

NOTICE

Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

NATHAN A. BLOCK,)	
)	
Appellant,)	Court of Appeals No. A-11215
)	Trial Court No. 1JU-11-382 CR
)	
v.)	
)	
STATE OF ALASKA,)	<u>MEMORANDUM OPINION</u>
)	
Appellee.)	<u>AND JUDGMENT</u>
_____)	No. 5943 — April 24, 2013

Appeal from the Superior Court, First Judicial District, Juneau, Louis J. Menendez, Judge.

Appearances: Josie Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. David L. Brower, Assistant District Attorney, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.*

ALLARD, Judge.

Nathan A. Block pled guilty to robbery in the first degree for robbing a Juneau jewelry store. Block's presumptive sentencing range depended on whether he

* Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

possessed a firearm rather than a pellet gun at the time of the robbery — a question left to the superior court by his plea agreement. At the evidentiary hearing, the superior court found beyond a reasonable doubt that Block had possessed a firearm during the robbery and sentenced him to 10 years with 3 years suspended, 7 years to serve.

On appeal, Block contends the State’s evidence supporting the firearm enhancement was legally insufficient. Block also argues that his sentence is excessive. Because the evidence that Block used a firearm was legally sufficient, we affirm the firearm enhancement and the higher presumptive sentencing range. With respect to the excessiveness claim, we direct the parties to file supplemental briefs on the issue of whether this Court has jurisdiction to review Block’s sentence. We will defer any ruling on the excessiveness claim until the supplemental briefing is complete.

Background

In March 2011, Nathan A. Block entered Lambros Goldsmith, a jewelry store in Juneau, and left with approximately \$100,000 worth of stolen jewelry after threatening the store clerk with a gun.

The State charged Block with one count of robbery in the first degree¹ and one count of theft in the first degree.² Pursuant to a plea agreement, Block later pled guilty to the robbery charge, a class A felony,³ and the State dismissed the theft charge. The plea agreement left sentencing open and also left open the question of which presumptive range applied. A first-time felony offender, Block faced either the default presumptive range of 5 to 8 years under AS 12.55.125(c)(1) or an enhanced range of 7

¹ AS 11.41.500(a)(1).

² AS 11.46.120.

³ AS 11.41.500(b).

to 11 years under AS 12.55.125(c)(2) if the State proved beyond a reasonable doubt that Block possessed a firearm during the commission of the offense.⁴

Block claimed that he had used a pellet gun during the robbery, not a real gun. The parties agreed that a pellet gun did not fit the statutory definition of a firearm and that the State needed to prove beyond a reasonable doubt that Block had used a real gun during the robbery in order to obtain the higher presumptive range under AS 12.55.125(c)(2).⁵ Block agreed to waive his right to a jury trial on this issue.

At the sentencing hearing, the State presented the testimony of the jewelry store clerk, Marjorie Falotico. Falotico testified that Block came into the store and appeared interested in buying jewelry. When she turned away to write up a receipt of sale, Block told her, “Turn around, I have a gun.” She turned and saw Block holding a gun. Block told her “I have nothing to lose, I will kill you.” Block then duct taped Falotico’s hands and feet together, and while doing so, he laid the gun on her back. Falotico stated that the gun “had weight ... it was heavy.” At a later point during the robbery, Block had put the gun in Falotico’s face and she “was looking down the barrel.”

Falotico testified that she was raised around guns and would target practice in her back yard with rifles and pistols. She was also familiar with pellet guns and, unlike pellet guns where “you can hear the bullets moving around,” the gun Block used “sounded very solid.” She testified that there was no doubt in her mind at the time of the robbery that it was a real gun.

⁴ AS 12.55.125(c)(2)(A). AS 11.81.900(b)(26) defines “firearm” as “a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury.”

⁵ See *Kinnish v. State*, 777 P.2d 1179, 1181 (Alaska App. 1989) (pellet gun does not fit statutory definition of firearm).

In addition to Falotico's testimony, the State introduced photographs of the robbery from a surveillance video and pictures of subcompact guns printed out from the Internet.

