STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2009
v	No. 281199 Wayne Circuit Court
DARNELL LARNELL THOMPSON, Defendant-Appellant.	LC No. 07-009537-01

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to 34 months to 10 years' imprisonment for the felon-in-possession conviction, and a consecutive five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The police were called to the scene of a shooting and were advised that several people were armed with guns. A police officer testified that he observed defendant in a nearby yard and saw him remove a handgun from the waistband of his pants, toss it to the ground, and run. The police apprehended defendant and found a handgun in the yard where defendant was first seen. At trial, defendant denied possessing a gun, denied running from the police, and claimed that he was a robbery victim.

Defendant first argues that the trial court erroneously prevented defense counsel from eliciting, on cross-examination of a police officer, that at the time of defendant's arrest, defendant told the officer that he had been robbed. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

Defendant argues that his statement to the police officer was admissible as a prior consistent statement under MRE 801(d)(1)(B), and that the exclusion of the officer's testimony violated his constitutional right to present a defense and confront the witnesses against him. Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*,

416 Mich 1, 8; 330 NW2d 814 (1982). Here, the trial court did not preclude defendant from presenting a defense, or from confronting any witnesses, but only excluded defendant's pretrial statement as inadmissible hearsay.

Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(a). Hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 802. Under MRE 801(d)(1)(B), a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Although defendant contends that the challenged testimony was admissible to rebut a claim that defendant's robbery story was fabricated, at the time the testimony was offered, defendant had not yet testified and there had been no claim that defendant fabricated a robbery story to explain his situation. Thus, there was no charge of fabrication to rebut, and nothing in the record for defendant's alleged statement to be consistent with.[1] Because a foundation for admitting the testimony under MRE 801(d)(1)(B) had not been established, and because defendant's out-of-court statement otherwise qualified as inadmissible hearsay, the trial court did not abuse its discretion by excluding the testimony.

Contrary to what defendant argues, the trial court did not preclude defendant from presenting his defense that he was a robbery victim. On the contrary, defendant was permitted to testify at length about several robberies and robbery attempts on him that night. He also was permitted to testify that when he was being arrested, he told a female officer that he had been robbed, and that he later told Sergeant Hughes at the police station that he had been robbed. We therefore reject this claim of error.

Defendant next argues that he was improperly convicted and sentenced for felony-firearm because the Legislature did not intend for felon in possession to be used as a predicate offense for a felony-firearm conviction. Although defendant concedes that this argument was squarely rejected in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), and *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001), defendant argues that those decisions are no longer valid in light of our Supreme Court's more recent decision in *People v Bobby Smith*, 478 Mich 292; 733 NW2d 351 (2007). We disagree.

In *Bobby Smith*, the Supreme Court adopted the same-elements test to determine whether convictions for two different offenses violate the double jeopardy protection against multiple punishments for the same offense. But the same-elements test is to be used only where the Legislature has not expressed a clear intent for multiple punishments. *Id*. at 316. "Where the Legislature does clearly intend to impose such multiple punishments, imposition of such sentences does not violate the Constitution, regardless of whether the offenses share the same elements." *Id*. (internal quotations omitted); *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007).

[1] The prosecutor waived opening statement and had not stated a theory at the time the witness testified.

In *Calloway*, the Supreme Court observed that the felony-firearm statute applies to all felonies, except the four felony offenses specifically enumerated in the statute. Accordingly, agreeing with this Court's decision in *Dillard*, the Court concluded that "[b]ecause the felon in possession charge is not one of the felony exceptions in the [felony-firearm] statute, *it is clear* that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *Calloway*, *supra* at 452 (emphasis added). Because the *Calloway* Court concluded that the felony-firearm statute clearly expresses the Legislature's intent to impose multiple punishments for separate convictions of felon in possession and felony-firearm, the same-elements test adopted in *Bobby Smith*, *supra*, does not apply. We therefore reject defendant's argument that he was improperly convicted and sentenced for both felon in possession of a firearm and felony-firearm.

Defendant next argues that resentencing is required because the trial court improperly scored ten points for both offense variable (OV) 9 (number of victims), MCL 777.39, and OV 19 (interference with the administration of justice), MCL 777.49, of the sentencing guidelines.

A sentence within the sentencing guidelines range must be affirmed on appeal absent an error in scoring the guidelines or reliance on inaccurate information. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. (citation omitted).

Ten points may be scored for OV 19 when an offender "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Evidence was presented at trial that defendant ignored a police command to get on the ground and instead attempted to flee from the police. As defendant acknowledges, such evidence has been found to be sufficient to support a ten-point score for OV 19. See *People v Cook*, 254 Mich App 635, 638-640; 658 NW2d 184 (2003). In support of his argument that such commonplace attempts to avoid detection or apprehension were not intended to support a ten-point score for OV 19, defendant relies on Justice Markman's dissent to our Supreme Court's denial of leave to appeal in *People v Spangler*, 480 Mich 947; 741 NW2d 25 (2007). However, Justice Markman's dissenting views do not allow this Court to ignore present case law, which defendant concedes supports the trial court's ten-point score for OV 19. Accordingly, we affirm the trial court's scoring of OV 19.

Plaintiff concedes that ten points were erroneously scored for OV 9, because there were fewer than two victims in this case. MCL 777.39(1)(d). However, a reduction of defendant's total OV score from 20 to 10 points does not affect defendant's placement in OV level II (10 to 24 points) of the applicable sentencing grid. MCL 777.66. Because the scoring error does not alter the appropriate guidelines range, resentencing is not required. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Finally, in a pro se supplemental brief, defendant argues that defense counsel was ineffective for failing to file a motion to suppress his custodial statement. Because defendant did not raise this issue in the trial court, our review is limited to mistakes apparent on the record. See *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective

assistance of counsel, defendant must show that counsel made an error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that defendant was prejudiced by the deficient performance. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

Defendant appears to argue that a motion to suppress his statement should have been filed because his statement was obtained in violation of his right to remain silent. A critical safeguard of *Miranda*[2] is that when a person who is subject to custodial interrogation asserts his right to remain silent, that request must be "scrupulously honored" and further questioning must cease. *Michigan v Mosley*, 423 US 96, 103-104; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Adams*, 245 Mich App 226, 230-231; 627 NW2d 623 (2001).

At trial, Sergeant Hughes testified that during his interview of defendant, he wrote down both his questions and defendant's answers as they were made. A copy of that written statement was presented at trial. Conversely, defendant admitted giving an oral statement to Sergeant Hughes, but testified that Sergeant Hughes never wrote anything down during their conversation. Defendant claimed that he told Sergeant Hughes that if he did write anything down, he would stop talking. Regarding the written statement that was presented at trial, it was defendant's position that he "didn't give Sergeant Hughes any of that." Defendant never testified, however, that he at some point invoked his right to remain silent, following which Sergeant Hughes continued to question him.

Although defendant's testimony established a factual dispute with regard to whether Sergeant Hughes wrote down defendant's statements during the interview, and whether the written statement that was presented at trial was made by defendant, it did not establish a basis for finding that any statement that was given was improperly obtained. Defendant's position at trial was that he never gave the written statement in the first instance, not that he gave the statement, but that it was improperly obtained after he invoked his right to remain silent. Thus, there is no basis in the record for concluding that defendant's statement was improperly obtained in violation of his right to remain silent. Because any motion to suppress would have been futile, defense counsel was not ineffective for failing to file such a motion. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).