

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE ELLIS,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 232247

Wayne Circuit Court

LC No. 00-004389

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of carjacking, MCL 750.529a, and felonious assault, MCL 750.82. He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of nine to twenty years for carjacking and twenty-three to seventy-two months for felonious assault. He appeals as of right and we affirm.

Defendant first contends that the trial court rendered inconsistent verdicts requiring reversal. We disagree.

A trial court sitting without a jury must make findings of fact from which this Court can determine whether the trial court correctly applied the law to the facts. MCR 2.517(A)(1); *People v Feldmann*, 181 Mich App 523, 533-534; 449 NW2d 692 (1989). A trial court sitting without a jury may not reach compromise verdicts or verdicts that reflect a court's dispensation of leniency. *People v Burgess*, 419 Mich 305, 310-311; 353 NW2d 444 (1984).

Defendant was charged with carjacking, assault with intent to murder, armed robbery, intentionally discharging a firearm from a vehicle, felony-firearm, and felon in possession of a firearm. The court found him guilty of carjacking, and felonious assault as a lesser included offense of assault with intent to murder, and acquitted him of the remaining charges. In rendering its decision, the court explained that it was satisfied beyond a reasonable doubt that defendant was the person who joined codefendant Jordan by the car with a gun. The court found that defendant and codefendant assisted each other with force and violence to steal the car. The court further found that defendant had a gun, and that while there was insufficient evidence to show that he had the intent to kill anyone, he at least intended to scare the complainants. The court found that the proofs did not establish that Jordan's intent to take Moore's necklace was known to defendant, and so found defendant not guilty of armed robbery. Regarding the firearms

counts, the court found that it had not been established beyond a reasonable doubt that a firearm was fired from the vehicle. The court further found that because the weapon was never found, and there were no shell casings, bullet holes or gunpowder residue found, it was not shown beyond a reasonable doubt that what was described as a firearm was indeed a true firearm.

The court's verdicts on the various counts were not inconsistent so as to require reversal. The court found that defendant and codefendant aided and abetted each other in the carjacking, and that they used force or violence to take the vehicle. The statute does not require that a weapon be used, or that if one is used, it be a real weapon.

With regard to the felonious assault conviction, the court concluded that defendant had a gun and fired it with an intent to either injure or scare. This statement would seem to be inconsistent with the court's acquitting defendant of the firearms possession counts. However, the court based its decision on those counts on the ground that it had not been sufficiently established that what was described as a firearm was a true firearm. If the gun involved was not a true firearm, it would not affect the court's verdict on the carjacking count. Nor would it mean necessarily that the gun, which the court found had been fired in some fashion, was not a dangerous weapon. The fact that the court could have convicted defendant of the firearms possession charges does not mean that the verdicts that were supported by adequate findings based on sufficient evidence must be reversed.

Defendant further argues that the verdicts were based on insufficient evidence and were against the great weight of the evidence. This Court reviews de novo a defendant's challenge to the sufficiency of evidence; a valid conviction requires that sufficient evidence be produced to justify the trier of fact in concluding that each element of the crime charged was proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Any conflicts in the evidence must be resolved in favor of the prosecution. *Id.* This Court reviews a trial court's findings of fact for clear error. MCR 2.517(A)(1); *People v Ramsey*, 89 Mich App 468, 476; 280 NW2d 565 (1979).

Carjacking requires proof that a defendant used, or threatened to use, force or violence to take an automobile from someone in possession of the car. MCL 750.529a; *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998). Here, the court issued comprehensive factual findings with regard to the evidence presented at trial and found the evidence sufficient to support a conclusion that defendant and his codefendant assisted each other in taking the complainant's car through defendant's use of a gun of some sort. Defendant's use of the gun satisfied the requirement that defendant accomplish the taking by putting the person in fear or threatening to use force or violence. The court's verdict was supported by sufficient evidence and was not against the great weight of the evidence.

Felonious assault requires proof that a defendant used a dangerous weapon to cause a person to be in reasonable apprehension of an immediate battery. MCL 750.82; *People v Avant*, 235 Mich App 499; 597 NW2d 684 (1999). The court found that defendant had a gun of some sort that was fired with the intent to injure or scare. This conclusion was supported by sufficient evidence, was not against the great weight of the evidence, and supported the finding of guilt.

Defendant next argues that his sentence guidelines resulted from an offense variable score unsupported by evidence. We disagree.

This Court reviews de novo the information on which a defendant's sentence guidelines were determined when a defendant challenges the factual basis of the information. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). A trial court's sentencing decision is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Absent an error in scoring or the sentencing court's reliance on inaccurate information, this Court must affirm a defendant's sentence when it falls within the guidelines' range. *People v Lerversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). A trial court may determine scores for offense variables when evidence adequately supporting the scores appears in the record. *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

MCL 777.31 establishes the procedure for scoring OV 1. OV 1 assesses points for the aggravated use of a weapon during the commission of a crime. MCL 777.31(1). The total points assessed are determined by which situation applicable to the circumstances of the crime results in the highest number of points. *Id.* Defendant was assessed 25 points for OV 1 – the highest number of points possible – for discharging a firearm at or toward a human being. MCL 777.31(a). Our review of the record reveals adequate evidence in support of defendant's OV 1 score. As the trial court specifically noted, credible evidence established that defendant fired a gun at a car occupied by three individuals. Because the evidence supported defendant's OV 1 score, and because defendant was sentenced to a term within the sentencing guidelines, this Court is required to affirm defendant's sentence. *Lerversee*, *supra* at 348; *Babcock*, *supra* at 73.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White