

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARRYL LYNN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 290169

Wayne Circuit Court

LC No. 08-004954-FH

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant was found guilty by a jury of carrying a concealed weapon in a motor vehicle, MCL 750.227(2), and was sentenced as a fourth habitual offender, MCL 769.12, to two to eight years' imprisonment. He appeals as of right. We affirm.

On March 29, 2008, around 11:00 or 11:30 a.m., defendant drove to the home of his ex-girlfriend Smith, parked his vehicle, stood on the street across from her second-story flat, and fired three shots into the air from a .45 handgun. Smith's current boyfriend, her teenage daughter, some friends of her other two children, and a cousin were also in the flat at the time. After Smith and defendant exchanged words, defendant drove away. The police arrived and one of the officers found three shell casings in the street. After the officers left, defendant allegedly returned in a different vehicle, but only drove past the house. When Smith and her current boyfriend left on an errand, defendant allegedly returned again, entered the home to look for Smith, and assaulted a sixteen-year-old friend of Smith's son. Smith's daughter, who told her mother that she was hiding in a closet, summoned Smith home. The police were again called to the scene.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), assault or assault and battery, MCL 750.81, and carrying a pistol in a motor vehicle, MCL 750.227(2). On December 16, 2008, defendant was found guilty by a jury on the weapon charge, but acquitted of the other two charges.

On appeal, defendant first argues that the prosecution did not present sufficient evidence to satisfy the due process standard of proving guilt beyond a reasonable doubt on the charge of carrying a pistol in a motor vehicle, MCL 750.277(2). We disagree.

With respect to a claim concerning sufficiency of the evidence, this Court reviews de novo the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising from that evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences. *Hardiman*, 466 Mich at 428. The jury may base its decision on inferences arising from the facts presented. *Id.* at 429. An inference may be properly based on another inference so long as the inferences remain reasonable. *Id.* at 425-428. The “rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt.” *Id.* at 425-426, quoting *Dirring v United States*, 328 F2d 512, 515 (CA 1, 1964).

To support a conviction for carrying a pistol in a motor vehicle under MCL 750.227(2), the prosecution must show: (1) that a weapon was present in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that the defendant was “carrying” the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). MCL 750.227(2) provides:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

Conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Under the defendant’s version of the events, he dropped his girlfriend off at work and then arrived at his sister’s home around 9:00 or 9:30 a.m. to work on her porch and roof while a friend worked on his girlfriend’s car. According to defendant and his sister, defendant did not leave his sister’s home until about 5:00 or 5:30 that afternoon. This presents a direct conflict with the statements of prosecution witnesses who said that they heard gunshots and either saw defendant with a gun in his hand or saw him at or near the home when the shots were fired. They then observed defendant drive off in a car. Smith herself testified that she witnessed defendant arrive in his vehicle, reach into the car’s backseat and pull out a gun, exit his vehicle, discharge the weapon into the air, and then get back into his car and leave. In convicting defendant, the jury chose to give credence to the testimony of the prosecution’s witnesses. While the obvious conflicts in the two versions of events would require the jury to choose which testimony to believe, “a jury is free to believe or disbelieve, in whole or in part, any of the evidence presented.” *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). On the basis of the record, a jury could reasonably find or infer that defendant handled a gun, that the gun had been present in defendant’s car on arrival to and departure from Smith’s house, that defendant was aware of the weapon’s presence in the vehicle, and that defendant had

been carrying or possessing the weapon. The evidence presented, when viewed in the light most favorable to the prosecution, satisfies the elements of MCL 750.227(2) and supports defendant's conviction beyond a reasonable doubt.

Defendant next argues that the trial court's score of ten points for Offense Variable (OV) 9 (two to nine victims placed in danger of physical injury or death), MCL 777.39, was clearly erroneous because he was being sentenced for carrying, and not for discharging, a weapon. Defendant, citing *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008), contends that the sentencing offense and its elements do not encompass the discharge of the weapon; therefore, defendant's act of firing the weapon cannot be considered in scoring OV 9. At sentencing, the only argument presented by defendant was that no one was placed in danger given the direction in which defendant discharged the gun. Thus, the issue now being argued on appeal was not preserved below. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004) (attorney failed to raise precise issue at sentencing). The trial court, responding to the particular argument posed by defendant, stated, "Firing a gun in the air, people are always placed in danger who are in the vicinity because of laws of gravity. What goes up must come down. That will remain the same. OV-9 will remain the same."

The ten points assessed by the trial court elevated defendant's overall OV score to Level II within the applicable scoring grid, resulting in a recommended minimum sentence range of 7 to 46 months. MCL 777.66; MCL 777.21(3)(c). Absent the ten points, defendant would have had an OV score that placed him at Level I, resulting in a recommended range of 5 to 46 months. *Id.* The minimum sentence imposed by the trial court, 2 years' imprisonment, falls within both guidelines ranges; however, assuming a scoring error, resentencing would ordinarily be required because the guidelines range would be altered. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006) (resentencing required where there was a preserved scoring error that altered the guidelines range even though minimum sentence imposed under incorrect range still fell within the correct or appropriate range). However, the precise issue presented on appeal was not raised at sentencing, in a motion for resentencing, or in a motion to remand filed with this Court. MCL 769.34(10).¹ In *Kimble*, 470 Mich at 312, our Supreme Court stated:

Because defendant's sentence is *outside the appropriate guidelines sentence range*, his sentence *is appealable* under § 34(10), even though his

¹ MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand. However, because defendant failed to raise the argument that OV 16 is not applicable at all until his application for leave to appeal with the Court of Appeals, defendant must satisfy the plain error standard[.] [Emphasis added.]

Here, assuming that the appropriate guidelines range is 5 to 46 months, and not 7 to 46 months, the 2-year minimum sentence imposed by the court nonetheless falls within the appropriate guidelines range of 5 to 46 months. As observed by the Court in *Kimble*, 470 Mich at 310-311:

[I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and* the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. [Emphasis added.]

The Supreme Court in *Francisco*, 474 Mich at 90 n 8, reiterated this point from *Kimble*, stating:

Finally, if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel.

Accordingly, given defendant's failure to preserve the issue now being argued on appeal, the fact that the minimum sentence imposed by the court still falls within a presumed appropriate guidelines range of 5 to 46 months, and given the absence of any ineffective assistance of counsel claim, MCL 769.34(10), as construed in *Kimble* and *Francisco*, dictates that defendant's sentence is not appealable.²

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens

² To the extent that defendant is also arguing in favor of resentencing on the ground argued below, i.e., the discharge of the weapon did not place 2 to 9 victims in danger of physical injury or death, MCL 777.39(1)(c) (ten points), we disagree, as there was sufficient evidence in the record to support the court's scoring of ten points on OV 9. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (applying preponderance of the evidence test with respect to a court's scoring of the sentencing variables).