STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v	No. 305104 Wayne Circuit Court
STEVEN JAMAL HARE, Defendant-Appellant.	LC No. 10-010034-FC

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two terms of five to ten years' imprisonment for assault with intent to do great bodily harm, two to five years' imprisonment for carrying a concealed weapon, and two years' imprisonment for felony-firearm. We affirm.

First, defendant argues that the evidence was insufficient for a rational jury to find him guilty. We disagree.

"This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (quotation marks and citation omitted). This Court reviews the evidence in the light most favorable to the prosecution. *Id*.

"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) (quotation marks and citation omitted; emphasis added by *Brown*). Intent to do great bodily harm is intent to do serious injury of an aggravated nature. *Id*. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted). Under the doctrine of transferred intent, if a defendant shoots at one person intending to hurt but not kill him, and the bullet strikes a second person, the defendant may be convicted of two separate counts of assault

with intent to do great bodily harm less than murder. See *People v Lovett*, 90 Mich App 169, 170, 174-175; 283 NW2d 357 (1979).

In order to establish that a defendant carried a concealed weapon, the prosecution must prove that the defendant knowingly possessed a concealed weapon. *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007). "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 Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007) (quotation marks and citation omitted).

"[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The positive identification of a defendant by witnesses may be sufficient to support his conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of witnesses' testimony is a question for the trier of fact that this Court does not resolve anew. *Id*.

Defendant first challenges the sufficiency of the evidence regarding identification. According to defendant at trial, on September 7, 2010, defendant was near a school with his younger brother, Terrance Hare, and Ersley House to protect Hare against Kacey Smith; however, he did not bring a gun near the school. Defendant stated that he was present when a gunshot was fired but that he did not fire the shot. Also, Sherard Dalton, one of the victims, and Heather Reid, an eyewitness, described the shooter as being a dark-skinned African-American male, and Dalton asserted, and defendant asserts, that defendant is light-skinned. We conclude that the jury was free to disbelieve in whole or in part this testimony. See *Perry*, 460 Mich at 63. Noelle Cooper, the other victim, was able to identify defendant as one of the boys she saw fighting at the time in question. Also, in Vondariuse Anderson's statement to police officer Detrick Mott he indicated that he saw defendant "shoot the boy." He denied the truth of this statement at trial, but he did admit at trial to having seen defendant shooting a gun. Moreover, according to Anderson at trial, after he heard a gunshot, he turned around and saw defendant holding a gun aimed toward the ground, toward Dalton's feet. Defendant gave a statement to Mott (which was voluntarily given, as discussed *infra*), in which defendant indicated that he shot "Kacey" because "Kacey" and Hare were about to fight.[1] Also, Dalton saw a boy reach for something inside of his clothes. When this boy first approached Dalton he did not observe him with a gun. Before Dalton could swing at the boy, Dalton was shot in his lower pelvic bone. Defendant confessed to having had the gun in his right pocket before shooting "Kacey." Lastly, Cooper was shot above her left eyebrow as she was standing nearby during this incident.

There was evidence that defendant shot Dalton, thinking he was "Kacey," in his lower pelvic bone. Additionally, there was evidence that Cooper was shot as a bystander. Therefore, the evidence was sufficient for a rational trier of fact to have found that defendant was the perpetrator of assault with intent to do great bodily harm less than murder against Dalton and Cooper. Additionally, because the evidence supports that defendant had a gun while perpetrating two counts of assault with intent to do great bodily harm less than murder, the evidence was

[1] Defendant believed Dalton to be Kacey Smith.

sufficient for a rational trier of fact to have found that defendant was the perpetrator of the felony-firearm offense.

Also, there was evidence that defendant did not have a gun visible when he approached Dalton and that he had a gun in his right pocket. The evidence was sufficient for a rational trier of fact to have found that defendant knowingly carried a concealed weapon.

Defendant argues that there was insufficient evidence to support the intent element of his assault convictions. However, according to defendant, defendant was near a school with Hare and House to protect Hare against Smith. Defendant gave a statement to Mott and indicated that he shot "Kacey" because "Kacey" and Hare were about to fight. At the time, defendant believed Dalton to be "Kacey." Also, according to Anderson, the group of boys, including defendant, were defending Anderson's honor.[2] As a result of being shot, Dalton suffered a fractured hip and torn rectum. This evidence supports a rational trier fact in finding that defendant intended serious injury of an aggravated nature to Dalton. In addition, Cooper was shot above her left eyebrow as a bystander. Defendant's intent toward Dalton could be transferred to satisfy the intent element of his conviction for assault with intent to do great bodily harm less than murder regarding Cooper. See *Lovett*, 90 Mich App at 170, 174-175. Therefore, the evidence was sufficient for a rational trier of fact to have found that defendant committed two counts of assault with intent to do great bodily harm less than murder.

Next, defendant argues that reversal is required because the verdict was against the great weight of the evidence. We disagree.

Where, as in the present case, this Court has denied a defendant's motion to remand so that the defendant could file a motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence, this Court reviews the defendant's great-weight claim for plain error affecting the defendant's substantial rights. *People v Horn*, 279 Mich App 31, 40-41; 755 NW2d 212 (2008). "To avoid forfeiture, the defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (citation omitted).

The same evidence set forth in our discussion of the sufficiency issue, *supra*, convinces us that the verdict was not against the great weight of the evidence and that no plain error occurred. Reversal is unwarranted.

Lastly, defendant argues that the trial court erred by denying his motion to suppress his confession. We disagree.

[2] Apparently Hare and Anderson both were involved in a conflict with Kacey Smith.

"This Court reviews de novo a trial court's ruling on a motion to suppress. Although this Court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous." *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011) (citation omitted). Deference is given to the trial court's factual findings. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). "A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake." *Steele*, 292 Mich App at 313.

In determining the voluntariness of a confession, the court should consider all the circumstances, including:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) (quotation marks and citation omitted).]

"The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* (quotation marks and citation omitted). "No single factor is determinative." *Id.*

"The absence of a parent, guardian, attorney, or other adult advisor does not necessarily mean that [a] defendant's confession should have been excluded."[3] *People v Inman*, 54 Mich App 5, 9; 220 NW2d 165 (1974). However, "threats to arrest members of a suspect's family may cause a confession to be involuntary." *United States v Finch*, 998 F2d 349, 356 (CA 6, 1993).

In addition, a defendant may waive his *Miranda*[4] rights provided that the waiver is made voluntarily, knowingly, and intelligently. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). An effective waiver of *Miranda* rights requires the following:

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[3] The interrogating officer testified that defendant was 17 at the time of the interrogation, defendant testified that he was 16 at the time, and the defense attorney in closing arguments referred to "a 17-year-old." The lower-court record lists defendant's date of birth as April 6, 1993, and the interrogation took place on September 8, 2010. Accordingly, it appears that defendant was 17 at the time of the interrogation. At any rate, defendant had been charged as an adult.

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

> [T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*Id*. (citation and quotation marks omitted).]

A defendant "need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *Id*. at 636 (quotation marks and citation omitted). A valid waiver merely requires the prosecution to present "evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id*. at 637 (quotation marks and citation omitted).

Factors one and three of the voluntary-confession analysis slightly weigh in favor of defendant. Defendant was 17 years old at the time of the interrogation, and defendant's mother, although initially present, was not present during the interrogation itself. Also, according to defendant, this was defendant's first time being formally interrogated by police.

However, factors four, five, eight, and nine strongly weigh in the prosecution's favor. Defendant was interrogated from 5:45 p.m. to 6:20 p.m. According to Mott, defendant had been in custody approximately 20 or 30 minutes before the interview. According to defendant, he had been in custody approximately six hours and 45 minutes before giving a statement. Whether defendant was in custody 20 or 30 minutes, or six hours and 45 minutes, he was not in custody an unduly long period of time before being interrogated. Defendant was not under the influence of drugs, alcohol, or medication and had suffered no head injuries. At some point during the interview defendant ate some fast food.

This Court gives deference to the trial court's findings of fact during the suppression hearing regarding factors two, six, ten, and 11.[5] The hearing record is silent regarding defendant's education level at the time of his confession. According to Mott, he read defendant his constitutional rights, defendant read his rights, and defendant indicated that he could read and write and that he understood each of his rights. Mott indicated that after defendant initialed the document pertaining to his rights, he "[w]as free to speak" and did speak about the shooting incident. According to defendant, he was asked questions about the incident, which he answered, before he was given his *Miranda* rights. Defendant testified that Mott read defendant his *Miranda* rights, defendant did not read them for himself, and defendant did not understand them. Defendant stated that he believed he was requesting an attorney when he signed the documents indicating that he had received and understood his constitutional rights.

[5] Defendant does not assert on appeal that factor seven was at issue.

According to Mott, he did not use force or coercion during the interview. He denied telling defendant that "his brother would be free to go" if defendant would cooperate. Mott testified that he and other officers did not make any promises or threats in order to get defendant to confess to the shooting. According to defendant, the police officers used force to arrest him by "push[ing him] to the car." Defendant also testified that while he was in the interrogation room, a police officer threatened him by saying, "your little brother is going to go to jail for life. He's going to get arrested and raped and all that kind of stuff if you don't cooperate."

The trial court ruled that it "recognize[d] [defendant's] age, he's a young person but [the court] does did not believe for a moment the officer read him his rights [afterwords] . . . ." The trial court also implied that defendant was smart enough to read his *Miranda* rights for himself. The court stated that defendant "did not appear to be slow or mentally retarded or suffered some shock that he was afraid of adults [sic], something to that effect." The trial court did not believe defendant was at a disadvantage. The court emphasized that defendant was able to "combat" the prosecutor at the hearing and "had an answer for all [the] questions." Also, the trial court did not find defendant's testimony regarding threats of incarceration and rape to Hare very credible. The trial court stated that it listened to defendant's testimony very carefully. The trial court acknowledged that defendant may have felt like he had to say "something." However, the court did not believe that the circumstances "rose to a level [such] that the information was involuntary given the totality of the circumstances . . . ." The court ruled that there was no "[un]constitutional level of coercion . . . ."

Given the totality of the circumstances, the testimony at the hearing, and the deference to be given the trial court, we find no basis for reversal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray