STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

ALLEN LESHAUN BAILEY,

Defendant-Appellant

UNPUBLISHED
April 29, 1997

No. 185079
Midland Circuit Court
LC No. 94-007354-FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and was sentenced to twenty to thirty-five years' imprisonment. Defendant appeals as of right. We affirm.

During the late evening hours of August 20, 1994, and the early morning hours of August 21, 1994, defendant traveled by car to various places with friends. Defendant had a sawed-off shotgun with him. During the first part of the evening, he left the gun at a friend's house. He later retrieved it and, for the remainder of the time, it was in the car. Defendant and his friends visited a trailer park twice. On their second visit, defendant became angry at another young man at the trailer park and took the gun out of the car. Defendant was calmed down by his friends, and they all left. Defendant was still agitated and was saying that he wanted to shoot the gun, so one of his friends suggested that he shoot at a mailbox, which he did. At various times during the evening, he talked about killing people and about what he would do if the police confronted them. Later in the evening, a police officer observed the car and, suspecting that it was being driven by a drunk driver, initiated a stop. As the officer approached the car, it took off and a high speed chase ensued. During the chase, defendant leaned out the back side window and shot the sawed-off shot gun at the officer, hitting the police car. The officer backed off and radioed in that shots had been fired. The chase continued until the driver of defendant's car rolled the car over and defendant ran away. Defendant was arrested the following day.

Defendant argues that there was insufficient evidence to support his conviction. In particular, he argues that there was insufficient evidence that he had the present ability to kill the officer. We disagree.

Viewed in a light most favorable to the prosecution, there was sufficient evidence. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Testimony established that the patrol car was approximately seventy-five feet behind the car defendant was in when defendant fired the gun. Evidence also showed the kill zone for a shot from the gun extended to 120 feet and that the shot could have penetrated the windshield. Thus, defendant had the present ability to kill the officer. Cf. *People v Reeves*, ___ Mich App ___ (No. 185225, issued February 25, 1997).

Defendant further argues that there is insufficient evidence that he had an intent to kill. Intent can be inferred from all the facts and circumstances of the case. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Shooting a shotgun at a patrol car during a high speed chase constituted sufficient circumstantial evidence of defendant's intent to kill.

Defendant contends that the trial court abused its discretion in granting the prosecutor's motion to have defendant shackled during trial. We disagree. The shackling was justified because evidence was presented showing that defendant posed a threat of injury to others and a threat of escape. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996); *People v Julian*, 171 Mich App 153, 160-162; 429 NW2d 615 (1988). In addition, the trial court minimized the effect of the shackling by providing that defendant be in the courtroom before the arrival of the jury whenever possible. *Julian*, *supra* at 162.

Defendant argues that the trial court abused its discretion in admitting evidence that (1) he was "on the run" from Florida authorities, (2) he shot at a mailbox that evening, and (3) he had taken the gun out of the car in connection with an argument with a person in the trailer park. We disagree. Because defendant conceded the relevance of the evidence concerning his flight from Florida authorities, and because he did not continue to argue against its admission, that issue is not preserved for appellate review. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). The remaining evidence was properly admitted as part of the res gestae of the case. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

Defendant claims that he was denied a fair trial because the prosecutor failed to produce a letter written by one of the persons in defendant's car to another person in the car urging that they each exculpate themselves of this crime. In particular, defense counsel attempted to question one witness with regard to the letter, and the prosecutor objected to the questioning without production of the letter and a foundation being laid. Defense counsel argued that it went to the witness' credibility and that he doubted that the prosecutor had the letter. The trial court adjourned the trial to allow the prosecutor to try to locate the letter, and, after the defense counsel had received the letter and reviewed it, the trial continued and defense counsel used the letter in cross-examination. Defendant asked for no further relief. Because the letter was not deliberately suppressed, and because it was not exculpatory of defendant, defendant was not denied due process. *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

Defendant further argues that certain questions and argument by the prosecutor denied him a fair trial. Defendant did not object to these questions or the argument and did not request a curative

instruction. After a review of the record, we conclude that there will be no miscarriage of justice if we fail to consider the issue further. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Defendant argues that the trial court erred in admitting Det. Lt. Bobalek's testimony regarding whether, in his opinion, the bird shot could have penetrated the patrol car's windshield. The testimony was properly admitted as lay opinion testimony under MRE 701. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989); *Mitchell v Oldford & Sons, Inc.*, 163 Mich App 622, 630; 415 NW2d 224 (1987).

Defendant argues that resentencing is required because the trial court failed to adequately articulate its reasons for the sentence imposed, the sentence is disproportionate, and the sentence is cruel or unusual punishment. We disagree. The trial court stated that it was sentencing defendant according to the guidelines, which is sufficient articulation. *People v Broden*, 428 Mich 343, 355; 408 NW2d 789 (1987); *People v Iacona*, 179 Mich App 442, 443; 446 NW2d 311 (1989). In addition to that statement, the trial court clearly laid out its concerns for protecting the public against defendant and its concern that defendant could not be rehabilitated.

We also reject defendant's claim that his sentence is disproportionate because he failed to rebut the presumption that a sentence within the guidelines' range is proportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). After reviewing the facts of this case and the circumstances of this defendant, who by the age of fifteen had amassed a significant juvenile history and committed this assaultive crime, we conclude that the trial court did not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant's proportionate sentence does not constitute cruel or unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs