

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY EDWARD BARRY,

Defendant-Appellant.

UNPUBLISHED

June 22, 2006

No. 259435

Kalamazoo Circuit Court

LC No. 03-000665-FH

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his sentences for two counts of unarmed robbery, MCL 750.530. He was sentenced as a habitual offender, MCL 769.10, to concurrent sentences of eight to 22½ years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 1, 2003 at approximately midnight, defendant entered a convenience store, attacked the clerks, and said he would use a gun if he were not given the money from the cash register. Defendant received the money, and fled the scene.

At sentencing, defendant raised no objection to the guidelines scoring or the information in the presentence investigation report (PSIR). He was sentenced in the middle of the guidelines range of 43 to 107 months to concurrent terms of eight to 22½ years.

Defendant moved for resentencing, challenging the scoring of Offense Variable (OV) 1, MCL 777.31, aggravated use of a weapon. The trial court denied the motion.

Defendant's sole claim of error concerns the trial court's scoring of OV 1 at five points. MCL 777.31 provides in pertinent part:

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(e) A weapon was displayed or implied..... 5 points

* * *

(2) All of the following apply to scoring offense variable 1:

* * *

(c) Score 5 points if an offender used an object to suggest the presence of a weapon.

* * *

(e) Do not score 5 points if the conviction offense is a violation of section 82 or 529 of the Michigan penal code, 1931 PA 328, MCL 750.82 (felonious assault) and 750.529 (armed robbery).

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision when there is any evidence in the record to support it. *Id.*

Defendant does not specifically contest the accuracy of the facts presented at trial or in the PSIR¹ but instead argues that the facts were insufficient to justify the scoring of five points for OV 1. He maintains that, if a weapon is not actually “displayed,” it can only be “implied” by the use of an object to suggest the presence of a weapon as stated in MCL 777.31(2)(c). He contends that mere verbal threats are not enough to imply the presence of a weapon.

We affirm defendant’s sentences. Although MCL 777.31(2)(c) instructs the court to score five points when a defendant uses an object to suggest the presence of a weapon, we find the instruction exemplary, and not the exclusive definition of how a defendant can imply the use or presence of a weapon. Defendant argues that the sight of a weapon (or its facsimile) would necessarily have a different effect on the victim than would mere verbal threat. This assertion is unpersuasive. For example, an individual who walks into a store and claims that he has planted explosives elsewhere in the building in an effort to ensure compliance with his orders would likely garner as much obedience as someone who threatens with his finger in his pocket. In this case, a witness testified that he and his fellow clerk strongly resisted defendant when he first attacked them, and only capitulated when they feared that he was armed.

Defendant also relies on earlier limitations in the armed robbery statute, MCL 750.529, to show that the Legislature intended that mere words are not enough to imply the presence of a weapon. See *People v Parker*, 417 Mich 556, 564-565; 339 NW2d 455 (1983) (words or threats alone are insufficient to prove the “armed” element of armed robbery). Defendant’s reliance is

¹ Because defendant did not challenge the accuracy of the statements in the PSIR, the trial court was justified in presuming the factual accuracy of the PSIR. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

misplaced because we must interpret and apply MCL 777.31, not the armed robbery statute.² Indeed, this offense variable is not to be scored when the conviction offense is armed robbery. MCL 777.31(2)(e). Therefore, the armed robbery statute is simply inapposite when MCL 777.31 is applied to offenses for which it does pertain. Defendant was convicted of unarmed robbery, MCL 750.529, and evidence in the record supported the trial court's finding that defendant "implied" the presence of a weapon during the commission of that offense. MCL 777.31(1)(e); *Hornsby, supra* at 468. Consequently, the trial court did not err in scoring OV 1 at five points.

We affirm.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter

² We note that the Legislature has amended the armed robbery statute to render a person guilty of that offense when he or she commits robbery and either "possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or . . . represents orally or otherwise that he or she is in possession of a dangerous weapon." MCL 750.529, as amended by 2004 PA 128, effective June 3, 2004. Thus, had defendant committed the same crime today, he could readily have been convicted of the more serious offense of armed robbery.