

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYARTA JEREMY GETER,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 315987

Ingham Circuit Court

LC No. 12-000551-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of one count of armed robbery, MCL 750.529, one count of felonious assault, MCL 750.82, and two counts of carrying a concealed weapon (CCW), MCL 750.227. The court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to serve concurrent prison terms of 180 to 480 months for the armed robbery conviction, 18 to 48 months for the felonious assault conviction, and 18 to 60 months for each conviction of CCW. Defendant's challenges to the scoring of his guideline variables lack merit. We therefore affirm.

I. BACKGROUND

On the evening of May 20, 2012, Dale Tuttle drove to a local party store with his ward, 15 or 16-year-old Kevin Sanders. Sanders waited in the parked vehicle while Tuttle went inside. Defendant approached the vehicle and asked Sanders for a cigarette. He then produced a knife, tapped the edge of the open vehicle window, and demanded Sanders's money. Sanders took \$15 from his wallet and gave it to defendant. Defendant walked away before Tuttle exited the store and reentered the vehicle.

As Tuttle and Sanders drove away, Sanders recounted the tale of his robbery. Tuttle immediately returned to the store. He approached defendant in the parking lot and ordered defendant to return the money. Defendant refused. Defendant pulled out a pocket knife but Tuttle was able to disarm him. Defendant then retrieved a box cutter. To frighten defendant, Tuttle yelled to Sanders to bring out his pistol. Defendant ran away, but was quickly discovered by the police. Defendant was carrying a knife, a box cutter, and \$15 when he was arrested.

Defendant was charged with armed robbery in relation to Sanders, felonious assault of Sanders, felonious assault of Tuttle, and two counts of CCW. The jury acquitted defendant of felonious assault in relation to Tuttle.

II. ANALYSIS

Defendant’s only appellate challenge is to the circuit court’s scoring of offense variables (OV) 9 and 10 at 10 points each. Because defendant preserved this issue by raising it at sentencing, *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), we review the trial court’s findings of fact for clear error, and the trial court’s application of the facts to the sentencing guidelines de novo, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The court’s factual findings “must be supported by a preponderance of the evidence.” *Id.*

A. OV 9

MCL 777.39(1)(c) governs the scoring of OV 9. It provides, in relevant part:

(1) Offense variable 9 is number of victims. Score offense variable 9 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:

* * *

(c) There were 2 to 9 victims who were placed in danger of physical injury or death 10 points

(d) There were fewer than 2 victims who were placed in danger of physical injury or death 0 points

(2) All of the following apply to scoring offense variable 9:

(a) Count each person who was placed in danger of physical injury or loss of life or property as a victim

The Department of Corrections (DOC) initially scored OV 9 at 0 points in relation to defendant’s armed robbery and felonious assault convictions. The prosecutor challenged this score, arguing that defendant also placed Tuttle in danger when the guardian tried to retrieve his ward’s stolen cash. Defense counsel countered that Tuttle testified that he was not afraid of defendant and that Tuttle was the aggressor in his encounter with defendant. The court agreed with the prosecutor that Tuttle was a second victim and that OV 9 should be scored 10 points. The sentencing information report (SIR) indicates that the court changed the score to 10 points only in relation to the armed robbery conviction.

The circuit court’s assessment was legally correct and supported by a preponderance of the evidence. OV 9 “must be scored giving consideration to the sentencing offense alone OV 9 does not provide for consideration of conduct after completion of the sentencing offense.” *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009). Armed robbery is a transactional offense, however, and defendant’s acts toward Tuttle in his attempt to retain the spoils are part of the offense. See *People v Mann*, 287 Mich App 283, 286-287; 786 NW2d 876 (2010) (holding that armed robbery is a transactional offense, including the act of fleeing from the scene).

MCL 750.530 reads in its entirety:

(1) A person who, *in the course of committing a larceny* of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, “*in the course of committing a larceny*” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or *in an attempt to retain possession of the property*. [Emphasis added.]

Accordingly, the sentencing offense—armed robbery—continued after defendant took Sanders’s money. Under the plain language of the statute, the crime was ongoing when Tuttle returned to the scene and defendant threatened him with a knife and a box cutter “in an attempt to retain possession of the property.”

The OV 9 score was also supported by a preponderance of the evidence. That the jury acquitted defendant of felonious assault against Tuttle does not preclude the court’s scoring of this variable. A court can find a fact proven by a preponderance of the evidence notwithstanding that a jury found that the same fact was not proven beyond a reasonable doubt. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). And defendant does not dispute that he wielded a knife and a box cutter during Tuttle’s attempt to regain the stolen property. Accordingly, defendant is not entitled to relief on this ground.

B. OV 10

Defendant also challenges the court’s increase of his score for OV 10 to 10 points. OV 10 takes into consideration the “exploitation of a vulnerable victim” as follows:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 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:

(a) Predatory conduct was involved..... 15 points

(b) The offender exploited a victim’s . . . youth or agedness . . . 10 points

* * *

(d) The offender did not exploit a victim’s vulnerability
..... 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) “Predatory conduct” means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. . . . [MCL 777.40.]

The DOC originally scored 0 points for OV 10. The prosecutor challenged this score, arguing:

[T]he victim was only 14 or 15 years old at the time. He was alone in a car. I believe circumstantially, if not directly, that’s why the defendant chose him out of anybody else that was in the parking lot or present that day to rob, so I think he took advantage of the victim’s youth at that time.

Defense counsel objected based on his theory of the defense: that defendant and Sanders knew each other before the offense because defendant was Sanders drug dealer and this case involved a drug deal gone wrong. Based on that theory, no exploitation occurred. The prosecutor retorted that the jury had not accepted that theory, negating defendant’s challenge. The court agreed with the prosecutor.

Although the scoring of OV 10 is a closer issue, we do not believe the circuit court clearly erred in its assessment of the record facts. “To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish.” *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988). “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

At the time of the robbery, Sanders was 15 or 16 years old, not 14 or 15 as stated by the prosecutor. He was 5 feet and nine inches tall and weighed less than 130 pounds. The court was free to infer from the circumstances that defendant did not decide to rob the first person he saw on the day in question. Rather, it was reasonable to infer from the evidence that defendant singled out Sanders because of his young age and gangly stature, and because he was sitting alone in the passenger seat of a parked vehicle with no ready means of escape. Tellingly, defendant did not choose to rob Tuttle, a grown man, who had left the vehicle only moments

earlier. Based on this evidence, we are not left with a definite and firm conviction that the court erred in scoring OV 10. The court could conclude that defendant used Sander's readily apparent susceptibility to manipulate him for a selfish purpose—to rob him.

We affirm.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly