

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 27, 2012

v

RANDALL CHARLIE MITCHELL,
Defendant-Appellant.

No. 304574
Wayne Circuit Court
LC No. 10-006642-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by the trial court after a bench trial of felonious assault, MCL 750.82, intentional discharge of a firearm from a motor vehicle, MCL 750.234a, possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, malicious destruction of personal property valued at \$200 or more but less than \$1,000, MCL 750.377a(1)(c)(i), and stalking, MCL 750.411i. He was sentenced, as an habitual offender fourth offense, MCL 769.12, to 6 to 15 years' imprisonment for the felonious assault conviction, 6 to 15 years' imprisonment for the intentional discharge conviction, 6 to 15 years' imprisonment for the felon in possession, two to five years' imprisonment for the carrying a concealed weapon conviction, two years' imprisonment for the felony-firearm conviction, and time served for both the malicious destruction and stalking convictions. He appeals by right. We affirm.

Defendant first argues that the trial court erred when it denied him the right to represent himself at trial. We disagree.

When reviewing a criminal defendant's waiver of the right to counsel, the trial court's factual findings are reviewed for clear error, and the interpretation or application of any legal or constitutional issues is reviewed de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), cert den 543 US 1095; 125 S Ct 965; 160 L Ed 2d 910 (2005). Criminal defendants have a right to represent themselves, and a violation of that right constitutes a structural error mandating reversal. *People v Brooks*, 293 Mich App 525, 535-536; 809 NW2d 644 (2011), vacated in part on other grounds 490 Mich 993 (2012). However, that right is not absolute. Before a defendant may proceed in propria persona, the trial court must determine that the defendant's assertion of his or her right to do so is unequivocal, knowing, voluntary, intelligent, and with full awareness of the risks involved; the trial court must also find that the self-

representation will not disrupt or unduly inconvenience trial proceedings. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). In addition, the trial court must comply with the requirements of MCR 6.005, which requires the court to advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation; and to offer the defendant the opportunity to consult with a lawyer. MCR 6.005(D); *Williams*, 470 Mich at 642-643; *Brooks*, 293 Mich App at 537.

Defendant only challenges the trial court's determination that his assertion was not knowing and intelligent. "The existence of a knowing and intelligent waiver depends upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986) (quotation omitted), overruled in part on other grounds *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996) (internal quotation marks and citation omitted). A defendant can be competent to stand trial with the representation of counsel and yet lack the capacity to represent himself. *Ind v Edwards*, 554 US 164, 175-176; 128 S Ct 2379; 171 L Ed 2d 345 (2008); *Brooks*, 293 Mich App at 541-542. Technical knowledge of legal matters is not relevant to the validity of the defendant's exercise of his right to self-representation. *Brooks*, 293 Mich App at 539.

We agree with the trial court's finding that defendant did not knowingly and intelligently waive his right to counsel. Defendant correctly concedes that the trial court properly followed all relevant procedures. Defendant's responses to the trial court's questioning clearly show an unequivocal intention to represent himself, but equally clearly reveal that beyond the general understanding that he risked imprisonment, he did not adequately understand the risks of doing so. The court also asked if defendant was prepared for trial, and defendant replied "I guess." Trial courts should not permit defendants to act as their own counsel if the validity of their waiver of their right to counsel is doubtful. *Brooks*, 293 Mich App at 537. The court took note of the complexity of the charges and defendant's limited education, and it further observed that, "Every question that I've asked you, [and] you have gone on at length, you've not always answered the questions . . ." While technical knowledge is not relevant to a defendant's exercise of his right to self-representation, a defendant's apparent ability to remain coherent and intelligibly responsive to the issues certainly is relevant. See *Id.* at 542. Finally, defendant's request was made late in the proceedings, after the prosecution had made its opening statement. Defendant had already been assigned three different attorneys throughout the proceedings, and the case had been postponed for many months. Based on the facts, the judge did not clearly err in its factual findings, or in the determination that defendant failed to knowingly and intelligently waive his rights.

Defendant argues that because he was competent to stand trial, he was competent to waive his right to counsel. However, it is well established that a defendant can be competent to stand trial with the representation of counsel and yet lack the capacity to represent himself. *Edwards*, 554 US at 175-176; *Brooks*, 293 Mich App at 541-542. Defendant also argues that the trial court improperly relied on his lack of legal knowledge, which is to some extent accurate, but the trial court only did so in the context of determining whether defendant would actually be able to comprehend and respond to the case against him at all coherently. Again, the trial court properly found that defendant did not knowingly and intelligently waive his right to counsel.

Defendant next argues that propensity evidence was improperly admitted pursuant to MCL 768.27b. In part, defendant contends that at the time of trial, our Supreme Court was considering whether a companion statute, MCL 768.27a, was constitutional. Our Supreme Court has since determined that MCL 768.27a is indeed constitutional. *People v Watkins*, 491 Mich 450, 455-456; 818 NW2d 296 (2012). Furthermore, *People v Pattinson*, 276 Mich App 613, 619-621; 741 NW2d 558 (2007), ruled that MCL 768.27b was constitutional. In any event, defendant specifically stated at trial that he had no objections to the admission of the evidence pursuant to MCL 768.27b, thus waiving the issue. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, defendant is not entitled to relief on this ground.

Defendant next argues that the trial court abused its discretion in scoring OV 1, aggravated use of a weapon, at 25 points. The trial court should score 25 points for OV 1 if “[a] firearm was discharged at or toward a human being . . .” MCL 777.31(1)(a). The trial court should score 15 points if “[a] firearm was pointed at or toward a victim . . .” MCL 777.31(1)(c). Defendant contends that no evidence showed that he pointed a firearm at or toward a human being. We disagree.

We review a trial court’s scoring under the sentencing guidelines “to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v Johnson*, 293 Mich App 79, 84; 808 NW2d 815 (2011) (quotation omitted). To the extent that a scoring challenge involves a question of statutory interpretation, review is de novo. *Id.* Facts in support of a sentencing variable decision must be established by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A fact that was not proven beyond a reasonable doubt in a criminal trial may still be proven by a preponderance of the evidence and thus used for sentencing. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), rem’d 447 Mich 984 (1994). “A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *Id.* at 125. We will uphold a scoring decision if any evidence in the record supports it. *Johnson*, 293 Mich App at 84.

The victim testified that defendant fired a gun at her, but he hit her vehicle instead, which was located between defendant and the victim. The victim specifically stated that a gun was pointed at her, that defendant fired the shots at her, and that the gun was pointed at her when the first shot was fired and she was sitting on her porch that was three steps away from the ground. Defendant was in the passenger seat of a van on the street and victim’s vehicle was parked between the van and the porch. The van was about two feet from the victim’s vehicle and about 30 feet from the porch. Defendant fired four shots, three of which hit the victim’s vehicle. Therefore, there was evidence that the shots, which hit the victim’s vehicle, were fired in the direction of the victim, who was on the porch behind her vehicle. Based on the record, there was evidence to support the court’s finding that a firearm was shot at or toward a human being.

Defendant asserts that such a finding is inconsistent with the trial court’s verdict at the bench trial: defendant was acquitted of assault with intent to commit great bodily harm less than murder and intentional discharge of a firearm in or at a building because the court found that those offenses were not proven beyond a reasonable doubt. However, as noted, the evidentiary

standard for sentencing is less stringent than the evidentiary standard for a criminal conviction. The trial court's verdict is not inconsistent because it could find a fact proven by a preponderance of the evidence but not beyond a reasonable doubt. The record evidence supports the trial court's factual findings in support of scoring OV 1.

Defendant finally argues that the trial court should have scored OV 12 at zero points instead of five; in response, the prosecutor concedes that the trial court relied on erroneous reasoning to score OV 12 at five points but argues that ten points should actually have been scored. A defendant is entitled to resentencing on the basis of a guidelines scoring error only if the error altered the recommended minimum sentence range. *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). Defendant's OV score was 41 points, so five points more or fewer would not affect defendant's minimum sentence range. See MCL 777.66. Consequently, we decline to address either argument: neither party would be entitled to any relief irrespective of our conclusions.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro