

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON MILLER,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 267083

Wayne Circuit Court

LC No. 05-007963-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two to ten years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for the ministerial task of correcting the presentence investigation report (PSIR). This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that there was insufficient evidence for his felony-firearm conviction. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Mayhew, supra* at 124-125.

To prove the offense of felony-firearm, the prosecutor must establish the following elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An item is a firearm for purposes of the felony-firearm statute if it is designed and manufactured to propel a dangerous projectile other than BBs, regardless of whether it is currently operable. *People v Peals*, 476 Mich 636, 641-642; 720 NW2d 196 (2006). Determining whether a person possessed a firearm during the commission of a felony requires examination of the circumstances at the time of the commission of the offense; possession or lack of possession of a firearm at the time of the arrest is irrelevant. *People v Burgenmeyer*, 461 Mich 431, 434-435; 606 NW2d 645 (2000). Armed robbery is a felony offense, and therefore, it can serve as the underlying felony for a felony-firearm conviction. MCL 750.529.

The victim of the armed robbery, Frank Bartlo, testified that defendant rushed at him from the street and pulled out a gun “or what looked like a gun.” Defendant and the man with him instructed Bartlo to “get down.” Defendant reached into Bartlo’s pocket, took his wallet, then ran away. Apparently, Bartlo was able to get a fairly good look at the gun, as he described it with specificity, testifying that it was black, very small, and looked to be a revolver. The fact that a gun was never found on defendant when he was arrested does not preclude the possibility that defendant possessed a gun while robbing Bartlo. Defendant certainly had the opportunity to dispose of the gun before the police eventually caught up with him at the liquor store.

The trial court found that defendant possessed a gun and used that gun to take Bartlo’s wallet. The trial court’s findings of fact in a bench trial are reviewed for clear error, giving regard to the “special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). Evidently the trial court found the testimony of Bartlo to be credible. Consequently, there was sufficient evidence to find defendant guilty of felony-firearm.

Second, defendant contends that there are inaccuracies in the presentence report that should be corrected, and the corrected report should be transmitted to the Department of Corrections. We agree. When reviewing a sentencing court’s response to a claim of inaccuracy in a presentence report, this Court reviews for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

“Critical decisions are made by the Department of Corrections regarding a defendant’s status based on the information contained in the presentence investigation report. Thus, the presentence investigation report should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report.” *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). MCL 771.14(6) states:

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

Similarly, MCR 6.425(E)(2) provides:

If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

Here, the presentence report indicated that defendant had not been attending school at the time of the incident. In actuality, he had been attending Henry Ford High School, which attendance was confirmed by a school transcript. Defense counsel objected to this inaccuracy at sentencing and the sentencing judge acknowledged the inaccuracy, concluding that the presentence report would be amended to reflect defendant's status as a student. Apparently, however, the presentence report was never amended. The prosecution concedes that the presentence report should be amended. When a sentencing report is found to be inaccurate, the sentencing judge shall correct it. *Norman, supra* at 275-276. Accordingly, a remand for the ministerial task of correcting the presentence report and transmitting it to the Department of Corrections is required. *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2003), rev'd on other grounds *People v Russell*, 471 Mich 182 (2004).

Defendant's convictions and sentences are affirmed, but we remand for the ministerial task of correcting the presentence report and transmitting it to the Department of Corrections. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood