

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

MARCUS TARREL NASH,

Defendant-Appellant.

No. 305572
Saginaw Circuit Court
LC No. 09-033434-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, as a lesser included offense of assault with intent to commit murder, MCL 750.83. He was sentenced to a prison term of 48 to 120 months.¹ Because defendant was not denied the effective assistance of counsel and probable cause existed to arrest him, we affirm.

Defendant's conviction arises out of the nonfatal shooting of Deleon Rodgers on June 25, 2009. On that date, defendant flagged Rodgers down as he drove by. As Rodgers slowed his vehicle to talk to defendant, defendant pulled out a gun and shot at Rodgers, firing shots into Rodgers left arm and shoulder. Rodgers sped away and was taken to the hospital.

On appeal, defendant argues that he was denied effective assistance of counsel. Specifically, defendant argues that defense counsel was ineffective in asking for jury instruction CJI2d 4.1 (out-of-court statements by defendant) because CJI2d 4.1 allowed the jury, if it believed defendant made a certain statement essentially amounting to a confession, to consider his supposed confession to the shooting as substantive evidence of guilt. Defendant asserts that the statement should have only been allowable as impeachment evidence.

¹ Defendant was found not guilty of carrying a firearm or dangerous weapon with unlawful intent, MCL 750.226, possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227.

To establish an ineffective assistance of counsel claim, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Carbin*, 463 Mich at 600.

Contrary to defendant's assertion otherwise, defendant's out-of-court statement could be used as substantive evidence irrespective of the requested jury instruction. Under MRE 801(d)(2)(A), admissions by a party are excluded from hearsay and are thus admissible as both impeachment and substantive evidence. See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Accordingly, defense counsel's action in requesting CJI2d 4.1 cannot be deemed objectively unreasonable and is not, at the very least, outcome determinative.

In his Standard 4 brief, defendant raises the additional argument that his arrest warrant was issued without probable cause. We disagree.

A magistrate shall issue an arrest warrant upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. MCL 764.1a. A magistrate may base the finding of reasonable cause upon factual allegations contained in the complaint, the complainant's sworn testimony, the complainant's affidavit, or any supplemental sworn testimony or affidavits of other individuals presented by the complainant or required by the magistrate. MCL 764.1a.

Each factual allegation in the complaint need not be independently documented. *Jaben v United States*, 381 US 214, 224; 85 S Ct 1365; 14 L Ed 2d 345 (1965). Moreover, each and every fact which contributed to the affiant's conclusions need not be spelled out in the complaint. *Id.* However, the complaint must contain enough information for the magistrate to conclude that "the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Id.* at 224-225.

In order to be timely, the defendant must object to the validity of an arrest warrant before submitting to the jurisdiction of the court by pleading to the information. *People v Hill*, 44 Mich App 308, 317; 205 NW2d 267 (1973), rev'd on other grounds *People v Mayberry*, 52 Mich App 450; 217 NW2d 420 (1974). Moreover, because an arrest warrant is not required, even when an invalid arrest warrant has been obtained, the issue becomes whether the officer had probable cause to arrest. *Mayberry*, 52 Mich App at 451.

In the present case, the complaint affirms that "the complaining witness says that on the date and at the location described, the defendant" committed the subsequently charged offenses. Also, the arrest warrant affirms that probable cause was found "[u]pon examination of the complaining witness." There is nothing to dispute the magistrate's finding. Additionally, defendant failed to object to the validity of the arrest warrant until appeal and the trial court had obtained jurisdiction over defendant by the filing of an information and an appearance by defendant. Additionally, at the preliminary examination on October 30, 2009, the district court

judge found probable cause that crimes had been committed and that defendant committed the crimes.

Finally, even if the arrest warrant was invalid, the complaining witness, a Saginaw Police Department detective, had probable cause to arrest defendant. “Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *People v Cohen*, 294 Mich App 70, 73; 816 NW2d 474 (2011). The complaint in this matter was filed on October 19, 2009, at which point the victim had already identified defendant as the shooter and a witness to the shooting had identified defendant as the shooter in a photo lineup. Moreover, prior to filing the complaint, the complaining witness had spoken with the victim’s brother who told him that he, the brother, was at defendant’s mother’s house when defendant came into the house and stated that he had just shot the victim. This information was sufficient to warrant a person of reasonable caution to believe that defendant had shot the victim.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot