

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JERALD WILLIE FRANKLIN,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 264589
Wayne Circuit Court
LC No. 05-003999-01

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count of assaulting and resisting a police officer, MCL 750.81d(1). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 2 to 15 years' imprisonment. He appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant argues that the prosecution failed to present sufficient evidence to support his conviction. We disagree. We review de novo a claim of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

MCL 750.81d provides:

(1) [A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment

* * *

(7) As used in this section:

* * *

(b) "Person" means any of the following:

(i) A police officer of this state or of a political subdivision of this state [MCL 750.81d(1), (7)(b)(i).]

Detroit Police Officer Derral Kelly testified that he approached defendant inside a CITGO gas station to talk to him about loitering in the area.¹ Because defendant was repeatedly placing his hands in his pockets and removing them, the officer, concerned for his safety and for that of his partner, asked defendant several times to put his hands up. Defendant did not. Instead, defendant pushed his shoulder in the center of the officer's chest, knocking him to the wall and on the ground. Defendant then fled the gas station. Based on this evidence, a reasonable juror could conclude that defendant knew (or reasonably should have known) that Kelly was a police officer, but assaulted and battered him by pushing Kelly's chest with his right shoulder and resisted him by fleeing. Deferring to the jury's superior ability to assess witness credibility, *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004), and viewing the evidence in a light most favorable to the prosecution, we conclude that this evidence is sufficient to support defendant's conviction.

II. Sentencing

Defendant raises three challenges to the sentence imposed.² First, defendant argues that the court erred in scoring five points under offense variable (OV) 3, MCL 777.33.³ However, defendant affirmatively agreed below to the scoring of OV 3, thereby waiving appellate review of the issue. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Further, a change in scoring OV 3 would not change defendant's sentencing cell. Second, defendant argues that in scoring OV 3, the court violated the United States Supreme Court's holding in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), our Supreme Court held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Third, defendant argues that his sentence violates the principle of proportionality. Defendant's minimum sentence falls within the range proscribed by the legislative sentencing guidelines. Because the trial court properly scored the variables in the sentencing guidelines, it did not err in imposing a sentence within the range of the guidelines. MCL 769.34(10).

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White

¹ Kelly was in full uniform.

² Defendant failed to provide this Court with his presentence investigation report as required by MCR 7.212(C)(7).

³ MCL 777.33(1)(e) provides that five points should be scored when "[b]odily injury not requiring medical treatment occurred to a victim."