon-in-possession conviction and remanded for resentencing on that conviction only because of erroneous assessment of points for Prior Record Variable (PRV) 2 and Offense Variable (OV) 12, and the proper assessment changed his guidelines range. *People v Newby*, unpublished per curiam opinion of the Court of Appeals, issued November 27, 2018 (Docket No. 339699). On remand, the trial court resentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 37 to 60 months' imprisonment for his felon-in-possession conviction and 60 months' imprisonment for his felony-firearm conviction. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case arises out of a shooting that took place at a bar in Detroit. Defendant, who was employed as a bouncer, was confronted by the victim outside the bar. The victim was looking for his sister, who had gone to the bar after she and the victim got into a heated argument. Prior to arriving at the bar, the victim

had informed his sister that he was going to kill her and shoot up the bar. Defendant and the victim engaged in a physical altercation. During the fight, the victim reached around defendant and attempted to open the door to the bar. Defendant slammed the door shut and the victim punched him in the side of the head. Defendant pushed the victim away from the door. As the victim stumbled backward, defendant saw him reach for what appeared to be a gun in his right pocket. Defendant pulled out a handgun and fired one bullet, which struck the victim in the stomach. The victim later died from his injuries. [*Newby*, unpub op at 1.]

Defendant appealed his sentence, arguing that his trial counsel provided ineffective assistance for conceding defendant's guilt as to the felon-in-possession and felony-firearm charges and failing to object to the assessment of points for PRV 2 and OV 12. This Court affirmed defendant's convictions but remanded for resentencing. *Newby*, unpub op at 6. This Court determined that defense counsel provided him effective assistance when he conceded defendant's guilt of the felon-in-possession and felony-firearm charges, but ruled that trial counsel provided ineffective assistance by failing to object to the erroneous PRV 2 and OV 12 assessment. *Id.* at 3-4.

After this Court's remand, defendant filed a memorandum regarding defendant's resentencing, objecting to the assessment of points for OV 1 and OV 3. Defendant argued OV 1 should have been assessed at zero points instead of 25 points, because an assessment of 25 points required the trial court to make an impermissible factual finding on acquitted conduct. Defendant also argued that OV 3 should have been assessed at zero points instead of 100 points, because the assessment was inconsistent with defendant's acquittal, and again required the trial court to make a factual finding on such acquitted conduct. At the resentencing hearing, the trial court concluded that the prosecution proposed the correct guidelines scoring after correcting PRV 2 and OV 12, and changed defendant's sentence from 40 to 60 months to 37 to 60 months' imprisonment for the felon-in-possession conviction.

II. STANDARD OF REVIEW

"[T]he proper interpretation and application of the statutory sentencing guidelines . . . are both legal questions that this Court reviews de novo." *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo constitutional challenges, including due-process rights and sentencing. *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018); *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

III. ANALYSIS

In this appeal from his resentencing, defendant argues that the trial court erroneously considered conduct for which the jury acquitted him when assessing points for OV 1 and OV 3, and claims entitlement to another resentencing. We disagree.

Points may be assessed for OV 1 in cases where evidence established that the felony offense included the aggravated use of a weapon. MCL 777.31. A sentencing court may assess 25 points for OV 1 if a firearm was discharged at or toward a human being. MCL 777.31(1)(a). Points may be assessed for OV 3 in cases where physical injury to a victim occurred. MCL 777.33; *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). A trial court must analyze the circumstances of the case and assign the highest point value that applies to a defendant's situation. *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005); MCL 777.33(1). Under MCL 777.33(1)(a), a sentencing court may assess 100 points for OV 3 if a victim was killed, and under MCL 777.2(b), 100 points may be assessed if death resulted from the commission of a crime and homicide was not the sentencing offense.

Defendant first asserts that the trial court improperly used a transactional approach to assess OV 1 and OV 3 in violation of *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). Under *McGraw*, OVs are "offense-specific" and a trial court may only consider the conduct underlying the sentencing offense when scoring them. *Id.* at 124. A transactional approach, in which a court examines "a continuum of the defendant's conduct" is improper in assessing offense-specific variables because this approach "can extend far beyond the acts that satisfy the elements of the sentencing offense." *Id.* Defendant contends that the trial court failed to use only conduct that occurred during the offense of which he was convicted.

The record indicates that during the commission of the felon-in-possession offense for which the jury convicted defendant, defendant, a felon, possessed a firearm which he discharged at or toward a human being, and the victim suffered physical injury including death from a gunshot wound. Therefore, defendant's conduct in relation to the commission of the offense of felon-in-possession could properly be considered in assessing points for OV 1 because during the commission of the offense he possessed and discharged the firearm at a person, and points for OV 3 could be assessed because his commission of the offense of felon-in-possession caused a victim physical injury that resulted in the death of the victim. Assessment of points for both OV 1 and OV 3 did not violate *McGraw*.

Defendant further contends that the trial court erred in assessing 100 points for OV 3 by finding that defendant's use of the firearm killed a victim. We disagree.

Defendant argues that he is not subject to an assessment of 100 points under OV 3 and seeks to rely on *People v Laidler*, 491 Mich 339, 348; 817 NW2d 517 (2012) (quotation marks omitted), in which our Supreme Court explained that, "[b]ecause OV 3 is concerned with criminal punishment, and because MCL 777.33(2)(b) instructs the court to score 100 points if death results from the commission of a crime, the injurious action must be criminal and the action must be that of the party whose punishment is at issue" Defendant argues that because he acted in self-defense his killing of the victim was justified, and therefore, not criminal, which fails to satisfy the requirements under MCL 777.33(1)(a). Defendant, however, misinterprets *Laidler*. The injurious action considered by the trial court was not the acquitted conduct underlying defendant's second-degree murder or voluntary manslaughter charges, but defendant's felon-in-possession conviction. Additionally:

Because the Legislature in MCL 777.33(2)(b) used the phrase "*results* from the commission of a crime," it is clear that the defendant's criminal actions must

constitute a factual cause of a death for purposes of OV 3. “In determining whether a defendant’s conduct is a factual cause of the result, one must ask, ‘but for’ the defendant’s conduct, would the result have occurred?” [*Laidler*, 491 Mich at 345 (emphasis in original, citation omitted).]

In this case, defendant’s criminal possession of the firearm and use of it during the commission of felon-in-possession constituted the factual cause of the victim’s death. The victim would not have died “but for” defendant’s crime of possessing a firearm as a felon. *Id.* at 345.

Defendant further asserts that because MCL 777.33(1)(a) requires a “victim” be killed for an assessment of 100 points, the assessment is inapplicable to him, since the killing was in self-defense and justified, producing no victim. “However, neither MCL 777.33 nor any other statutory provision provides a definition of ‘victim’ for purposes of OV 3.” *People v Albers*, 258 Mich App 578, 592; 672 NW2d 336 (2003). After considering the statutory language, this Court, in *Albers*, concluded “for purposes of OV 3, the term ‘victim’ includes any person harmed by the criminal actions of the charged party.” *Id.* at 593. Our Supreme Court reasoned similarly in *Laidler*, 491 Mich at 349. Under this definition, the victim may be someone “harmed by the criminal actions” of defendant, for possessing a firearm as a felon, regardless of whether defendant acted in self-defense. *Albers*, 258 Mich App at 593.

Defendant’s contention that the trial court could not consider the conduct underlying the acquitted charges of second-degree murder and voluntary manslaughter is misplaced, because the trial court properly considered defendant’s conduct underlying the felon-in-possession charge, not the acquitted conduct. “[W]hen a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.” *People v Beck*, 504 Mich 605, 627; 939 NW2d 213 (2019). “[C]onduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.” *Id.* at 627. While “a sentencing court may not rely even in part on acquitted conduct when imposing a sentence . . . [,] sentencing courts do not violate that principle by considering the entire *res gestae* of an acquitted offense, and *Beck* does not preclude a sentencing court from generally considering the time, place, and manner in which an offense of which a defendant has been convicted is committed.” *People v Stokes*, 333 Mich App 304, 310-311; 963 NW2d 643 (2020).

In *Beck*, the trial court imposed its out-of-guidelines sentence because it concluded that a preponderance of the evidence showed the defendant had committed the murder of which the jury had acquitted him. Our Supreme Court held that this violated *Beck*’s rights to due process.

In this case, the jury acquitted defendant of second-degree murder and voluntary manslaughter but found him guilty of felon-in-possession and felony-firearm. At no time did the trial court make any finding or indeed give any indication that it was imposing the sentence it did because the court felt a preponderance of the evidence showed defendant had committed the acquitted offenses. The acquittals did not preclude the trial court from considering the circumstances regarding the incident, including defendant’s status as a felon who possessed and used a firearm which resulted in the death of a victim. The trial court, therefore, did not err in assessing points for OV 3. Additionally, a “sentencing court may consider all record evidence before it when calculating the guidelines, including . . . testimony taken at a preliminary

examination or trial.” *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). Even though the jury acquitted defendant of second-degree murder and voluntary manslaughter, during his trial testimony, defendant admitted that he shot the victim. Regardless of whether defendant acted in self-defense, the trial court could properly consider defendant’s admission of possession of a firearm and discharging the firearm at a person which caused that person’s death in assessing points for OV 3. *Id.* at 541. Accordingly, the trial court did not err in assessing 100 points for OV 3.

Defendant also argues that the trial court could not consider his acquitted conduct in assessing points for OV 1. As stated, a trial court may not evaluate acquitted conduct in assessing points for sentencing “when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.” *Beck*, 504 Mich at 627. Nevertheless, this “does not preclude a sentencing court from generally considering the time, place, and manner in which an offense of which a defendant has been convicted is committed.” *Stokes*, 333 Mich App at 310-311. A “sentencing court may consider all record evidence before it when calculating the guidelines, including . . . testimony taken at a preliminary examination or trial.” *Althoff*, 280 Mich App at 541.

The trial court could properly consider defendant’s general conduct during his criminal possession of a firearm. At trial, defendant admitted firing the gun at a person. Because defendant discharged a firearm “at or toward a human being[,]” the trial court properly assessed defendant 25 points for OV 1. MCL 777.31(1)(a).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford