STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN LARUE GIBSON,

Defendant-Appellant.

UNPUBLISHED
May 21, 2009

No. 283508
Wayne Circuit Court
LC No. 07-007754-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 28 months to 7-1/2 years for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Because the trial court did not render an inconsistent verdict, did not abuse its discretion by concluding that Jeffrey Moore's and Kareem Garrett's preliminary examination testimony was admissible at trial, and did not erroneously score certain offense variables during sentencing, we affirm.

I. Basic Facts

Defendant's convictions arise from a July 27, 2006, shooting in Detroit. Toby Adams and Angela Jackson were killed, and Sigmund Horn was injured. It was alleged that defendant and Adams had a "beef" about control of the drug trade in the area. The principal evidence implicating defendant was the preliminary examination testimony of Jeffrey Moore and Kareem Garrett that was read into the record at trial because both witnesses were deemed "unavailable." After hearing the evidence, the trial court found that although it had a "gut feeling" that defendant was the shooter, the evidence did not establish beyond a reasonable doubt the charged crimes of first-degree premeditated murder and assault with intent to commit murder. However, the trial court did find that there was sufficient credible evidence that defendant possessed a MAC-11 firearm on the night of the incident.

[1] Defendant was acquitted of the additional charges of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and assault with intent to commit murder, MCL 750.83.

Before the offense, Adams testified at an unrelated proceeding, that on June 22, 2006, DeAndre Henry flagged down his car as he was driving on Whitmore Street in Detroit and Henry was with defendant. Adams stopped his car and Henry asked him if he had knocked on his hotel door. After Adams answered no, Henry looked at defendant, and defendant allegedly told Henry to shoot Adams. Adams indicated that Henry pulled out a gun and shot him multiple times, but Adams managed to escape. Adams appeared in court and testified about the shooting on July 17, 2006.

At trial, Horn testified that on the evening of July 27, 2006, he parked his car outside his apartment building, and Adams and Jackson were sitting nearby in chairs on the sidewalk. Horn heard a male voice state, "I got you now." The voice emanated from where Adams and Jackson were sitting. Horn then heard several shots. After Horn was shot once and fell, an unidentified person approached him and shot him two more times. Adams was later found under Horn's car, having been shot 15 times. Jackson was still seated in her chair, and had been shot in the head, hand, and chest. On Jackson's lap was a purse containing a .40 caliber firearm, and inside her bra were packets of marijuana and suspected cocaine. Police recovered 26 nine-millimeter casings and five fired bullets at the scene. Twenty-five of the casings were fired from the same weapon. A firearms expert explained that a MAC-11 firearm could have been the weapon used in the shooting.

According to Moore's preliminary examination testimony, on the night of the shooting, he was sitting in his car in an alley near Whitmore Street waiting for his girlfriend. Moore heard gunshots and, shortly afterward, saw defendant and "Carl" running toward him. He described defendant as wearing a black hoodie sweatshirt with an object "swinging from off his waist" underneath the hoodie. Defendant got into the front passenger seat of Moore's car and Carl got into the back seat. Once defendant was inside the car, Moore saw that the object swinging underneath defendant's hoodie was a black MAC-11 nine-millimeter firearm. Moore had seen defendant with the same MAC-11 firearm "a couple of days" before the shooting. Moore did not see a weapon in Carl's possession. After defendant directed Moore to "pull off," Moore immediately drove away and eventually dropped off the men near defendant's mother's residence. Moore testified that the day after the shooting, he spoke with defendant outside a house on Whitmore Street, and defendant allegedly talked about "people running their mouths" and, in reference to Adams, stated that "he had to handle that." Moore indicated that he was aware that Adams had testified against Henry in court.

According to Garrett's preliminary examination testimony, a couple of weeks before the shooting, defendant asked him to "kill" Adams and showed him a MAC-11 firearm with a shoulder strap. Garrett was aware that Adams and defendant's good friend, Henry, had a disagreement. Garrett did not take the firearm or agree to kill Adams. Garrett testified that on the night of the shooting, he heard gunshots and "a minute or two later" saw a car drive past him. Moore was driving the car, and defendant, who was wearing a hoodie, and a third unidentified male passenger were also inside. After the shooting, Garrett saw defendant on Whitmore Street and asked defendant if he had "a job" for him. Defendant responded that he had a job for him, but "he took care of it" himself.

II. Inconsistent Verdict

Defendant first argues that the trial court rendered an inconsistent verdict by acquitting him of two counts of first-degree premeditated murder and assault with intent to commit murder, but convicting him of felon in possession and felony-firearm. Defendant contends that the trial court determined that Moore's and Garrett's testimony was "totally unworthy of belief" and acquitted him of the murder and assault charges, yet used the same incredible testimony to convict him of the felon in possession and felony-firearm charges. Defendant further asserts that the incredible testimony was insufficient to support his convictions.

A judge who sits without a jury in a criminal case must make specific findings of fact and state conclusions of law. MCR 6.403; *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). The verdict reached in a bench trial must be consistent with the trial court's findings of fact. See *People v Smith*, 231 Mich App 50, 52-53; 585 NW2d 755 (1998). Although juries "are not held to any rules of logic" and possess the "capacity for leniency," "[t]hese considerations change when a case is tried by a judge sitting without a jury." *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). A trial judge acting as the trier of fact may not enter a plainly inconsistent verdict. *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). In reviewing a verdict in a bench trial, we review the trial court's factual findings for clear error and its conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Defendant mischaracterizes the trial court's factual findings and incorrectly posits that a trier of fact is required to find all of a witness's testimony either credible or incredible. In this case, the trial court found that Moore's testimony that he saw defendant in possession of a MAC-11 firearm, in conjunction with Garrett's testimony that defendant had showed him a MAC-11 firearm before the shooting, established beyond a reasonable doubt that defendant possessed a firearm.[2] Contrary to defendant's characterization of the trial court's factual findings, the trial court did not find Moore or Garrett "totally unworthy of belief." Rather, the trial court explained that it did not believe "everything" in either witness's testimony, but found portions believable. The trial court evaluated their testimony as follows:

> And the other thing that bothers me about both their testimony, Mr. Moore tells us he happens to be waiting for his girlfriend when the defendant runs and gets in his car right after a shooting, and he drives away. So *I can't believe everything* that he says *unless it's supported by something else*.
>
> And it's true, there are no eyewitnesses. This is a circumstantial case. But in a circumstantial case, all of those pieces have to fit together.
>
> * * *

[2] The elements of felon in possession of a firearm include a previous felony conviction and possession of a firearm. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). Defense counsel stipulated that defendant was convicted of a specified felony, and thus, was ineligible to possess a firearm. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

> I understand why, if the defendant - - and I'm going to tell you, I have a gut feeling that the defendant did commit these murders. I think that. But can't be sure *beyond a reasonable doubt* that he actually did it when I'm dealing with people like Moore and Garrett?
>
> *The only thing that I am sure about in Moore and Garrett's testimony*, and Moore is not a good guy . . . .
>
> And I'm not so sure that the testimony or the statement [Garrett] gave the police was credible, *except for one thing*. *I believe* that he did see Mr. Adrian Gibson in a car with Mr. Moore the night of this incident. And *I'm convinced* that at the time that he saw him, Mr. Adrian Gibson was in that front seat next to Mr. Moore who was driving.
>
> And almost everybody admits that Mr. Gibson carries that MAC-11 around, and he had that MAC-11 that night when he got in the car. And he has been previously convicted of possession of a felony; and therefore, at the time he got in the car, he had a gun.

The trial court's verdict was not factually inconsistent. It is evident from the trial court's factual findings that it determined that Moore's and Garrett's testimony that they each personally observed defendant in possession of a MAC-11 weapon, and that he was in Moore's car on the night of the shooting, was credible. These findings support defendant's convictions of felon in possession and felony-firearm, and are not inconsistent with defendant's acquittal of the other charges. The trial court could logically and consistently find that the witnesses' testimony was sufficient to establish beyond a reasonable doubt that defendant possessed a MAC-11 firearm, and at the same time find that defendant's identity as the shooter was not established beyond a reasonable doubt. Indeed, neither witness claimed to have seen defendant shoot the victims, but both claimed to have seen him in possession of a MAC-11 firearm. The factfinder, whether the judge or the jury, "may choose to believe or disbelieve any witness or any evidence presented in reaching a verdict." *People v Cummings*, 139 Mich App 286, 293-294; 362 NW2d 252 (1984). Consequently, the trial court's decision to acquit defendant of the murder and assault charges while convicting him of felon in possession and felony-firearm is not inconsistent.

III. Former Testimony of Two "Unavailable" Witnesses

Defendant next argues that the trial court abused its discretion by admitting Moore's and Garrett's preliminary examination testimony at trial under MRE 804(b)(1). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

MRE 804(b)(1) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now

> offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MRE 804(a) provides that "'[u]navailability as a witness' includes situations in which the declarant":

> (3) has a lack of memory of the subject matter of the declarant's statement; or
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> * * *
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

A. Moore Deemed an Unavailable Witness

Defendant argues that there was an inadequate showing that Moore had a lack of memory and thus, he was not "unavailable" under MRE 804(a)(3). Because defendant did not argue below that Moore was not an unavailable witness, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). At trial, Moore was questioned and stated numerous times that he did not recall any facts from the night of the shooting, his testimony at the preliminary examination, or the statement he made to the police. The prosecutor attempted to refresh Moore's memory with the contents of his statement, but Moore continued to profess that he had no recollection. Moore's professed lack of memory brought his preliminary examination testimony within the scope of MRE 804(a)(3) and MRE 804(b)(1). Consequently, the trial court's finding that Moore was "unavailable" did not constitute plain error.

B. Lack of Due Diligence in Procuring Garrett's Attendance

With regard to Garrett, defendant argues that the trial court abused its discretion in finding that the prosecution exercised due diligence in attempting to produce him for trial. On November 30, 2007, a subpoena was issued for Garrett to appear at trial on December 3, 2007. When Garrett did not appear, the trial court held a due diligence hearing on December 4, 2007. At the hearing, the prosecutor explained that the police and the prosecution had been very successful in producing Garrett for prior hearings, and had no indication that he would not appear for trial. Officer Anthony O'Rourke testified that on at least three prior occasions the police were successful in locating Garrett in the Palmer Park area of Detroit or at his residence on Lee Place and bringing him to court. O'Rourke had also driven Garrett to his residence on Lee Place after one hearing. With regard to the trial subpoena, O'Rourke testified that he was instructed to serve Garrett with the subpoena and obtain his phone number so he could be reached for further instructions. O'Rourke explained that the police searched for Garrett for a week before the subpoena was served. When O'Rourke went to Garrett's last known residence at 1410 Lee Place, he was told that Garrett and his mother had moved to Pingree Street. On the Friday before trial began, O'Rourke went to the Pingree address to serve Garrett with the subpoena. O'Rourke met Garrett and successfully delivered the subpoena. O'Rourke explained to Garrett where and when he needed to report and advised him that a failure to do so would

result in his arrest. O'Rourke had Garrett sign the document, gave him a copy, and had him write down his phone number. Over the weekend, Sergeant Gary Diaz attempted to call Garrett and a female told him that Garrett was not there. The prosecutor also made repeated calls to the phone number provided by Garrett. When Garrett did not appear on December 3rd, the trial court issued a witness detainer for Garrett's arrest.

On the morning of December 4, 2007, Diaz went to the Pingree residence to locate Garrett. Through the front window, Diaz could see Garrett sleeping on a couch. Diaz indicated that he banged on the window and Garrett woke up. After Diaz called Garrett's name, Garrett looked Diaz "in the face" and walked to the back of the house, and Diaz heard the back door slam. In the back, Diaz saw a set of footprints in the snow leading from the house over a fence into the next yard. O'Rourke testified that he also went to the Pingree address at two separate times on December 4, 2007, but was unsuccessful in finding Garrett. Two other officers attempted to locate Garrett in the Palmer Park area. The prosecutor indicated that Garrett left a message on her phone, indicating that he was "homeless" and to "stop going over to [his] mother's house."

The trial court found that the prosecution had exercised due diligence, and that Garrett's preliminary examination testimony would be allowed. The trial court stated that Garrett's action of fleeing the police when they came to the Pingree residence indicated his intention to make himself unavailable. Despite its ruling, the trial court gave the prosecution another day to locate Garrett. That night, police officers searched for Garrett in the Palmer Park area and at the Pingree residence, but were unsuccessful.

This Court reviews a trial court's determination that due diligence was exercised for an abuse of discretion, *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998), and its findings of fact for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of the witness for trial. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The focus is whether diligent, good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *Bean*, *supra*. Here, the record certainly supports the trial court's determination that the prosecution made reasonable efforts to locate and produce Garrett for trial. The trial court's finding of due diligence was not an abuse of discretion.

C. Opportunity to Cross-Examine Moore and Garrett Under a Similar Motive

Defendant further argues that he was not afforded an adequate opportunity to cross-examine Moore and Garrett at the preliminary examination under a similar motive. MRE 804(b)(1). Whether a party had a similar motive to develop the witness's testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding, and whether the party actually cross-examined the witness during the prior proceeding. *People v Farquharson*, 274 Mich App 268, 275, 278; 731 NW2d 797 (2007). Here, defendant's motive was similar. The witnesses' prior testimony was principally offered to prove that defendant possessed a firearm and shot the victims. Their preliminary examination testimony was introduced at trial for the same purpose. At the preliminary examination, defense counsel cross-examined the witnesses in an effort to demonstrate that they were not credible. During the cross-examination of both witnesses, defense counsel attempted to show that their

recollection was not believable, and that each had a motivation to lie. In particular, defense counsel questioned Moore about his plea agreement with the prosecution that included a grant of leniency in exchange for his testimony against defendant. Defense counsel also elicited that Garrett had previous theft and dishonesty convictions and was addicted to cocaine.

Furthermore, because MRE 804(b)(1) is a firmly rooted hearsay exception, evidence admitted under the exception does not violate a defendant's constitutional right of confrontation. *People v Meredith*, 459 Mich 62, 69-71; 586 NW2d 538 (1998). The trial court did not abuse its discretion by concluding that Moore's and Garrett's preliminary examination testimony was admissible at trial under MRE 804(b)(1).

IV. Scoring of Offense Variables 1, 3, and 9

Finally, defendant argues that resentencing is required because the trial court erroneously scored offense variables (OV) 1, 3, and 9 of the sentencing guidelines at 25 points, 100 points, and ten points, respectively. When scoring the guidelines, "[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).

Defendant challenges the scores on the basis that he was acquitted of the murder and assault charges and, therefore, he was scored on the basis of criminal activity for which he was not convicted. However, it is well established that a different burden of proof applies to the establishment of a minimum sentence and, therefore, the scoring of the guidelines need not be consistent with the verdict. In *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), our Supreme Court specifically stated that "[a] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." See also *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003) ("situations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing"). Consequently, the prosecution's failure to prove the murder and assault charges beyond a reasonable doubt did not prevent the trial court from considering the evidence when sentencing defendant. Indeed, at sentencing, the trial court specifically stated that although there was insufficient evidence to prove the murder and assault offenses beyond a reasonable doubt, "by a *preponderance of the evidence*, [it] believed that [defendant is] the person who shot these people, based on all of the testimony together."

Applying the correct burden of proof, the evidence was sufficient to support the trial court's scoring of OV 1, 3, and 9. MCL 777.31(1)(a) provides that 25 points should be scored if "a firearm was discharged at or toward a human being[.]" MCL 777.33(1)(a) provides that 100 points should be scored for OV 3 if "[a] victim was killed." The instructions for OV 3 provide that 100 points should not be scored if homicide is the conviction offense. MCL 777.33(2)(b). MCL 777.39(1)(c) provides that OV 9 should be scored at ten points if there are two to nine victims. "[E]ach person who was placed in danger of physical injury or loss of life" should be counted as a victim. MCL 777.39(2)(a).

At trial, there was evidence that defendant had a problem with Adams, that defendant's associate had previously shot Adams, that Adams had testified against defendant's associate, and that defendant had approached Garrett about shooting Adams. On the night of the shooting, Horn heard someone in the area near Adams and Jackson say "I got you now." Numerous gunshots followed, during which Adams was shot 15 times, Horn was shot three times, and Jackson was shot three times. Moments after the gunfire, defendant ran to Moore's car that was parked in an alley near the scene of the shooting. Defendant had a MAC-11 firearm that was consistent with the type of firearm used during the shooting. Garrett saw Moore and defendant driving in Moore's car shortly after hearing gunfire. In the days after the shooting, defendant made remarks to both Moore and Garrett indicating that he was the person who shot Adams. This evidence supports the trial court's findings that defendant discharged a gun in the direction of three persons (Horn, Adams, and Jackson), and that those persons were victims because they were placed at risk of injury or death as a result of defendant's actions. Therefore, OV 1 was correctly scored at 25 points, and OV 9 was correctly scored at ten points. MCL 777.31(1)(a) and MCL 777.39(1)(c). The evidence also supports the trial court's finding that defendant unlawfully possessed a firearm on the evening of the shooting and, as a result, two victims were shot and killed. Therefore, the trial court correctly scored OV 3 at 100 points because the victims' deaths resulted from a crime, but homicide was not the sentencing offense. MCL 777.33(2)(b). Defendant is not entitled to resentencing.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio