

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JOHNATHAN COWANS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2004

No. 249134

Calhoun Circuit Court

LC No. 02-001891-FC

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

Defendant David Cowans appeals as of right from his convictions of two counts of armed robbery, MCL 750.529, and one count of conspiracy to commit armed robbery, MCL 750.157. The trial court sentenced Cowans to 144 to 300 months in prison. We affirm.

II. Basic Facts And Procedural History

At trial, Anthony Dixon, a police officer for the Battle Creek Police Department, testified that he was on duty on September 19, 2001 and responded to a report of an armed robbery at a Shell gas station at 4954 West Columbia. Officer Dixon testified that he interviewed employee Tod Behlke and customer Sue Anne Stafford in addition to the store manager, Earlene Beatty. When Officer Dixon arrived at the scene, he and other officers secured the gas station and called for both a crime technician and a canine officer. The dispatcher also issued a “be-on-the-lookout” advisory. The cash drawer was sitting out on the counter at the register area, and the telephone cord was pulled out from the wall. Officer Dixon also testified that the drawers in the back office were opened and some items appeared to have been shuffled around as though they had been gone through.

Tod Behlke was working at the West Columbia Shell gas station on the evening of the incident in question. Behlke testified that Stafford came in at approximately 1:00 a.m. and began to play a video poker game. Shortly after her arrival, three black men wearing dark clothes, scarves, and hats rushed into the station with guns. They went directly to the counter where Behlke was standing. Each of the men had what appeared to be black semi-automatic pistols, and one gun had a laser sight. One of the men told Behlke to give them the money. Behlke opened the cash register while the man holding the gun with the laser sight stood behind the

counter with him, keeping the gun pointed at him the entire time. Behlke gave the money to one of the men on the other side of the counter.

After Behlke handed over the money, the man with the laser sight took him into the back room and told him to turn off the lights over the gas pumps. Behlke testified that he was nearly 100% certain that the man with the laser-sighted gun was Cowans. Behlke estimated that he was in the back room for a total of one to two minutes. Behlke stated that they returned to the front of the store, and one of the men told him to lie down behind the counter. The men then grabbed lottery tickets and cigarettes and ripped the phone cables out of the wall before leaving. After the men left, Behlke called 911 from the back room, where he noticed the room was in disarray and money was missing. According to Behlke, the whole incident took place in about ten minutes.

Sue Anne Stafford testified that at the time of the incident, she had stopped at the gas station in order to occupy some time before reporting to work at 2:30 a.m. Stafford had been playing a video poker game for about ten minutes when she heard the bell that rings when the doors open. Stafford turned around to see who had entered and was confronted with a gun in her face. According to Stafford, there were three men, dressed in dark colors with stocking caps on their head, and the man who had the gun on her was wearing a scarf tied up over his nose and around his head. This man told Stafford to sit down, and he removed \$60 from her wallet. Stafford stated that as she had turned to sit down, she noticed that the cash register drawer had been pulled out. At this point, according to Stafford, one man told the attendant to turn off the lights and, shortly thereafter, she saw the lights in the parking lot shut off. One man had a gun with a red flashing light and stood back behind the counter with the attendant. Stafford said that after she retrieved her wallet from the floor, she was told to get up and move to the other side of the counter and sit down. At this point, one man was coming out of the back room with the attendant and another was rummaging behind the counter. Stafford could only see lottery tickets being strung out. She heard one man say that he "forgot the cigarettes" and then they began to leave. Stafford testified that they were told not to move or the men would "blow [them] both the fuck away." One of the men ripped the phone out of the wall on his way out. After the incident, Beatty, the store manager, arrived. Stafford also spoke with an officer, but could not recall his name. Stafford estimated that the whole incident took place over the span of ten minutes.

Beatty testified that she was the manager of the West Columbia Shell at the time of the robbery. According to Beatty, at about 2:00 a.m., she received a call from Behlke reporting that he had been robbed. Beatty arrived at the gas station and found Behlke, Stafford, and several police officers. Beatty calculated that approximately \$300 had been stolen from the change box in the back room. Switches in the electrical panels in the back room were off that were normally on, including the parking lot lights, and some of the doors on the panels had been bent, giving the appearance that someone had attempted to open them with their hands. Beatty testified that approximately \$190 was missing from the cash register, about \$89 of lottery tickets was stolen, and about 20 packs of cigarettes were gone.

Christian Kloosterman, a police officer with the Kalamazoo Township Police Department, testified that on October 7, 2001, which was eighteen days after the gas station robbery, he was working the midnight shift and responded to a call at 3314 West Main Street for a possible accident and a possible fight in the parking lot of an apartment complex called The Landings. According to Officer Kloosterman, Officer Bryan Ergang called him to the front of

Building 3312, where Sergeant Marlet directed him to begin investigating an accident involving a Crown Victoria car that had run into the building. Officer Ergang indicated that he had found a gun on one of the individuals who had been riding in the car. At this point Sergeant Marlet told Officer Kloosterman that the three individuals in the car were possibly involved in an armed robbery and that they had consent from the driver to search the car. Officer Kloosterman and Officer Campice then began to search the car. The officers discovered three Halloween masks and a black wig lying on the deck of the trunk, in addition to what appeared to be a laser-sighted handgun. Officer Campice also found a sawed-off shotgun in a blue nylon bag. Officer Kloosterman found what appeared to be a nickel-plated .25-caliber handgun with a pearl handle underneath the driver's seat of the vehicle.

Officer Ergang testified that he was working from 2:00 p.m. to midnight on October 7, 2001, when he responded to the possible fight or accident at 3314 West Main Street. On that evening, he spoke with and identified Cowans. As Officer Ergang spoke with Cowans, he noticed some movement in the car that Cowans was driving. Officer Ergang shone his flashlight into the car and noticed two people, later identified as Clarence Thigpen and Clorese Love, sitting very low in the car. Officer Ergang testified that he immediately became suspicious because the Kalamazoo County Sheriff Department had just reported an armed robbery at a 7-Eleven store. Officer Ergang asked Cowans to walk to the rear of the vehicle with him so that he could speak with him while watching the people inside the vehicle at the same time. Officer Ergang testified that he radioed for back-up and when back-up units arrived, he asked Cowans if he would allow both a personal and vehicular search, that Cowans consented to both. According to Officer Ergang, Love also consented to a personal search that revealed a gun.

The three suspects were taken to the Township of Kalamazoo Police Department, placed in separate rooms, and interviewed. Officer Ergang said that he advised Cowans of his *Miranda* rights three separate times that evening, including once before he interviewed him. After Officer Ergang interviewed Cowans about the incidents that occurred in Kalamazoo, he asked if there was anything else Cowans wanted to tell him. According to Officer Ergang, Cowans cried with his head in his hands and blurted out "Battle Creek." Cowans signed a waiver of *Miranda* rights at 4:03 a.m. on October 8, 2001 and then admitted that he and the other two detainees were responsible for robbing the Shell gas station in Battle Creek. Cowans also admitted that the guns found in his car were those that were used in the Battle Creek robbery. Cowans admitted that the three of them went in and went directly to the back, that they then came out, and that another of the men then took the attendant back to turn the lights off. Cowans also admitted that they took money and cigarettes and left the store. According to Officer Ergang, after this discussion, he prepared a written statement that Cowans signed, indicating that he read it, understood it, and verified that it was his statement.

Following Officer Ergang's testimony, the prosecution rested. Cowans presented no witnesses. Following deliberations, the jury returned a verdict of guilty as charged. At sentencing, Cowans objected to the scoring of Offense Variable 8 (OV-8) regarding asportation of Behlke to a place of greater danger. Cowans had stated in his confession that someone else had taken Behlke to the back room. On this basis, defense counsel asserted that Cowans should have been scored zero points instead of fifteen for OV-8. The trial court disagreed, stating that while that may have been a reasonable interpretation of the evidence, Cowans was convicted as an aider and abettor involved in the armed robbery of two individuals, and the trial court was

satisfied that he should be held responsible in terms of scoring the guidelines for the specific acts done by the other individuals, where it appears that all was done as part of a previously agreed-upon crime within the scope of the enterprise.

III. Offense Variable 8

A. Standard Of Review

Cowans contends that he is entitled to resentencing because the court's scoring of Offense Variable 8 (OV-8), asportation of the victim to a place of greater danger, was clearly erroneous as a matter of law. As noted above, at sentencing, the trial court found that Cowans moved the clerk from the front of the store to a back room, thereby asporting him to a place of greater danger. Cowans argues that the movement of the clerk was merely incidental to the commission of the underlying offense. Cowans further asserts that the clerk was not placed in a situation of greater danger, nor was he held captive beyond the time necessary to commit the underlying offense. A sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score.¹ A scoring decision for which there is any evidence in support will be upheld on appeal.²

B. Calculating OV-8

In calculating OV-8, a court must assess fifteen points if the victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.³ Here, there is evidence in the record that supports the trial court's scoring of OV-8. The clerk testified that Cowans was the one who took him to the back room of the gas station. There was also evidence that the back room is more dangerous than the front of the store because the front of the store consists of windows and the back room is separate and more secluded. Because the record contains some evidence to support the trial court's decision, we conclude the trial court did not err in scoring OV-8 at fifteen points. Because no error occurred, MCL 769.34(10) requires that we affirm.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad

¹ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).

² *Id.*, citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

³ MCL 777.38(1)(a); *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003).