STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 293538 Macomb Circuit Court
JOHN COTTER LAMPING, Defendant-Appellant.	LC No. 2008-001740-FH

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and failure to stop at the scene of an accident, MCL 257.617. He was sentenced to two to ten years' imprisonment for his assault with intent to do great bodily harm conviction, two to four years' imprisonment for his felonious assault conviction, and two to five years' imprisonment for his failure to stop at the scene of an accident conviction. He appeals as of right. We affirm.

Defendant's first issue on appeal is that the prosecution engaged in misconduct when it brought additional charges—assault with intent to do great bodily harm less than murder and failure to stop at the scene of an accident—against defendant when defendant refused to plead guilty to felonious assault. We disagree. Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005).

A prosecutor violates a defendant's right to due process when he or she punishes the defendant "for asserting a protected statutory or constitutional right." *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Actual prosecutorial vindictiveness will be found only when there is objective evidence in the form of an "expressed hostility or threat" indicating that the defendant was deliberately penalized for exercising a procedural, statutory, or constitutional right. *People v Jones*, 252 Mich App 1, 7; 650 NW2d 717 (2002). The defendant has the burden to demonstrate actual prejudice. *Id.* at 8.

"The mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor's charging

discretion." *Ryan*, 451 Mich at 36. The United States Supreme Court explained the reason for allowing prosecutors to bring additional charges in the following way:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"-and permissible-"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." . . . It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. [*Bordenkircher v Hayes*, 434 US 357, 364; 98 S Ct 663; 54 L Ed 2d 604 (1978) (citations omitted).]

Therefore, the reasoning follows that since plea bargaining is constitutionally permissible, a prosecutor may add permissible charges after a defendant fails to plead guilty.

"[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). A prosecutor may "bring any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). To support a bindover, a prosecutor must only establish probable cause that the crime was committed. *Venticinque*, 459 Mich at 101. Probable cause requires a lower quantum of proof than beyond a reasonable doubt and exists when there is evidence sufficient to cause "a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the [defendant's] guilt" even if he or she has some reservations. *People v Hudson*, 241 Mich App 268, 277; 615 NW2d 784 (2000).

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and citations omitted; emphasis in original). To convict a defendant of the failure to stop at the scene of an accident, the prosecution must show that the defendant was the driver of a vehicle and knew or had reason to know that the accident in which he was involved on a public road or any property open to the public resulted in serious injury to or the death of another person and the driver failed to immediately stop. MCL 257.617; *People v Lang*, 250 Mich App 565, 572; 649 NW2d 102 (2002).

We conclude that defendant has failed to show that the prosecution acted with vindictiveness when it brought additional charges against defendant after defendant failed to plead guilty. The United States Supreme Court has recognized that an integral part of plea bargaining is allowing the prosecution to bargain with a defendant by threatening to charge him with additional crimes. *Bordenkircher*, 434 US at 364. The record indicates that defendant and prosecution engaged in plea bargaining. The deal that seemed to have been struck was that defendant would plead guilty in exchange for only receiving the lesser charge of felonious assault. When defendant refused to plead guilty, the prosecution acted within its discretion to add charges supported by the evidence. What the prosecution did in the case is part of the usual bargaining process. Defendant has failed to show that the prosecution acted with vindictiveness.

Moreover, the additional charges brought by the prosecution against defendant were supported by probable cause. Three eyewitnesses testified at the preliminary examination that defendant drove his black car at Timothy Moore, the victim, intending to hit him. They further testified that defendant drove away after hitting Moore. In particular, Moore's girlfriend, Stephanie Turskey, testified that she witnessed defendant yelling at Moore, driving his car at Moore and hitting him. She further testified that defendant then drove his car away from the scene of the crime. Moore corroborated that defendant drove his car at him. Moore testified, at the last minute, that he tried to get out of the way of defendant's car, but defendant's vehicle hit Moore's right leg. Moore then watched defendant drive away. Finally, another witness, Joel Thompson, testified that he heard defendant tell Moore that he was going to hit him. Thompson then witnessed defendant hit Moore with his car and drive off. Thompson got in his car and drove after defendant. Thompson obtained defendant's license plate number. Both Thompson and Turskey identified defendant as the driver of the black car from a photograph shown to them at the scene of the crime and they identified him again in court. Moore also identified defendant in court as the driver who hit him. Taken together, this evidence was sufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of defendant's guilt of assault with intent to do great bodily harm and failure to stop at the scene of an accident. The evidence demonstrates that defendant acted with force by hitting Moore with a car and that he manifested an intent to do great bodily harm by telling Moore he was going to hit him. Moreover, the evidence further shows that defendant was involved in an accident, had reason to know that someone was seriously injured in the accident and fled the scene.

Defendant next argues that the trial court erred in refusing to suppress the on-the-scene and in-court identifications of defendant because of an unduly suggestive photographic identification procedure. We disagree. A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error and the trial court's ultimate ruling is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

To sustain a due process challenge to a photographic lineup, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). In examining the totality of the circumstances, relevant factors include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Id.* at 306, citing *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

An improper suggestion often arises when the witness is told or believes that the police have apprehended the right person or the witness is shown only one person or a group in which one person is singled out in some way. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The exhibition of a single photograph is very suggestive. *Id.*

In this case, the trial court made the following ruling, after holding an evidentiary hearing, regarding whether showing the single photograph was unduly suggestive:

> I have examined the preliminary examination, and there were actually three witnesses [Thompson, Turskey and Moore.] at the preliminary examination[.]
>
> I didn't see any equivocations among these witnesses as to who they saw and the method of the on-scene identification, calling up a picture of the person. This is what ties it up in the Court's mind as far as the identification issues is that we have a license plate number that matches a black Talon and is registered to a person that looks remarkably like the picture in the, that was called up from the department of state.
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> So all these things add up. A unique set of circumstances that you don't often see this when a citizen witness actually pursue [sic] an alleged defendant . . ., and get [sic] the license plate number and all these circumstances add up to an, I think, a proper impounding of the vehicle and a proper evidentiary procedure used by the police.

We agree with the trial court that the unique circumstances of the case made it permissible for the police to show Turskey and Thompson a single photograph of defendant at the scene of the crime. These circumstances made it unlikely that defendant would be misidentified when the police showed the single photograph. As noted above, three eyewitnesses testified at the preliminary examination that they witnessed defendant hit Moore with his car. Moore, Turskey and Thompson indicated that they could clearly see defendant during the incident and were paying attention, and that there was nothing blocking their view. Moreover, Thompson followed defendant as he drove his vehicle out of the parking lot and obtained defendant's license plate number. The photograph shown was obtained by running the license plate number through the state system. This was not a situation where the photograph was only tangentially related to the facts of case. Finally, the police showed the single photograph of defendant to Turskey and Thompson soon after the crime occurred. There is no indication that the police told Turskey and Thompson that the picture was of the driver of the black car. They merely asked Turskey and Thompson if the picture of defendant represented the driver. Moreover, there was no evidence that either Turskey or Thompson equivocated at identifying defendant as the driver. It is true that neither Turskey nor Thompson gave a detailed description of the driver before seeing the photograph, but that alone is not enough to render the single photograph unduly suggestive. Because we conclude that the photographic identification was not unduly suggestive, we need not address defendant's arguments that showing the photograph tainted Turskey's, Thompson's and even Moore's in-court identifications of defendant.

Defendant's third issue on appeal is that the trial court erred in denying defendant's motion to suppress any evidence from the illegal seizure of his car. We disagree. A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error and the trial court's ultimate ruling is reviewed de novo. *Williams*, 472 Mich at 313. A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *Brown*, 279 Mich App at 127.

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution in this regard is generally construed to provide the same protection as the federal constitution. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009). Whether a search or seizure is reasonable depends upon the circumstances of each case. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Generally, items that are seized during an unlawful search or that are the indirect result of an unlawful search may not be admitted as evidence against a defendant. *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003).

To constitute a constitutionally reasonable search, a search must have been executed pursuant to a warrant or based upon a specific exception to the warrant requirement. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). One exception to the warrant requirement allows police officers to "search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime may be found in it." *People v Perreault*, 486 Mich 914, 915; 781 NW2d 796 (2010). Probable cause exists when there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). Another exception to the warrant requirement allows police officers to seize items in plain view without first obtaining a search warrant "if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003).

In this case, the police seizure of defendant's car was not unlawful both because it was a car involved in a crime, but also because the car was in plain view and was obviously incriminating. Thompson testified at the preliminary examination that he followed the car, which hit Moore, and obtained its license plate number. Thompson gave the license plate number to the police. Police Officer James Gilcrest used the license plate number to obtain the make and model of the car, an Eagle Talon, and defendant's address. As a result, Gilcrest testified that the police went to defendant's residence where they found a black Eagle Talon parked in the driveway "out in the open." Gilcrest testified that the license plate number matched the number given to him by Thompson. Seeing the car in plain view and believing it to be involved in a crime, Gilcrest had the vehicle towed. Based on the actions of Thompson, Gilcrest had probable cause to believe that defendant's car was involved in a crime. Moreover, the car was in plain view. Therefore, we conclude the seizure of defendant's car was lawful and the trial court did not err in denying defendant's motion to suppress the car.

Defendant's final issue on appeal is that the trial court abused its discretion when it scored defendant 25 points for offense variable 3, the physical injury suffered by a victim. We disagree. A trial court's decision regarding the points to assess in the sentencing guidelines calculations is reviewed for whether the court properly exercised its discretion and the record adequately supported the particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

OV 3 concerns the degree of physical injury suffered by a victim. MCL 777.33(1). In assessing points under the sentencing guidelines, a court must assess the highest applicable points under OV 3, depending on the physical injury to the victim. *People v Morson*, 471 Mich

248, 260; 685 NW2d 203 (2004). A defendant should be scored 25 points if the victim suffered "a life threatening or permanent incapacitating injury[.]" MCL 777.33(1)(c). A defendant should be scored only ten points if the victim suffered "a bodily injury requiring medical treatment[.]" MCL 777.33(1)(d).

Medical evidence is not necessary to prove a life threatening or permanently incapacitating injury. *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). The trial court need only find the existence of the sentencing factor by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

The record indicates that Moore testified at trial that defendant drove his car into Moore breaking the tibia and fibula in Moore's right leg. Turskey testified that she could see the bone coming out of Moore's right leg after the incident. When Moore arrived at Mount Clemens Regional Medical Center, x-rays of his leg were taken and he had emergency surgery. In the surgery, a rod was put in Moore's leg. Moore was in the hospital for three and a half days and he was in a cast for two and a half months and missed work that entire time. Even 15 months after the incident, Moore was still having problems with his leg.

Although the record evidence is not overwhelming, we conclude that there were minimally sufficient proofs to allow the trial court to find by a preponderance of the evidence that Moore had undergone prolonged medical treatment and suffered a permanent incapacitating injury to his leg as a result of defendant's actions. Indeed, the fact that Moore continued to have problems more than 15 months after the incident and had to have the rod in his leg indicates that he suffered a "permanent incapacitating injury" within the meaning of OV 3. Because there was some evidence in the record to support the score, we conclude that the trial court did not abuse its discretion in scoring defendant 25 points of OV 3.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro