

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ROSS MUNRO,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 280154

Oakland Circuit Court

LC No. 2007-214455-FH

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of failing to stop at the scene of an accident resulting in serious impairment or death, MCL 257.617, and felonious assault, MCL 750.82. He was sentenced to concurrent prison terms of 23 to 60 months for the failure to stop conviction and 23 to 48 months for the felonious assault conviction. Because the trial court did not abuse its discretion in denying defendant's motion for a mistrial, the offense variables were properly scored, and defendant's sentence was not violative of his Sixth Amendment rights, we affirm.

I

On April 26, 2006, Joseph Farrar, a construction crew flagman, stopped traffic on Joslyn Road in Orion Township to allow an excavator to move across the road. A man driving a white dump truck repeatedly disregarded Farrar's directions and tried to pass the line of vehicles waiting for the excavator to finish crossing. Farrar stood in the truck's path and signaled the driver to stop. The driver yelled angrily at Farrar and "nudged" him with the bumper of his truck. The driver ignored another worker's signal to stop and swerved past Farrar. As the truck sped away, the side mirror struck Farrar on the forehead and knocked him to the ground. The rear wheels of the truck then ran over Farrar's feet and continued on, without stopping. Farrar received multiple injuries and required extensive surgery. Defendant was charged as the driver of the white truck.

II

Defendant argues that the trial court erred in denying his motion for a mistrial after a police officer testified that defendant invoked his Fifth Amendment right against self-

incrimination. We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001). However, a violation of this principle does not necessarily warrant a mistrial. *Id.* at 583.

In *Dennis, supra*, the prosecutor asked a police officer an open-ended question about the "type of investigation follow-up" the officer conducted, and the officer responded that he attempted to question the defendant, but the defendant asserted his right to consult an attorney before answering questions. *Id.* at 570. The trial court denied the defendant's motion for a mistrial, "stating that it was convinced the prosecutor did not intend to elicit testimony on this point and that it did not think 'the jury picked it up or caught it in any way.'" *Id.* at 571. The trial court also gave a curative instruction explaining that the defendant had "an absolute right" not to speak with the police, and that his refusal to talk to the officer could not be used by the jury "in any way and is not an indication of anything." *Id.*

The Supreme Court in *Dennis* disapproved of "the inappropriate injection of a defendant's exercise of the *Miranda* rights into a trial by either prosecutors or the police," but concluded that reversal was not required, explaining:

In the present case, considering (1) the limited nature of the improper testimony, (2) the lack of any effort by the prosecution to improperly use defendant's invocation of the *Miranda* rights against him, (3) the strong curative instruction used by the trial court, and (4) that defendant did not testify so there is no concern of his post-*Miranda* silence having been used for impeachment purposes, we conclude that there was no constitutional violation and that the trial court did not abuse its discretion by declining to order a mistrial. [*Id.* at 583.]

These same four considerations support the trial court's denial of a mistrial in this case.

The challenged testimony was elicited on the prosecutor's questioning of Deputy Mackie, as follows:

Q. Detective Mackie, I want to just specifically talk about one issue, and that is you learned information while you were at the station from Deputy Meyer, correct?

A. Correct.

Q. Okay.

A. I was attempting to interview Mr. Munro. I read him his *Miranda* rights.

Q. Okay.

A. He refused to speak with me.

The objectionable testimony involved a single, isolated reference to defendant's exercise of his right to silence. While defendant insists that previous statements by Deputy Mackie that he was attempting to interview defendant, coupled with the above, implicitly suggests that defendant was exercising his right to remain silent, an "attempt" at an interview does not necessarily lead to a conclusion that defendant was silent.

Moreover, the record does not support defendant's contention that the prosecutor deliberately elicited Deputy Mackie's testimony. The prosecutor might have foreseen that her response of "okay" to Deputy Mackie's statements would prompt Deputy Mackie to continue testifying about his attempt to interview defendant, including defendant's refusal to speak, but the trial court did not find that she intentionally injected this error into the proceeding through an "open-ended" question. Furthermore, the trial court immediately intervened to prevent any further incursions into the subject. Consequently, there was only a brief, limited reference to defendant's post-*Miranda* silence, and the prosecutor did not attempt to use this testimony against defendant. The trial court also issued a curative instruction. Defendant did not testify, so there was no danger of prejudice in regard to impeachment. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

III

Defendant next argues that the trial court erred in scoring four of the sentencing guidelines offense variables. We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

With respect to offense variable (OV) 3, physical injury to victim, the trial court assigned 25 points in accordance with MCL 777.33(1)(c), concluding that the victim sustained a life threatening or permanent incapacitating injury. Defendant contends that the trial court should only have scored ten points, for bodily injury requiring medical treatment. MCL 777.33(1)(d). However, Farrar testified that he continues to suffer from complications from his injuries, including frequent choking. He stated that he had not been able to return to work since the injury, and he could not estimate when he would return to work, because of his continuing physical and psychological problems. This testimony was sufficient to support the trial court's scoring decision.

With respect to OV 4, the court scored ten points for serious psychological injury requiring professional treatment. MCL 777.34(1)(a). The presentence investigation report (PSIR) indicates that "[a]s a result of the trauma [Farrar] has been seeing a psychiatrist." Defendant speculates that this does not establish that Farrar required professional treatment for psychological injury because he might have consulted a psychiatrist in relation to civil litigation arising from the incident. However, the statement plainly indicates that Farrar consulted a psychiatrist because of the trauma from the incident. This statement, along with Farrar's testimony that his psychological problems prevented him from working, support the trial court's scoring decision.

The trial court scored ten points for OV 17, degree of negligence, for wanton or reckless disregard for life or property (MCL 777.47(1)(a)) describing defendant's behavior as "reckless and so self-centered." Defendant argues that a ten-point score was improper because the jury convicted him of felonious assault, an offense based on intentional conduct, rather than the lesser alternative offense of felonious driving.¹ He argues that because the offense of felonious assault is already subject to a more severe sentence range (class F), MCL 777.16d and MCL 777.67, than the offense of felonious driving (class G), MCL 777.12g and MCL 777.68, the trial court's scoring decision is redundant of an enhancement already built into the sentencing scheme.

Nothing in MCL 777.47 indicates that OV 17 may not be scored where a defendant is convicted of an offense that includes an element of intentional conduct. Furthermore, intentional conduct and negligent conduct are not mutually exclusive; indeed, defendant's offenses in the instant case involve both levels of culpability. The evidence supports a finding that defendant acted wantonly and recklessly in swerving past Farrar, and that he acted intentionally in failing to stop when he realized that he had knocked him down. Evidence regarding the assault also supports a finding that defendant acted both intentionally and recklessly against Farrar. He acted intentionally by "nudging" Farrar with the truck and then acted wantonly and recklessly by swerving around Farrar without regard to potential injury.

Finally, with respect to OV 19, interference with the administration of justice, the trial court scored ten points based on defendant's conduct "in attempting to subvert his capture and his conviction." Defendant argues that there is insufficient evidence that he tried to influence the testimony of witnesses because only one witness, Bateman, so testified, and other witnesses testified to the contrary. This Court gives deference to the trial court's factual findings, particularly where the credibility of witnesses is involved. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Bateman's testimony was sufficient to support the trial court's scoring decision.

Defendant also argues that the trial court's scoring decisions violate his Sixth Amendment right to a jury trial because they were based on facts not found by the jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In each of these cases, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. As defendant acknowledges, however, our Supreme Court has held that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum

¹ The felonious driving statute, MCL 257.626c, imposes criminal liability where a motorist operates a vehicle "carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property," and causes a serious impairment of a body function, but not death.

sentence. *People v Drohan*, 475 Mich 140, 147, 159-160; 715 NW2d 778 (2006), cert den ____ US ____; 127 S Ct 592; 166 L Ed 2d 440 (2006). We therefore reject this claim of error.

Affirmed.

/s/ Deborah A. Servitto

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly