

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMIAN BENTON DRAKE,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 269103

Wayne Circuit Court

LC No. 05-009338-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of discharge of a firearm toward a dwelling or occupied structure, MCL 750.234b, discharge of a firearm from a motor vehicle, MCL 750.234a, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Pursuant to MCL 769.12, he was sentenced as a fourth habitual offender to prison terms of 152 months to 40 years for the assault and felon-in-possession convictions, 10 to 15 years for each for the convictions involving discharge of a firearm, and a consecutive two-year term for the felony-firearm conviction. Defendant now appeals as of right, and we affirm. This appeal is being decided without oral argument. MCR 7.214(E).

I

Defendant's convictions arise out of his firing an assault rifle at Michael Tibbs's residence in the city of Detroit. Approximately one hour before the shooting, defendant and Tibbs were involved in a physical altercation. Thereafter, defendant appeared in a car in front of Tibbs's driveway and fired an assault rifle toward Tibbs's house. Defendant's vehicle then sped down the street, turned around, and came back toward Tibbs's house. At that time, Tibbs was standing in his driveway and saw defendant leaning out of the car with the rifle. Tibbs heard defendant yell before firing a second volley of shots, which struck Tibbs's house, Tibbs's car parked in the driveway, and Tibbs's neighbor's house. At trial, defendant admitted that he shot toward Tibbs's house to scare him, but denied that he intended to kill Tibbs.

II

Defendant first argues that the trial court rendered inconsistent verdicts, requiring reversal of his conviction for assault with intent to do great bodily harm less than murder. We disagree. In reviewing a verdict reached in a bench trial, we review the trial court's factual findings for clear error and its conclusions of law de novo. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

A trial court sitting without a jury must make findings of fact and conclusions of law on contested matters and state its findings and conclusions either on the record or in a written opinion. MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). While juries are not required to explain their verdicts and may render inconsistent or illogical verdicts, a verdict rendered by a trial judge sitting as a trier of fact must be logically consistent. *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). If the trial court's factual findings are inconsistent with its verdict such that the two "cannot be rationally reconciled," then the verdict is inconsistent. *Id.* at 27.

Based on the presence of Tibbs, Ryan Pierce, Tibbs's neighbor, and the neighbor's nine-year-old son in the immediate area where defendant was shooting, defendant was charged with four counts of assault with intent to commit murder, MCL 750.83. The trial court determined that defendant assaulted Tibbs with the intent to do great bodily harm less than murder, but concluded that "the prosecutor has not proven, beyond a reasonable doubt, that the Defendant committed the crime of assault with intent to murder" with respect to the other three individuals.

Defendant now argues that the trial court could not have logically reached these verdicts because, if he possessed the necessary intent regarding Tibbs, the doctrine of transferred intent would have transferred that intent to the remaining three persons, requiring the same verdict with respect to all four individuals. Under the doctrine of transferred intent, the prosecutor need only show that the defendant possessed the requisite intent and that it was directed toward a potential victim; the prosecutor need not show that the defendant's intent was directed toward any specific victim. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003); *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). Here, the trial court found that defendant possessed the intent to assault Tibbs with the object of doing great bodily harm less than murder. Moreover, all four victims were present in the immediate area where the shots were fired, and it appears from the record that all four were similarly assaulted by being placed in equal apprehension of an imminent battery from defendant's shooting. Accordingly, the trial court's verdicts might appear logically inconsistent.

But it is not entirely clear from the record why the trial court acquitted defendant on three of the four assault charges. Indeed, as defendant himself implicitly concedes on appeal, the most likely explanation for the trial court's seemingly inconsistent verdicts is not that the court granted an impermissible "waiver break," see *Ellis, supra* at 26, but is instead that the court simply misapplied the legal doctrine of transferred intent. As noted, the trial court sitting without a jury must render logically consistent verdicts in a criminal case. *Id.* However, under circumstances where a defendant is properly convicted of certain charges beyond a reasonable doubt, but inconsistently acquitted of other, related charges based on a misapplication of the law, we will not set aside the defendant's proper convictions. See *People v Smith*, 231 Mich App 50, 52-53; 585 NW2d 755 (1998). Defendant is accordingly entitled to no relief on this issue.

III

Defendant next contends that his sentences of 152 months to 15 years for discharge of a firearm toward a building and discharge of a firearm from a motor vehicle are invalid because they violate the “two-thirds” rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). This rule prohibits imposing a minimum sentence that exceeds two-thirds of the maximum sentence.¹ *Id.* at 690. The record reflects that, at sentencing, the trial court announced that it was sentencing defendant to 10 to 15 years’ imprisonment for these convictions. Although the original judgment of sentence erroneously indicated that defendant was sentenced to 152 months to 15 years’ imprisonment for these convictions, a second amended judgment of sentence was entered on October 5, 2006, correctly denoting the 10-to-15-year sentences. Accordingly, defendant is entitled to no further relief in this regard.

IV

Defendant next argues that offense variable 2 (OV 2) and offense variable 17 (OV 17) were incorrectly scored because the evidence did not support the particular scores assessed under those variables. A sentencing court has discretion regarding the number of points to be assessed at sentencing, provided that record evidence supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold a scoring decision on appeal if there exists any evidence supporting the decision. *Id.*

Defendant contends that the trial court improperly scored 15 points for OV 2 because no evidence showed that he used a “fully automatic weapon” as required by MCL 777.32(1)(b). Defendant’s argument lacks merit. A police officer testified at trial that the recovered assault rifle, which defendant admitted using in the shooting, was an automatic weapon. Thus, there was evidence to support the trial court’s scoring decision with respect to OV 2. *Hornsby, supra* at 468.

Defendant also argues that the trial court improperly scored ten points for OV 17. Although defendant did not object to the scoring of OV 17 at sentencing, he raised this issue in a motion to remand filed with this Court. However, because defendant’s motion was untimely, it was arguably not a *proper* motion to remand as required by MCL 769.34(10) to preserve for appeal his challenge to the scoring of the sentencing guidelines.

Nevertheless, we conclude that defendant’s challenge lacks merit. MCL 777.22(1) provides that for all crimes against a person, the sentencing court should score OV 17 “if the offense or attempted offense involves the operation of a vehicle” Here, the offense involved the operation of a vehicle. Defendant admitted that he shot the assault rifle from a car, engaging in what is commonly referenced as a “drive-by” shooting. Accordingly, the offense involved the operation of a vehicle, and OV 17 was correctly scored. MCL 777.22(1).

Moreover, the evidence supported a scoring of ten points for OV 17. MCL 777.47(1)(a) states that ten points should be scored for OV 17 if “[t]he offender showed a wanton or reckless

¹ Our Legislature codified this rule at MCL 769.34(2)(b).

disregard for the life or property of another person.” Defendant testified that he fired an assault rifle at Tibbs’s residence and that he knew that Tibbs was near or inside the residence. He further testified that he did not intend to shoot Tibbs’s car, but “the gun’s kind of big, so when I aimed out the window, I really wasn’t under control.” We conclude that the trial court properly scored ten points for OV 17 because defendant showed a wanton or reckless disregard for the life or property of another person when he fired the weapon from a moving motor vehicle. *Hornsby, supra* at 468.

V

Finally, defendant contends that he is entitled to resentencing on his convictions for discharge of a firearm toward a building, discharge of a firearm from a motor vehicle, and felon-in-possession because his sentences for these offenses were not based on the legislative sentencing guidelines. Because defendant received multiple concurrent convictions, a presentence report was prepared only for his conviction of assault with intent to do great bodily harm less than murder, which was defendant’s most severe offense and his highest crime class felony conviction. MCL 771.14; *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). The trial court was required to score only this most severe offense. *Id.* at 127-129.² Therefore, defendant’s claim in this regard lacks merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

² In *People v Johnigan*, 265 Mich App 463, 470-472; 696 NW2d 724 (2005), Judge Sawyer expressed his belief that *Mack* was incorrectly decided on this issue. Judge Sawyer noted that “*Mack* does correctly note that MCL 771.14 only requires the presentence investigation report to include guidelines scoring for the highest crime class,” but he observed that “[t]he critical error in *Mack* is that it overlooks the language of MCL 777.21(2), which provides . . . ‘[i]f the defendant was convicted of multiple offenses, . . . score each offense as provided in this part.’” *Johnigan, supra* at 470. Despite Judge Sawyer’s disagreement with *Mack*, he concluded that *Mack* was not dispositive to the resolution of *Johnigan* and declined to declare a conflict with the *Mack* decision. *Johnigan, supra* at 472. At least one Justice of our Supreme Court has also recognized a potential conflict between *Mack* and *Johnigan*. See *People v Smith*, 475 Mich 891, 891-892; 716 NW2d 273 (2006) (Corrigan, J., concurring). Nonetheless, we perceive no reason not to follow the rule of *Mack* in this case. See MCR 7.215(J)(1).