

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN BO HARRIS,

Defendant-Appellant.

UNPUBLISHED

October 6, 2011

No. 298684

Wayne Circuit Court

LC No. 09-030643-FC

Before: M. J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant Deshawn Bo Harris appeals as of right his bench convictions of armed robbery, MCL 750.529, and carjacking, MCL 750.529a. The trial court found him not guilty of an additional charge of possession of a firearm during the commission of a felony. See MCL 750.227b. The trial court sentenced him to serve concurrent sentences of 5 to 15 years for each conviction. Because there were no errors warranting relief, we affirm.

Defendant first argues that there was insufficient evidence to establish that he had a weapon during the events at issue. For that reason, he maintains, the trial court could not convict him of armed robbery. With challenges to the sufficiency of the evidence, this Court reviews the record de novo in the light most favorable to the prosecution to determine whether a rational trier-of-fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

Although armed robbery all too often involves the use of a dangerous weapon, a person can be guilty of armed robbery without possessing a dangerous weapon. Indeed, the Legislature has provided that a person who uses force, assaults, or puts another in fear during the commission of a larceny can be guilty of armed robbery even though he or she does not possess any weapon at all. It is sufficient that the person possessed “an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon,” or represented “orally or otherwise that he or she [was] in possession of a dangerous weapon.” MCL 750.529; see also *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (listing the elements of armed robbery).

Here, Jerrell White testified that he drove his van to a store and made a purchase. As he was returning to his van, defendant ran up. White said that, when he opened the van's door and got in, defendant pulled him out and held what White thought was a .38 caliber revolver to his head. Defendant further threatened to "bust" him. White stated that he was in fear for his life and that he ran from the scene after a second man ordered him to do so.

The trial court ultimately determined that the prosecution failed to prove beyond a reasonable doubt that defendant possessed an actual firearm during the robbery. And, for that reason, found defendant not guilty of felony-firearm. Nevertheless, as already noted, a person can be guilty of armed robbery even if he or she does not possess a gun or other dangerous weapon. The evidence showed that defendant approached White suddenly with an object that White clearly believed was a gun. He then put the object to White's head and demanded White's money and keys, which White handed over. The act of placing the object to White's head while demanding money and threatening to "bust" him is evidence that defendant fashioned or used the object in a manner designed to cause White to reasonably believe that the object was a dangerous weapon. And that was sufficient to establish the element at issue.

Defendant also argues that there was insufficient evidence to convict him of carjacking. To establish a carjacking, the prosecutor had to prove that defendant committed a larceny of a motor vehicle and that while doing so he used force or violence or the threat of force or violence against the victim or put the victim in fear and the victim was, in relevant part, the operator of the vehicle or another person in lawful possession of the vehicle. MCL 750.529a(1). White testified that defendant ran up to him with a gun, pulled him from the van and, while holding the gun to his head, demanded his money and keys. The act of pulling White from the van and placing the gun to White's head—even if the gun were not real—while demanding his keys was sufficient to establish that defendant used force or the threat of force to gain possession of White's van. See *People v Green*, 228 Mich App 684, 695-696; 580 NW2d 444 (1998). The evidence also plainly established that White was the van's operator. Although White did not observe defendant get into the van and drive it away, the circumstantial evidence was sufficient to prove that defendant did just that. Defendant demanded White's keys and White complied with the demand. Moreover, someone drove White's van from the scene. And a police dog tracked a scent from the area where the van was found to the house where defendant was found. A reasonable trier of fact could find from this evidence that defendant demanded the keys in order to steal the van and was the person who actually drove the van from the scene.

Finally, defendant argues that the trial court erred in scoring offense variables (OV) 1 and 2 of the sentencing guidelines. During sentencing, defendant's lawyer conceded that the variables were properly scored. Thus, there is no error to review. See *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000). Defendant also argues that his lawyer was ineffective for failing to object the scoring of these variables. To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and that, but for the error, there is a reasonable probability that the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Under our Legislative sentencing guidelines, the trial court must properly score all of the required sentencing variables on the basis of its findings. *People v Bemmer*, 286 Mich App 26, 32; 777 NW2d 464 (2009). With OV 1, which involves the “aggravated use of a weapon”, the trial court must score 15 points if “[a] firearm was pointed at or toward a victim.” MCL 777.31(1)(c). With OV 2, which considers the “lethal potential of the weapon possessed or used” by the defendant, the trial court must score five points if the defendant possessed or used a pistol, rifle, or shotgun. MCL 777.32(1)(d). At trial, the trial court was not convinced beyond a reasonable doubt that the weapon that defendant held was a real gun. On that basis, defendant argues that the trial court could not properly find that he used a gun for purposes of scoring these variables and, therefore, his lawyer’s decision to concede that these variables were properly scored fell below an objective standard of reasonableness under prevailing professional norms.

It is well-settled that—because of the different burdens of proof—the findings used to score the sentencing guidelines need not be consistent with the verdict. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). The trial court did not have to find beyond a reasonable doubt that defendant possessed an actual gun in order to score these variables; it only had to find by a preponderance that defendant possessed a gun. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).¹ This Court has thus recognized that “situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.” *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). The evidence adduced at trial was sufficient to establish by a preponderance—if not beyond a reasonable doubt—that defendant possessed a gun during the commission of the crimes at issue. Accordingly, the trial court’s finding that defendant possessed a gun was not clearly erroneous. Once the trial court found that defendant possessed an actual gun, it had to score OVs 1 and 2 as it did. *Bemmer*, 286 Mich App at 32. Consequently, defendant’s lawyer’s decision to concede that these variables were properly scored did not fall below an objective standard of reasonableness under prevailing professional norms. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (“[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.”).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello

¹ Defendant argues that a trial court should be required to score the variables on the basis of the findings at trial that were made beyond a reasonable doubt, but concedes that our Supreme Court has determined otherwise. See *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).