A friend of Block's, Tessa Luna, testified on his behalf. She testified that in the five to six months that Block had lived with her, she had never seen Block with a real handgun. Luna knew that her brother and Block had shot a BB gun, although she did not know whether that was the same weapon Block used during the robbery.

Block also testified on his own behalf. He testified that he used a plastic pellet gun when he committed the robbery and that he threw the pellet gun into the ocean after the robbery was complete. Block stated that he fired the pellet gun during the robbery but nothing came out because the gun was not loaded. Block denied saying he would kill Falotico.

Block's attorney produced photographs of a pellet gun from the Internet that looked similar to the photographs of the subcompact handguns produced by the State.

After hearing the testimony and reviewing the parties' exhibits, Superior Court Judge Louis J. Menendez found that the State had proven beyond a reasonable doubt that Block had possessed a firearm when he committed the offense. He found that the store clerk had been articulate, credible, and precise about her reasons for believing that it was a real gun in contrast to Block whose credibility he questioned. He further found that the object Block carried looked like a real gun in the surveillance video based on its appearance and the way Block carried it.

Judge Menendez sentenced Block to 10 years of imprisonment with 3 years suspended, 7 years to serve, an active term on the low end of the applicable presumptive range with the firearm enhancement. Block now appeals, arguing that there was insufficient evidence that he used a firearm and that his sentence is excessive.

The evidence supporting the firearm enhancement was legally sufficient.

In reviewing the sufficiency of the evidence after a trial without a jury, this Court views the evidence in the light most favorable to upholding the judge's verdict.⁶ We do not re-weigh the evidence or choose between competing inferences; we determine only whether the evidence is adequate to support a conclusion by a reasonable mind that the sentencing enhancement was proven beyond a reasonable doubt.⁷

Here, the State produced evidence that an eyewitness familiar with guns identified the gun used by Block as a real gun, not a pellet gun, and that she had specific reasons for this belief. Judge Menendez was entitled to credit this testimony over the conflicting testimony by Block, which he found not credible.

Block argues that the evidence that he possessed a firearm was insufficient because the State never presented any evidence that he owned a gun, purchased a gun, or possessed a gun at any time prior to the robbery. Block further argues that the store clerk's belief that he had used a real gun does not establish that it actually was a real gun. He points to various situations where suspects with pellet guns have been shot by police who genuinely but mistakenly believed that the suspect was armed with a real gun. But these arguments rely on viewing the facts in the light most favorable to Block rather than in the light most favorable to upholding the superior court's decision, as we are required to do.⁸

Block also argues that Judge Menendez improperly shifted the burden of proof to the defense when he stated during his findings, "We don't have the gun to look

⁶ *Helmer v. State*, 608 P.2d 38, 39 (Alaska 1980).

⁷ *Noble v. State*, 552 P.2d 142, 144 (Alaska 1976).

⁸ *Id.*

at, and that's because of Mr. Block's decision to get rid of the gun." We acknowledge that the State urged the superior court to assume that the missing evidence (the gun) would have been favorable to the State. But we see nothing in the record to suggest that Judge Menendez accepted this argument. Judge Menendez's statement about Block's disposal of the gun was made as part of his summary of the evidence before the court. In context, it is clear that Judge Menendez's statement that the gun was not available was a comment on what evidence was available for him to consider, not an acceptance of the State's burden-shifting argument, and his other comments indicate that he held the State to its full burden of proof on this issue.

Block's excessive sentence claim

Block argues that his sentence of 10 years of imprisonment with 3 years suspended, 7 years to serve, is excessive. Alaska Statute 12.55.120(e), declares that this Court does not have jurisdiction to hear this claim because Block's sentence is within the applicable presumptive range.

The constitutionality and exact meaning of AS 12.55.120(e) is currently before this court in *Reandean v. State*, A-10469 and *Alvarenga v. State*, A-10554. We have decided to request supplemental briefing on this issue in this case as well, and we therefore defer any action on this claim until the jurisdictional issue is resolved.

Conclusion

This Court will issue a separate opinion on Block's excessive sentence claim. In all other respects, we AFFIRM the superior court's judgment.