STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 1999
v	No. 204645 Jackson Circuit Court
JEFFREY NATHANIEL POPE, Defendant-Appellant.	LC Nos. 97-079130 FH; 97-079131 FC

Before: Sawyer, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). He was sentenced as a second drug offender on the cocaine conviction to twenty to forty years in prison and as a fourth offender on the marijuana conviction to two to four years in prison. In a separate trial, defendant was also convicted following a jury trial of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), resisting and obstructing a police officer, MCL 750.479; MSA 28.747, assault with intent to do great bodily harm less than the crime of murder, MCL 750.84; MSA 28.279, and disarming a police officer, MCL 750.479b(2); MSA 28.747(2)(2). He was sentenced as a fourth offender, MCL 769.12; MSA 28.1084, to forty to seventy years on the assault with intent to murder conviction, ten to fifteen years on the resisting and obstructing conviction, thirty-five to seventy years on the assault with intent to do great bodily harm conviction, fifteen to thirty years on the disarming a police officer conviction, and to the mandatory consecutive two-year terms on the felony-firearm convictions. Defendant now appeals and we affirm.

Defendant's convictions, although occurring in separate trials, arise out of the same incident. Briefly, defendant was suspected of being involved in drug dealing. An informant was sent in to make a controlled buy. After she purchased a gram of cocaine from defendant, a search warrant was obtained and executed on February 14, 1997. During the execution of the warrant, defendant attempted to flee.

When caught by an officer, defendant struggled. He managed to disarm the officer and shoot the officer before being shot himself. The search of the house resulted in the discovery of the drugs which give rise to defendant's drug convictions. The struggle and shooting is the basis for the other crimes for which defendant was convicted.

Turning first to defendant's drug convictions, he argues that he was denied a fair trial because testimony was elicited to the effect that the police had investigated him and determined that he was a large-scale drug dealer, as well as opinion testimony by a police officer that defendant's intent was to deliver the drugs. Defendant's argument focuses on the testimony of Detective Gonzalez, who testified regarding the activities of a regional drug task force, LAWNET, and the testimony of Detective Saucedo who testified as to defendant's intent, as well as associated arguments by the prosecutor.

For the most part, defendant has not properly preserved this issue for review. With respect to any comments made by the prosecutor during opening statement or closing argument, there was no objection. See *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). Similarly, there was no objection to Detective Saucedo's testimony and, therefore, it is not properly preserved for review. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).[1]

With respect to Detective Gonzalez' testimony, defendant did raise a number of objections. Most of those objections were either sustained or resulted in the prosecutor's voluntarily dropping or rephrasing the question. One of the objections which was overruled did have some relationship to this issue. Specifically, the prosecutor asked "what actually constitutes LAWNET in terms of the various counties that you represent?" Defendant objected, arguing relevancy. The trial court overruled, stating that it was relevant to foundation, but cautioned the prosecutor not to go to far afield.

That objection is not, in our opinion, sufficient to preserve for review the question whether Detective Gonzalez should have been allowed to testify concerning the nature of LAWNET and its activities, either in general or as they related to defendant. Defendant did not object to the testimony concerning LAWNET or its investigation of defendant. Rather, he only objected to a particular question concerning what geographic area LAWNET covered. An objection on one ground at trial is insufficient to preserve an appellate attack on a different ground. *Stimage, supra*.

For the above reasons, we are not persuaded that this issue is properly before us for review.

Next, defendant argues that he was denied a fair trial because the prosecutor argued that defendant was unemployed, as well as arguing and introducing evidence that defendant was "leaching" off his girl friend, Jessica Ernst. Specifically, in his opening statement, the prosecutor stated that there would be evidence that defendant was unemployed and "leaching" off his girl friend. Further, during the girl friend's testimony, she testified that defendant had been living with her for many months before the raid and that he had not contributed towards the household expenses.

With respect to the prosecutor's opening statement, there was no objection and, therefore, the issue is not preserved for appeal. *Vaughn, supra*. With respect to the girl friend's testimony, defendant raised two objections, one of which was overruled and the other sustained.

The first, which was overruled, was whether defendant was living with her and whether he was paying his share of the expenses. Defendant objected on grounds of relevancy. The prosecutor argued that it was relevant to establishing defendant's residency in the house and, thus, the connection to the drugs found there. The trial court agreed, though cautioned the prosecutor to quickly establish his point. We agree that these questions were relevant to the issue of defendant's residency in the house and, therefore, to his possession of the drugs found in the house. While that evidence could possibly be used in an improper manner to argue that defendant was a "deadbeat," the objection would be to that argument and not to the evidence itself which could be used in an appropriate manner. As noted above, defendant has not preserved any issue with respect to how the prosecutor utilized the evidence once obtained.

The second objection raised by defendant was in response to a question by the prosecutor whether defendant's girl friend was aware that at the time of defendant's arrest the police had seized a large sum of money. Defendant objected on grounds of relevancy; the prosecutor argued that it was relevant that defendant was not contributing to the household. The trial court concluded that the prosecutor had "gone too far" and sustained the objection. An answer was never obtained from the witness, nor did the defendant request any further relief. Therefore, there is no relief for this Court to now afford defendant. See *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984) (where an objection is sustained, this Court will not reverse absent manifest injustice if the defendant has not requested a mistrial).

Defendant's final argument with respect to the drug charges is that the trial court erred in failing to give instructions on the lesser included misdemeanors of possession and use of marijuana. Defendant did properly preserve this issue by requesting those instructions at trial.

The Supreme Court in *People v Steele*, 429 Mich 13, 19-21; 412 NW2d 206 (1987), reviewed the requirements which must be met in order to give a lesser-included misdemeanor instruction for a felony charge: (1) that a proper request is made; (2) that an appropriate relationship exists between the charged offense and the requested misdemeanor, which requires a showing that the two offenses relate to the same interests and that they are related in an evidentiary manner so that proof of the misdemeanor is necessarily presented as part of the proof of the charged offense; (3) that the requested misdemeanor be supported by a rational view of the evidence; (4) that if the request is by the prosecutor, the defendant had adequate notice; and (5) that the requested instruction will not result in undue confusion or injustice.

With respect to the requested instruction on use, that can be easily addressed. There was no evidence in the record that defendant was engaged in use at the time of the charged offense. This is akin to the situation in *Steele*, where the Supreme Court agreed that a use of LSD instruction was not warranted where the only evidence of use was that there may have been some at a time not connected

with the transaction for which the defendant had been charged. *Id.* at 24. Therefore, the trial court properly declined to give an instruction on use of marijuana in the case at bar.

The issue of the giving of an instruction on simple possession of marijuana, however, is not so easily dismissed. *Steele* provides no guidance because in that case the defendant admitted to a delivery, but thought he was delivering mescaline rather LSD. Therefore, the Court concluded that a possession of LSD instruction was not required. In the case at bar, however, defendant's argument is that he did not possess the large quantity of marijuana found in the house, but only the relatively small amount actually found on his person.[2]

In any event, we are satisfied that a rational view of the evidence does not support the misdemeanor of simple possession. Either the jury believed the marijuana belonged to defendant or it did not so believe. If it believed that the marijuana belonged to defendant, the quantity involved supports only an intent to deliver, not for personal use. If the jury did not believe that defendant possessed the marijuana, then it would acquit on both possession and possession with intent to deliver.

Therefore, the trial court did not err in refusing to give an instruction on possession.

We now turn to the issues raised by defendant with respect to the non-drug convictions. First, defendant argues that he was denied a fair trial when the prosecutor sought to introduce evidence of the drugs which were seized as part of the execution of the search warrant. Before trial, the trial court granted defendant's request to have the drug charges tried separately from the remaining charges. The prosecutor was also directed not to bring up the issue of the drugs found in the house under the warrant, and the jury was instructed that the reason for the search was irrelevant.

Defendant complains of various attempts by the prosecutor to inject this issue into the trial. Two such instances are properly presented for our review. First, there was a question by the prosecutor on cross-examination of defendant concerning the discovery of drugs in the house and the charges against defendant's girl friend as a result. This resulted in an objection which was sustained and for which defendant subsequently requested a mistrial. The other occurred during the questioning of Detective Sergeant Bowman regarding defendant's statement that he thought he was being "ripped off" and acted in self-defense. This objection was overruled.

With respect to the motion for mistrial, we review that for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The trial court denied the motion, concluding that the cautionary instruction was sufficient. We are not persuaded that the trial court abused its discretion. The question put to defendant specifically regarded criminal charges against his girl friend, not against himself. Further, the specific question regarding the discovery of a large amount of drugs in the house was never completed and no answer taken. The trial court sustained the objection, admonished the prosecutor, and instructed the jury to ignore the question. Under the circumstances, we are satisfied that the trial court properly handled the situation and, therefore, did not abuse its discretion in thereafter denying the motion for mistrial.

Turning to the testimony of Detective Bowman, the issue was raised in the context of defendant's statement following arrest that he did not believe the individuals entering the house were police officers, but rather that he was being robbed. On redirect, the prosecutor asked Detective Bowman whether "the context of that would often come up with is when drug dealers get ripped off, correct?" Defendant immediately objected. The trial court overruled the objection, noting that defendant had opened the door. We agree with the trial court. Defendant developed the theory that he thought he was being robbed. Further, on cross-examination of Detective Bowman, defendant established that defendant had been threatened by others to have the Drug Enforcement Agency raid his home. We agree with the trial court that the prosecutor was entitled to probe into the nature of defendant's claim that he thought he was the victim of a robbery rather than a police raid.

Defendant next argues that the trial court erred in denying his motion for directed verdict on the assault with intent to murder charge. We disagree. In considering a sufficiency of the evidence question, a court must look at the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could reasonably conclude that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

In the case at bar, defendant claims that there was insufficient evidence to establish that he had the intent to kill Trooper Chartrand. We disagree. Defendant's argument on this issue essentially shows why it would have been reasonable for the jury to conclude that he did not possess the intent to kill. However, our concern is not with whether it would have been reasonable for the jury to conclude that defendant did not intend to kill Trooper Chartrand. Rather, we must consider whether it was reasonable for them to conclude that he *did* intend to kill Trooper Chartrand. The trooper's testimony at trial is that defendant knocked the trooper's weapon from his hand, picked it up and shot the trooper with it. Defendant argues that because the wound was to the trooper's arm, that the jury could not infer from the wound an intent to kill. We do not agree.

We think it is reasonable for the jury to conclude an intent to kill from the fact that defendant fired a weapon at the trooper. A firearm, by its very nature, is a dangerous weapon which, when shot at someone, has the likelihood of killing the person. The evidence in this case does not compel the conclusion that defendant took care to inflict a non-fatal wound, such as intentionally shooting the officer in the foot. Rather, defendant was engaged in a struggle with another officer when Chartrand approached to render assistance. Defendant managed to disarm Chartrand, retrieve the weapon, and fire at Chartrand, while continuing to struggle with the other officer. We are satisfied that a reasonable trier of fact could conclude that defendant possessed the intent to kill Chartrand.

Next, defendant argues that the trial court erred in giving a flight instruction when the evidence did not support it. However, defendant has not preserved this issue for appeal by raising the appropriate objection in the trial court and, therefore, we decline to consider the issue. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Defendant's argument that he did object to the flight instruction is incorrect. In discussing the instructions, defense counsel did address this instruction, though he ultimately conceded that the trial court was correct. Furthermore, at the end of the discussion on the jury instructions, the trial court asked defense counsel if there were any objections

other than to the trial court's refusal to give the requested instruction CJI2d 7.17 (no duty to retreat in one's own home to claim self-defense). Defense counsel indicated that there was not. Similarly, after the jury was instructed, the trial court again asked if there were any objections and defense counsel indicated that there were not. Accordingly, we conclude that defendant has not preserved this issue for appeal.

Defendant's next argument is that the trial court erred in admitting defendant's post-arrest statement into evidence. Specifically, defendant argues that the prosecutor failed to establish that defendant had knowingly and voluntarily waived his constitutional rights. We disagree. After holding the obligatory *Walker*[3] hearing, the trial court found that defendant knowingly and voluntarily waived his constitutional rights and made a voluntary statement to the police. In its findings, the trial court found the testimony of the interrogating officer, Detective Bowman, to be credible.

Defendant was interrogated at the hospital following his treatment for the gunshot wounds. Detective Bowman testified that when interrogated defendant, defendant was awake and alert, giving responsive answers to questions. Detective Bowman further indicated that he had been advised by the medical personnel that defendant was in a satisfactory condition to talk to the police.

We cannot say that the trial court clearly erred in accepting Detective Bowman's testimony as credible. Furthermore, in light of Detective Bowman's testimony, we are satisfied that the trial court did not err in concluding that, under the totality of the circumstances, *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998), defendant knowingly and voluntarily waived his constitutional rights and chose to speak to the police. Defendant's argument is essentially that his waiver of rights could not have been voluntary because it was made shortly after he had been shot and received medical treatment. However, we are aware of no rule that states that an injured person is, by virtue of the injury, automatically incapable of understanding or waiving his constitutional rights and choosing to speak to the police voluntarily. Indeed, in *People v Cleveland*, 251 Mich 542, 547; 232 NW 384 (1930), the Court held the mere fact that a defendant is suffering from a severe physical injury and is under great excitement and strain does not of itself render a statement inadmissible.

In the case at bar, the totality of the circumstances indicates that defendant, despite his injuries, was capable of understanding his constitutional rights and to knowingly and voluntarily waive those rights, which he did. Therefore, the trial court did not err in concluding that defendant's statement was admissible.

Next, defendant argues that he was denied a fair trial because of the trial judge's questioning of a witness. We disagree. At issue is a single question posed by the trial court to Dr. Casey, one of the physicians who attended to defendant in the emergency room following the shooting. During the examination of Dr. Casey, the issue of the bullet wounds inflicted on defendant and their trajectory was developed. Essentially, defendant was endeavoring to establish that his wounds were consistent with his description of the events and inconsistent with Officer Gonzalez' description. At the end of the examination, the trial court posed a single question to Dr. Casey:

> Q: Would what you observed concerning the wounds be consistent with somebody walking up the stairs where, perhaps, the shot went in the leg that would have been foremost; that is, going up the stairs at the time and the body leading forward?
>
> A: That could occur.

The trial court's question, is essence, was whether the wounds could be consistent with Officer Gonzalez' version of the events.

This Court, in *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), discussed the principle that, while a trial judge may question a witness, it must take care in doing so:

> A defendant in a criminal trial is entitled to expect a "neutral and detached magistrate." *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.*, 405.

We are not persuaded the trial court demonstrated any form of partiality in front of the jury or damaged the witness' credibility by its single question. Undoubtedly the question and answer benefited the prosecutor rather defendant. However, it did not demonstrate any bias or prejudice against defendant. While the answer to the question may have influenced the jury's decision, we cannot say that the mere fact that the trial court posed the question influenced the jury against defendant. That is, any harm to defendant was done by the information in the answer, not because the trial court demonstrated to the jury that it favored the prosecutor. Therefore, we cannot say that the trial court improperly imposed itself into the trial.

Finally, defendant argues that he was denied a fair trial by the prosecutor's misuse of Ernst's out-of-court statements. We disagree. At issue is the prosecutor's attempt to establish, through statements by Ernst, that defendant knew the police were on their way. The first such incident that defendant refers to is a question by the prosecutor to Ernst concerning whether she had told her attorney that defendant knew the police were on their way. The following exchange took place:

> Q: In fact, didn't you tell your attorney that it was your understanding that Mr. Pope knew the police were on their way there?
>
> THE COURT: Anything she told her attorney is privileged.
>
> BY MR. MC BAIN [PROSECUTOR], CONTINUING:

Q: Did you know that?

THE COURT: Know what?

MR. REID [DEFENSE COUNSEL]: Your Honor.

MR. MC BAIN: Strike and rephrase.

First, we note that, to the extent that defendant objected, the objection was sustained and, therefore, defendant is entitled to no further relief absent a motion for mistrial, which was not made. *Wise, supra*. Second, we note that the privilege was held by the witness, not defendant. Therefore, neither defendant nor the trial court could stop Ernst from the answering the question if she chose to do so. It was for her to assert the privilege, not defendant or the trial court to do so. See *People v Wood*, 447 Mich 80, 89-90; 523 NW2d 477 (1994).

Similarly, defendant argues that it was improper for the prosecutor to call a witness when it is known that the witness will refuse to testify, asserting a privilege. However, that is not the situation in the case at bar. First, although Ernst was called by the prosecutor, it was at the request of defendant, apparently under the res gestae rule, so that she could be cross-examined; she was not called at the initiative of the prosecutor. Second, before she was called, the issue of her asserting her Fifth Amendment privilege against self-incrimination was considered. Ernst acknowledged that, once she took the witness stand and began testifying, she would not be permitted to thereafter assert the privilege against self-incrimination and she agreed to testify without asserting that privilege. Finally, with respect to the attorney-client privilege, she never actually asserted that privilege. It is, therefore, at best speculative that she would have done so and that the prosecutor knew that she would have done so in response to his question. Therefore, we cannot conclude that the prosecutor knowingly called a witness who would assert a privilege.

Defendant also complains of the prosecutor's questioning Ernst regarding her statement to the police that the police had identified themselves when entering the house. At trial, Ernst testified that she did not know who it was that was entering the house. The prosecutor questioned her on her statement to Detective Pompey shortly after the raid that they had identified themselves as police officers and that they possessed a search warrant. Ernst denied any recollection of making that statement to the police. Defendant, however, did not object to this testimony and, therefore, the issue is not preserved for appellate review. *Stimage, supra.*

Defendant also complains that the prosecutor improperly argued the prior statement as substantive evidence of guilt. Specifically, the prosecutor had called Detective Pompey as a rebuttal witness to establish Ernst's prior statement. While defendant concedes that this would be proper impeachment evidence, defendant claims that the prosecutor improperly argued in closing that the statement was substantive evidence of defendant's guilt. Defendant, however, failed to preserve this argument for appeal by raising an objection at the time of the prosecutor's closing argument.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry W. Saad

[1] We note that *Stimage*, *supra* at 30, also concluded that it was not improper for a police witness to give an opinion regarding the amount of drugs found as it relates to an intent to deliver. Defendant urges us to conclude that *Stimage* was incorrectly decided. We are not persuaded that it was.

[2] Out of over 485 grams of marijuana found, less than 7 grams was found in defendant's wallet. The remainder was found elsewhere in the house, mainly in the refrigerator.

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).