STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 228146 Oakland Circuit Court
JAY DEAN MCGUIGAN, Defendant-Appellant.	LC No. 99-166343-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree fleeing and eluding a police officer, MCL 750.479a(4), and felonious assault, MCL 750.82. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of two and a half to fifteen years for the fleeing and eluding conviction, and three to fifteen years for the felonious assault conviction, to be served consecutive to a sentence for a prior offense for which defendant was on parole. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred by admitting evidence of a prior conviction. Defendant states his issue as follows:

> WAS IT ERROR FOR THE TRIAL COURT TO ALLOW THE PROSECUTION TO ADMIT EVIDENCE OF THE DEFENDANT-APPELLANT'S PRIOR CONVICTION FOR LEAVING THE SCENE OF A PERSONAL INJURY ACCIDENT IN ORDER TO ESTABLISH PROOF OF ONE OF THE ELEMENTS OF THE CRIME OF SECOND DEGREE FLEEING AND ELUDING?

In the body of his argument, defendant challenges the propriety of admitting a prior fleeing and eluding conviction. Although the record indicates that there was much confusion regarding the nature of defendant's prior conviction, on appeal defendant does not brief his argument that his prior conviction was of leaving the scene of a personal injury accident, nor does he deny that he had a prior conviction of fleeing and eluding. Thus, we deem this argument abandoned. *People v Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002). We proceed to address defendant's argument regarding the admission of a prior fleeing and eluding conviction.

Defendant was charged with violating MCL 750.479a(4), which provides that a person is guilty of second-degree fleeing and eluding if the person flees or eludes a police officer and the person "has 1 or more prior convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting subsequently similar conduct." As defendant acknowledged at trial, proof of a prior conviction is an element of the offense. CJI2d 13.6b; see also *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999). Contrary to defendant's contention on appeal, the plain language of the statute does not provide for proof of a prior conviction only as it pertains to a sentence enhancement. Because the statutory language is clear and unambiguous, judicial construction is neither permitted nor required. *People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001). Here, where defendant refused to stipulate that he had a prior conviction, the prosecutor was required to prove this element and defendant may not now claim error in the admission of the evidence. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997).

Defendant also argues that the trial court erred by denying his motion for a directed verdict on the original charge of assault with intent to do great bodily harm, MCL 750.84. We review this claim de novo by examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. MCR 6.419(A); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). Defendant argued below that the evidence was insufficient to prove that he specifically intended to harm the police officer. Defendant now argues that the trial court applied the wrong legal standard to decide his motion. We disagree. The record reveals that the trial court viewed the evidence in the light most favorable to the prosecution and expressly found the evidence to be sufficient to support a conviction of assault with intent to do great bodily harm. At the time of defendant's motion, evidence had been presented that the police officer believed that defendant was going to hit him with his car and that defendant's vehicle came within ten feet of the officer before the officer dove into the police car. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intentionally drove toward the officer with the intent to cause great bodily harm. *Hampton, supra*. *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998).

Defendant also asserts that the evidence was insufficient to prove that he was the person who failed to stop for the first officer. We disagree. The officer identified defendant in court as the person who tried to run him down and then fled. The officer's identification testimony, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was the person who committed the crimes. *Id.*

Defendant also argues that the trial court improperly denied his motion for a mistrial after the jury sent a note that volunteered information that the jurors were deadlocked, eleven to one. The trial court had instructed jury not to reveal the status of its deliberations. The court did not inquire or comment on the status of the jury vote, but gave the deadlocked jury instruction, CJI2d 3.12. A trial judge may not ask the jury about the numerical division of their vote, *People v Wilson*, 390 Mich 689, 690, 692; 213 NW2d 193 (1973), and even inadvertent discovery of how the jury is voting or who is dissenting may be cause for reversal. *People v Curry*, 77 Mich App

85; 257 NW2d 751 (1977). In this case, contrary to the trial court's instruction, the jury volunteered the information and the court did not ask any questions about it or single out any juror. See *Curry*, *supra*. There is no indication of coercion. *People v Pollick*, 448 Mich 376, 382-383; 531 NW2d 159 (1995). We find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Next, defendant argues that his sentences are excessive. Because the charged crimes occurred after January 1, 1999, the statutory sentencing guidelines apply. MCL 769.34(1) and (2). Defendant's minimum sentences are within the sentencing guidelines recommended range for each offense. Defendant acknowledged at sentencing that the guidelines were properly scored and that the presentence investigation report was correct. On appeal, defendant does not allege a scoring error or assert that inaccurate information was relied on by the trial court. Accordingly, we must affirm defendant's sentences. MCL 769.34(10); *People v Laversee,* 243 Mich App 337, 348; 622 NW2d 325 (2000).

Finally, defendant argues that he was improperly denied sentencing credit. Defendant remained incarcerated following his arrest in this case and defense counsel conceded below that defendant was on parole status. Defendant asserts that his sentence for the prior conviction was retroactively terminated after he was sentenced in this case and contends that he should be given jail credit because of that retroactive order. However, defendant was not serving time on the charged offenses before sentencing. Bond was set, but defendant was held on an unrelated parole detainer. Accordingly, defendant is not entitled to sentence credit in this case. *People v Miller*, 182 Mich App 692, 694; 452 NW2d 882 (1990); *People v Beal*, 182 Mich App 184, 186-187; 452 NW2d 214 (1989).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot