

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES CHRISTOPHER OUSLEY,

Defendant-Appellant.

UNPUBLISHED

June 25, 1996

No. 178691

LC No. 94-000814-FC

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797; three counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277; assault with intent to rob while armed, MCL 750.89; MSA 28.284; and possession of a firearm during the commission of a felony, MCL 750.277b; MSA 28.424(2). Defendant was sentenced to fifteen to thirty years imprisonment for the armed robbery conviction, two to four years for each assault with a dangerous weapon conviction, five to ten years for assault with intent to rob while armed, and to a mandatory term of two years for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentence but remand to allow for correction of defendant's judgment of sentence.

Defendant forcefully entered an apartment, held a 12-gauge, sawed-off, double-barrel shotgun to the head of one victim, and aimed the gun at the two other adults and two children in the apartment and demanded money. At trial, the prosecution informed the trial court of its intention to use defendant's prior convictions for impeachment purposes. Defendant requested a ruling at that time, but the trial court delayed its ruling until after the close of proofs by the prosecution.

Defendant argues that the trial court's delayed ruling on the admissibility of his prior convictions under MRE 609 unfairly prejudiced his trial strategy, because he embarked on an "ill-fated" strategy of eliciting "incriminating identification testimony" while not knowing whether defendant could testify that

* Circuit judge, sitting on the Court of Appeals by assignment.

his half-brother, who looks like him, committed the crime. We disagree. The trial court's only obligation when ruling on an MRE 609 issue is that the trial court must rule on the admissibility of the prior convictions before a defendant testifies. *People v Lytal*, 415 Mich 603, 609; 329 NW2d 738 (1982). Defendant has not established that he was unable to elicit information regarding his half-brother's identity from those witnesses called, especially his sister who testified, upon cross-examination, that defendant has a half-brother and that they use the same name. Defendant has failed to establish any error on the part of the trial judge, and "[e]rror requiring reversal must be that of the trial court, and not error to which the appellant contributed by plan or negligence." *Bloemsma v Auto Club (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991). We find that the trial court did not err when it delayed its ruling until the close of the prosecution's proofs.

Defendant also argues that the trial court incorrectly scored OV 2 at twenty-five points, because OV 1 already considers the factors used by the trial court to score OV 2 at twenty-five points and because terrorism is inherently included in armed robbery. We disagree.

Appellate review of guidelines calculations is very limited. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). A sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *Id.* A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

Under armed robbery, OV 1 covers the aggravated use of a weapon and allows a score of fifteen points if a firearm is pointed toward a victim or touches the victim, while OV 2 covers a physical attack of and/or injury to a victim and allows a score of twenty-five points if the victim is injured or subjected to terrorism. *Michigan Sentencing Guidelines* (2d ed), p 99. We have reviewed the record and conclude that there was sufficient evidence to support the score of twenty-five points for OV 2. It was not duplicative of the scoring for OV 1, because the score for OV 1 covers defendant pointing the gun at the victims and the score for OV 2 covers defendant's express oral threat to kill the children and their father.

Finally, although defendant does not raise this issue, we order this matter remanded to the trial court in order to allow for the correction of defendant's judgment of sentence. MCR 7.216(A)(7). Although the trial court only ordered defendant's felony-firearm conviction to run consecutively to the other convictions in this matter, the judgment of sentence provides that all counts except count II are to run consecutively. In addition to the fact that the judgment of sentence does not reflect the sentence ordered, the trial court may order sentences to run consecutively only when specifically authorized by statute. See *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996). We are aware of no such statutory authority except as to the felony-firearm conviction. Thus the judgment of sentence must be corrected to reflect that only the felony-firearm sentence is to run consecutively to the others. By this ruling, we do not upset the trial court's order that the sentences in this matter are to run consecutively to the prison term defendant was serving as a violation of his parole.

Affirmed. This matter is remanded to allow for the correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien