

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ODIE MILLER,

Defendant-Appellant.

UNPUBLISHED

February 3, 2009

No. 282423

Berrien Circuit Court

LC No. 2004-410632-FC

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his prison sentences of 96 to 180 months for unarmed robbery, MCL 750.530, and 96 to 480 months for bank robbery, MCL 750.750.531. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with armed robbery, MCL 750.529, bank robbery, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). The evidence showed that defendant waited in a vehicle while Ronnie Boone entered a credit union, held his hand in his pocket in such a way that made a teller believe that he was armed with a gun, and took \$10,000 in cash.

The police stopped the vehicle and apprehended defendant. A search of defendant's person revealed marijuana, rolling papers, seven .25 caliber bullets, and paper money bands. Boone commandeered the vehicle and drove away, but was apprehended. An unloaded .25 caliber semiautomatic pistol was found in the center console of the vehicle.

The jury acquitted defendant of armed robbery and the weapons offenses, and convicted him of unarmed robbery as a lesser offense of armed robbery, bank robbery, and possession of marijuana. The trial court sentenced defendant to concurrent terms of 114 months to 15 years in prison for unarmed robbery and bank robbery, with credit for 411 days on each sentence, and to one year in jail for possession of marijuana, with credit for time served.

Defendant claimed an appeal to this Court (Docket No. 270495), challenging the scoring of Offense Variable (OV) 2, MCL 777.32, lethal potential of weapon possessed or used, OV 3, MCL 777.33, physical injury to victim, and OV 9, MCL 777.39, number of victims, and

challenging the amount of restitution ordered. This Court remanded this case for resentencing and for recalculation of the restitution owed.

On remand, the trial court rescored OV 2 and OV 3, but continued to score OV 9 at 25 points for ten or more victims. The guidelines as scored by the trial court recommended a minimum term range of 50 to 100 months. Defendant objected to the scoring of OV 9 at 25 points, and contended that because only six persons were in the immediate vicinity when the robbery took place, OV 9 should have been scored at ten points for two to nine victims. The trial court rejected defendant's argument, noting that evidence showed that 12 persons were within 30 feet of the assailant when the robbery occurred. The trial court found that all 12 persons were in danger at the time the robbery occurred, and so scored OV 9 at 25 points. The trial court sentenced defendant to concurrent terms of 96 to 180 months for unarmed robbery and 96 to 480 months for bank robbery, with credit for 1,319 days on each sentence.

The proper interpretation and application of the sentencing guidelines are legal questions that we review de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review a trial court's scoring of the guidelines to determine whether that court properly exercised its discretion and whether the evidence supports the scoring decisions. A trial court's findings of fact are reviewed for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Offense Variable 9 is properly scored at 25 points if ten or more victims were "placed in danger of physical injury or death . . ." MCL 777.39(1)(b). Each person placed in danger is to be counted as a victim. MCL 777.39(2)(a).¹

Defendant argues that he is entitled to resentencing because the trial court abused its discretion by scoring OV 9 at 25 points for ten or more victims. Defendant asserts that only those six persons who were in the immediate vicinity could have been considered to be in danger during the incident. In addition, defendant asserts that because Boone was not actually armed during the robbery, no one in the bank was in danger of getting shot directly or being hit by ricocheting bullets. We disagree.

Boone made a motion with his hand to convince the teller that he was armed, and demanded money. It is undisputed that 12 persons were in the bank and were within approximately 30 feet of Boone when the robbery occurred. Boone left the bank, and he and defendant drove away before the police arrived. However, the police had been notified, and had

¹ 2006 PA 548, effective March 30, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life or property" is to be counted as a victim.

they arrived while the robbery was ongoing, the bystanders could have been subject to injury or death. Under the circumstances, the trial court did not abuse its discretion by scoring OV 9 at 25 points for ten or more victims. See *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988).

The minimum terms imposed by the trial court were within the guidelines as properly scored by the trial court. Defendant is not entitled to resentencing.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra