

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RHONDA SUE HARDIN,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2005

No. 252552

Oakland Circuit Court

LC No. 2003-191015-FC

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

MEMORANDUM.

Defendant appeals as of right her concurrent sentences of 81 months to 25 years in prison following her bench trial conviction of two counts of assault with intent to rob while armed, MCL 750.89. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted on the theory that she aided and abetted her codefendant by driving a vehicle that allowed him to flee the scene after robbing the victims with an air gun. The statutory sentencing guidelines established a minimum term range of 81 to 135 months. Defendant objects to the scoring of Offense Variable (OV) 1, MCL 777.31, regarding the aggravated use of a weapon. She argues that the sentencing court should not have scored fifteen points for OV 1 because the weapon used did not meet the definition of a firearm. We disagree. In calculating the sentencing guidelines, the sentencing court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in the record. *Id.*

Michigan law excludes a smooth bore rifle or handgun designed “exclusively for propelling BBs not exceeding .177 caliber by means of spring, gas or air” from the definition of a firearm. MCL 8.3t; see also MCL 750.222(d). The weapon used in the robbery was introduced as evidence at trial but no witness specifically testified regarding the caliber or type of projectile that the weapon shot. However, the trial court saw the weapon at issue and the prosecutor argued that the type of weapon used was also capable of shooting pellets. Defendant presented no affirmative evidence that the weapon “exclusively” shot BBs but relied instead on the prosecutor’s lack of evidence to the contrary. In this case, the prosecutor’s introduction of the weapon itself provided a sufficient evidentiary basis for the trial court’s determination that the fifteen-point score was warranted. Moreover, the minimum term of 81 months would have

been within the concededly appropriate guidelines range of 51 to 85 months even if the sentencing court had scored OV 1 at 5 points. Because the sentencing court clearly indicated that it considered the sentence it imposed proper, given defendant's prior record and the circumstances of the incident, any error in the scoring of the guidelines was harmless. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).<sup>1</sup>

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello

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<sup>1</sup> Similarly, we reject defendant's argument that she is entitled to resentencing because the sentencing court violated *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by basing its sentencing decision on facts not found by the trier of fact. *Blakely* generally does not apply to Michigan's system of indeterminate sentencing, *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), and should never apply in a situation, such as this one, where the sentence falls within the guidelines range irrespective of the sentencing court's disputed factual finding.