

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
December 27, 2011

v

ANDRE DESEAN WASHINGTON,  
Defendant-Appellant.

No. 300246  
Wayne Circuit Court  
LC No. 10-001115-FC

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Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to do great bodily harm (two counts), MCL 750.84. He was sentenced to 3 to 10 years' imprisonment for each conviction, to be served concurrently. We affirm.

Defendant argues that the trial court improperly scored offense variable one (OV1), aggravated use of a weapon, at 25 points instead of zero points. We disagree. "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant's offenses were committed after January 1, 1999. Therefore, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were properly used to determine the recommended range of defendant's minimum sentence. MCL 777.31 provides that the sentencing court is to score OV1 at 25 points when, "[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." Sentencing variables are scored using a preponderance of the evidence standard. *Osantowski*, 481 Mich at 111.

The trial court's acquittal of defendant on two counts of assault with a dangerous weapon (felonious assault) is not determinative in the scoring of OV1. A fact that increases a crime's penalty beyond the statutory maximum must be proven beyond a reasonable doubt. *People v Althoff*, 280 Mich App 524, 540; 760 NW2d 764 (2008). In this case, the scoring of OV1 at 25 points did not increase defendant's sentence beyond the statutory maximum of 10 years' imprisonment. See MCL 750.84. Consequently, the court's acquittal of defendant on the felonious assault charges, which require proof beyond a reasonable doubt, is not determinative in the scoring of OV1, which requires only proof by a preponderance of the evidence. See

*Osantowski*, 481 Mich at 111; *People v Gayheart*, 285 Mich App 202, 214; 776 NW2d 330 (2009).

There was evidence to support the trial court's decision to score OV1 at 25 points. In scoring OV1 at 25 points for use of an aggravated weapon, the court explained that it was difficult to determine exactly what kind of weapon defendant used, but "something stabbed these people." The court articulated that defendant "used some sort of instrument in inflicting the wounds on his victims." Both victims went to the hospital and received stitches.

Stewart suffered two cuts in the area near his right armpit, which made him bleed profusely. His injuries required 14 stitches and an overnight stay in the hospital. Anderson's mother described Anderson's shirt as "full of blood," and later observed five to six cuts on her back, neck, and hands. At least one of these wounds, the one at the back of Anderson's neck along her hairline, required stitches. Like Stewart, she was taken to the hospital by ambulance and stayed overnight. In addition, Stewart testified that in the bedroom there was blood "everywhere," including on Anderson's back and hands, and on the bed and walls. This testimony was corroborated by photographs of the bedroom taken right after the assault. It is reasonable to infer from this evidence that these types of injuries and the blood scattered across various surfaces in the room were not caused by defendant merely hitting or punching the victims with his fists. The evidence clearly supported the conclusion that defendant used some kind of stabbing or cutting weapon on his victims.

Finally, Stewart testified at trial that defendant had a knife at some point during defendant's assault on Stewart and the other victim, Raquel Anderson. Although Stewart's testimony at the preliminary examination, that he did not see defendant with a weapon, called into doubt his credibility, the type of injuries the victims sustained and the state of the crime scene is also evidence that defendant used some kind of cutting or stabbing weapon.

Affirmed.

/s/ David B. Shapiro  
/s/ William C. Whitbeck  
/s/ Elizabeth L. Gleicher