STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2009
v	No. 286959 Wayne Circuit Court
BRIAN DANGELO BROOKS, Defendant-Appellant.	LC No. 08-002798-FC

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Brian Dangelo Brooks was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. He was found not guilty of two counts of assault with intent to rob while armed, MCL 750.89, and one count of carrying a concealed weapon, MCL 750.227. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent sentences of 6 to 20 years' imprisonment for the assault conviction and 3 to 10 years' imprisonment for the felon in possession conviction, and a consecutive sentence of 5 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that the trial court incorrectly scored Offense Variable (OV) 12 (contemporaneous felonious acts) because it considered both the assault offenses for which the jury found him not guilty and the assault offense for which he was convicted. Specifically, in scoring OV 12, the trial court found that defendant had committed three contemporaneous felonious criminal acts: two assaults with intent to rob and one assault with intent to do great bodily harm. Defendant was found not guilty of the two charges relating to the assaults with intent to rob, but was convicted of and sentenced for the assault with intent to do great bodily harm. Defendant argues that, therefore, he is entitled to resentencing. We disagree.

When scoring the sentencing guidelines, the trial court uses a preponderance of the evidence standard, not a reasonable doubt standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). As a result, "situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same

fact may be found by a preponderance of the evidence for purposes of sentencing." *People v Ratkov* (*After Remand*), 201 Mich App 123, 126; 505 NW2d 886 (1993). This is such a situation. There was sufficient evidence on the record, in the form of witness testimony, to support the trial court's inclusion in sentencing of the two charges of assault with intent to rob by a preponderance of the evidence, even though the jury acquitted defendant of these charges.

Defendant argues that the holding in *Blakely v Washington*, 542 US 296, 301-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004), should preclude the sentencing court from considering offenses for which he was acquitted when sentencing OV 12. However, in *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), cert den 549 US 1037; 127 S Ct 592; 166 L Ed 2d 440 (2006), our Supreme Court stated that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which the defendant is given a sentence with a minimum and a maximum and a judge may only adjust the minimum sentence at the sentencing hearing. *Id*. at 159-160. The *Drohan* Court held that, in rendering the minimum sentence, a judge could consider facts that were neither decided by a jury nor admitted. *Id.* at 159, 164. The Court concluded that this does not violate either the holding in *Blakely* or the Sixth Amendment because "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict." *Id*. at 159. Because this case only concerns the scoring of offense variables used to determine defendant's minimum sentence, *Blakely* does not apply. The trial court did not err when it included the assault with intent to rob charges in scoring OV 12.

However, OV 12 defines contemporaneous felonious acts as those that occur "within 24 hours of the sentencing offense" and that "[have] not and will not result in a separate conviction." MCL 777.42(2)(a)(*i*)-(*ii*). Therefore, none of the acts that resulted in convictions in this case should be scored under OV 12. The trial court's inclusion of the assault with intent to do great bodily harm conviction in scoring OV 12 was erroneous because the defendant was already convicted for that crime. Therefore, the trial court erred when it scored OV 12 at 25 points instead of at 10 points.

Although defendant correctly notes that a score of zero points for OV 12 would have reduced his grid location from D-V to D-IV (reducing the minimum sentence range from 29-85 months to 19-57 months), a score of ten points for OV 12 does not have the same effect. Even with a decreased aggregate OV score of 50 points, defendant's grid would still be D-V, and he would still be sentenced within the same range of 29 to 85 months. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Therefore, we decline to remand for resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis