

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALAN BUTLER,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 253181

Macomb Circuit Court

LC No. 2002-003704-FC

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. The trial court sentenced him as an habitual offender, fourth offense, MCL 769.12, to twenty-five to forty-five years' imprisonment. He appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant first contends that the evidence was insufficient to sustain his conviction for armed robbery. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact's role of determining the weight of evidence and the credibility of witnesses. *Wolfe, supra* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

“The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Defendant challenges only the armed element. “Conviction of armed robbery requires a finding that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery.” *People*

v Jolly, 442 Mich 458, 465; 502 NW2d 177 (1993), citing MCL 750.529. In order to establish the armed element, there must be “some objective evidence of the existence of a weapon or article” *Jolly, supra* at 468. “The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article.” *Id.* at 469-470.

Here, defendant walked behind the counter of a bridal shop with his hand in the front pocket of his sweatshirt and the hood of the sweatshirt over his head. Carolyn Wojcik, an employee of the shop, testified that defendant was holding a concealed article in his front pocket that was the “size and shape of a gun.” Defendant stood next to Wojcik, pointed the concealed article at her, and demanded money. When Linda Wallis, another employee of the shop, denied having any money, defendant moved his hand underneath his sweatshirt as if he was “reaching for something,” and again demanded money. Wallis indicated that she believed that defendant had a gun, so she directed Wojcik to retrieve the money. Wojcik retrieved the money from a filing cabinet, and defendant took the money with one hand, while keeping the other hand in his pocket holding the article. From this evidence, viewed in a light most favorable to the prosecution, a jury could reasonably infer that defendant either had a gun or simulated an article to deliberately lead the victims to reasonably believe he had a gun. Although defendant denied being armed, the jury was entitled to weigh the evidence and disbelieve defendant’s assertion. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Consequently, the evidence was sufficient to sustain defendant’s conviction of armed robbery.

II. Sentencing

Defendant also argues that he is entitled to resentencing because the trial court improperly scored offense variable 4 (OV 4), MCL 777.34 (psychological injury to a victim).¹ “We review for an abuse of discretion issues concerning the proper scoring of sentencing guidelines variables.” *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The trial court scored defendant ten points for OV 4. A defendant is to be scored ten points for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). The trial court’s score of ten points was supported by Wallis’ victim impact statement, which indicated that she found the experience to be a “nightmare,” and

¹ A sentence that is within the appropriate guidelines sentence range is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion for remand filed in this Court. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant raised this issue in a motion for remand in this Court, which this Court denied. *People v Butler*, unpublished order of the Court of Appeals, entered July 6, 2004 (Docket No. 253181).

caused her to suffer “anxiety attacks.” The court also observed that Wallis was an “emotional wreck.” Defendant challenges the score on the basis that there was no evidence that psychological treatment was necessary or sought by either victim. But MCL 777.34(2) directs a score of ten points if the “serious psychological injury *may* require professional treatment.” (Emphasis added.) As the guidelines instructions clearly state, “the fact that treatment has not been sought is not conclusive.” MCL 777.34(2). Therefore, the trial court did not abuse its discretion in scoring defendant ten points for OV 4.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens