STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKIE BERNARD BROWN,

Defendant-Appellant.

UNPUBLISHED
April 17, 2003

No. 234222
Oakland Circuit Court
LC No. 00-174760-FC

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84,[1] carrying a concealed weapon (CCW), MCL 750.227, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 5-1/2 to 15 years for the assault conviction, and 3 to 7-1/2 years each for the CCW and felon in possession of a weapon convictions, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions.[2] Defendant appeals as of right, and we affirm.

I. Facts

This case arises out of a shooting outside a house in Oak Park. As Leondra Steen and his nephew sat inside Steen's truck, two men approached and Steen recognized one of the men, defendant, as a neighbor's boyfriend. Defendant stopped near a tree, about ten feet away from the driver's side of the truck and the other man positioned himself to the rear of Steen's truck. Defendant twice raised his shirt, and Steen could see a handgun in the waistband of defendant's pants. Steen told his nephew to get out of the truck and go into the house, and he yelled to his wife (who was watching from the front porch) to go into the house and call the police.

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[1] This was a lesser offense to the charged crime of assault with intent to commit murder, MCL 750.83. The jury was also instructed on a second lesser offense, felonious assault.

[2] The sentence for CCW was also to be served concurrent to the felony-firearm sentences.

While facing Steen, defendant backed up four or five paces. Defendant then pulled out his gun as he continued to back away. Defendant pointed the gun with both hands, shot at Steen and then fled. Steen testified that there was a dispute between his children and the family of defendant's girlfriend, though Steen denied that he was personally involved.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues unpersuasively that the trial court erred by denying his motion for a directed verdict on the charge of assault with intent to commit murder, as well as the lesser offense of assault with intent to do great bodily harm less than murder.

"When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "The elements of the crime of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). As our Court also explained in *Warren*, "intent to kill may be proven by inference from any facts in evidence. *Id*. For the crime of assault with intent to commit great bodily harm, the intent element requires an intent to do great bodily harm *less than murder*. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified *People v Pena*, 457 Mich 885 (1998).

Defendant maintains that the prosecutor failed to present evidence of an intent to murder or do great bodily harm because defendant moved approximately four houses away from Steen before the shooting. According to defendant's specious argument, if he intended to kill Steen, he could have done so when he was closer to him, but he did not take advantage of that proximity.

Viewing the evidence in the light most favorable to the prosecutor, a reasonable jury could find that defendant moved away from the victim not to decrease the risk of harm to the victim, but rather to either provide himself a measure of safety or increase the chance of an effective escape. Because evidence that defendant pointed a gun at Steen and fired at least twice was sufficient to support the charged offense of assault with intent to commit murder, the trial court did not err by denying defendant's motion for directed verdict. For this reason, we also reject defendant's argument that the jury's consideration of the charge of assault with intent to commit murder may have resulted in a compromise verdict. See *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). Moreover, the evidence was clearly sufficient to support defendant's conviction of assault with intent to commit great bodily harm.

B. Discovery

Defendant argues that the trial court should have granted a mistrial when the prosecutor introduced a tape recording of the emergency 911 telephone call to the police, because the prosecutor failed to give the tape to defendant during pretrial discovery. The prosecutor says that defendant waived this issue when he told the trial court during a pretrial conference that no further discovery was requested.

We decide this issue for a reason other than the one advanced by the prosecutor. We conclude that defendant simply has not demonstrated a discovery violation because he has not shown that there was a written or oral discovery request or order. Thus, defendant has not shown that he was entitled to any discovery materials beyond those required by statute. See, e.g., MCL 767.40a (disclosure of res gestae witness names). We disagree that defendant is excused from requesting discovery under *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992). In *Canter*, the Court stated that a prosecutor may be required to produce exculpatory evidence where the defendant has made "only a general request for exculpatory information or no request at all." *Id.* Here, however, the 911 tape was not exculpatory and, therefore, does not fall within the narrow scope of *Canter's* ruling. The prosecutor was not obligated to provide the 911 tape in discovery without a discovery request. Because defendant did not request the tape, we need not address whether defendant waived production by acknowledging that discovery was complete.[3]

C. Lesser Included Misdemeanors

Defendant contends that the trial court erred by denying his requested jury instructions on two misdemeanors as lesser offenses of assault with intent to commit murder, reckless discharge of a firearm, MCL 752.861,[4] and discharge of a firearm without malice, MCL 750.234.[5]

The trial court ruled that a rational view of the evidence did not support the misdemeanor instructions. MCL 768.32(1)[6] permits a jury to consider necessarily included lesser offenses if

[3] The pretrial order, filed October 25, 2000, stated: "No further discovery is requested by the defendant at this time. All discovery has been completed."

[4] MCL 752.861 provides:

> Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court.

[5] MCL 750.234 provides:

> Any person who shall discharge, without injury to any other person, any fire-arm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one [1] year or by a fine of not more than five hundred [500] dollars.

[6] MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

they are supported by a rational view of the evidence, but does not authorize consideration of cognate lesser offenses. *People v Cornell*, 466 Mich 335, 352-355, 357, 359; 646 NW2d 127 (2002).

Neither of the misdemeanors cited by defendant is a necessarily included lesser offense of assault with intent to commit murder. A person can commit assault with intent to murder without recklessly discharging a firearm or discharging a firearm without malice. MCL 752.861 penalizes the careless, reckless, or negligent discharge of a firearm in which death or injury results; neither the use of a firearm nor death or injury is an element of MCL 750.83. MCL 750.234 penalizes the discharge of a firearm aimed at or toward another person without malice. Discharge of a firearm is not an element of MCL 750.84. Therefore, these misdemeanors are cognate lesser offenses, and the trial court correctly declined to instruct the jury on those offenses. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *Cornell*, *supra*.[7]

D. Excited Utterance

Defendant complains that the trial court unfairly prohibited defense counsel from cross-examining a police officer about an excited utterance made by one of the complainants. We review the trial court's evidentiary ruling for an abuse of discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

When the police arrived at the scene of the shooting, they saw Steen confronting defendant's girlfriend. Not knowing what occurred, the police approached Steen with their guns drawn. One officer testified that Steen said, "they just shot at me, you got to go get them, he just tried to kill me."[8] During cross-examination, defense counsel asked the officer about *written* statements that were given to the police at the scene, some time after Steen made the oral remarks to the police officers. The prosecutor objected and the trial court sustained the objection because defendant did not lay a proper foundation that the written statements were made while Steen or his family were in an "excited state."

The police officer testified that Steen and his family were excited when the police first arrived at the scene, but he did not testify that their excitement level remained high when the written statements were procured later that evening. When asked whether statements were obtained "more less in the excitement of the moment," the officer responded that he obtained statements "after," thus indicating that the excitement had subsided. A proponent of evidence has the burden of showing that the foundational requirements have been satisfied. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). Defendant did not show that the declarant was "under the stress of excitement caused by the event" when the written statements

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[7] Were we to conclude that the offenses were necessarily included, we would nonetheless agree with the trial court that a rational view of the evidence does not support the instructions. See *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998) (defendant not entitled to instruction on careless, reckless or negligent discharge of a firearm where uncontested evidence showed that the defendant intentionally fired a weapon).

[8] Defense counsel did not object to this testimony, though he later stated, "I'm assuming this is an excited utterance," to which the prosecutor answered "yes."

were made. See MRE 803(2). Accordingly, the trial court did not abuse its discretion when it ruled that defendant had not laid a proper foundation for admission of the evidence.

E. Sentencing

Defendant further asserts that he is entitled to resentencing because his sentences were based on misscored guidelines and inaccurate information. Because the offenses occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant argues that offense variable 9 ("number of victims") was improperly scored at ten points for two or more victims. The statute provides that each person placed in danger of injury or loss of life should be counted as a victim. MCL 777.39(2)(a). We will uphold the scoring of a sentencing variable if there is any evidence to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). According to the statement by the complainant's nephew, defendant shot "and ran away from *us*." From this evidence, the trial court could properly conclude that Steen's nephew was also placed in danger of injury or loss of life.

Defendant also argues that the trial court erred by referring to his lack of remorse when sentencing him. We note that the cases cited by defendant are inapposite because, unlike this case, they hold that a sentencing court may not rely on a defendant's refusal to admit guilt. See *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977); *People v Hicks*, 149 Mich App 737, 748; 386 NW2d 657 (1986). Lack of remorse, however, is a permissible sentencing consideration. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Thus, no error occurred and, because defendant's sentences are within the properly scored guidelines, they must be upheld. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette