STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 247126 Wayne Circuit Court
NICHOLAS DION DAWSON, Defendant-Appellant.	LC No. 02-008868-01

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to do great bodily harm less than murder, MCL 750.84, malicious destruction of property less than $100, MCL 750.377a(1)(d),[1] and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of three to ten years in prison on the assault conviction and ninety days on the MDOP conviction, and to the mandatory consecutive two-year term on the felony-firearm conviction. Defendant now appeals and we affirm.

Defendant's convictions arose out of an incident in which defendant went up to the victim and shot him in the leg, as well as shot the victim's car, apparently in retaliation for an earlier incident between the defendant and the victim. Defendant's theory of the case was that the victim had a gun, which went off while defendant was attempting to take the gun away from the victim.

Defendant first argues that he is entitled to a new trial because the prosecutor failed to exercise due diligence in producing two res gestae witnesses, yet the trial court failed to consider that these witnesses would have testified favorably to defendant. We disagree. At the close of the prosecutor's case, the prosecutor announced that two endorsed witnesses had not appeared and attempts to serve subpoenas on them had been unsuccessful. The trial court ruled that the prosecutor had failed to exercise due diligence to obtain the presence of the witnesses, but also ruled that defendant's request for an adverse witness instruction was premature and that the trial

[1] Sic. Although the trial judge stated "less than $100" in rendering his decision and that is the offense stated in the judgment of sentence, we assume that the trial judge meant "less than $200," the lowest of the MDOP value ranges.

court would entertain such a request at the appropriate time. Defendant did not, thereafter, renew the request.

While it is unclear to us why the trial judge put off handling the issue, it is clear to us that doing so did not constitute error. The trial court agreed with defendant that the prosecutor did not show due diligence, but failed to immediately fashion a remedy. It requested defendant to renew his request for a remedy at a later point in the trial. Defendant thereafter failed to request a remedy. Therefore, defendant has failed to preserve for appeal the issue of the appropriate remedy and we review this issue for plain error. *People v Carines*, 460 Mich 750; 602 NW2d 576 (1999). Defendant makes no showing that the failure to produce the witnesses prejudiced him in any way. At best, defendant speculates that their testimony may have been helpful to him. Accordingly, defendant has not made the requisite showing of prejudice in order to be entitled to relief. *Id*. at 763.

Defendant's other issue on appeal is a challenge to the scoring of the sentencing guidelines. Specifically, defendant argues that Offense Variable 10 should have been scored at zero points rather than fifteen points. We disagree. OV 10 deals with "Exploitation of a Vulnerable Victim" and fifteen points is appropriate where "Predatory conduct was involved." "Predatory conduct" is defined to mean "pre-offense conduct directed at a victim for the primary purpose of victimization." The trial court supported the scoring, opining as follows:

> There was an argument and I believe that the complainant became angry, drove around for a while to a number of bars and drank quite a bit. Came back to where the argument was and I think he set fire to the complainant's car.
>
> The following day the complainant was talking with his brothers and then the defendant was seen to running him around the corner of the house and shot the complainant and as well shot up other cars, he shot up somebody's car.

Conduct such as following a victim to an opportune place or time to commit the crime or waiting until the victim is in a convenient location and at a convenient time to commit the crime has been identified by this Court as predatory conduct. See *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), affirmed on other grounds ___ Mich ___; ___ NW2d ___ (No. 122271, decided 6/29/04) (following victim as she was driving until she pulled into the driveway, then shooting her in order to steal the car), and *People Witherspoon*, 257 Mich App 329; 670 NW2d 434 (2003) (the nine-year-old victim's mother's boyfriend waited until the victim was alone in the basement to molest her). Similarly, the conduct cited by the trial court can reasonably be interpreted as defendant waiting until an opportune time to attack the victim and, therefore, justified the scoring of fifteen points for OV 10. Accordingly, we conclude that there is adequate evidence to support the trial court's scoring of this offense variable. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens