STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2009
v	No. 279720 Wayne Circuit Court
REZA CONWELL TATUM, Defendant-Appellant.	LC No. 06-012021-01

Before: Jansen, P.J., and Meter and Fort Hood, 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, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 7-1/2 to 15 years for the assault with intent to do great bodily harm conviction, 47 months to 7-1/2 years for the felon-in-possession conviction, 2-1/2 to 6 years for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of feloniously assaulting Stephen Pruitt and shooting Timothy Brown on September 25, 2006. Pruitt was the brother of defendant's former girlfriend, Melanie Sims. There was a history of hostility between defendant and Sims's family. Pruitt was previously acquitted of charges related to a shooting incident at defendant's house in March 2006. Defendant was previously convicted of home invasion in relation to an incident at Sims's house in February 2006. In July 2006, defendant was sentenced to three years' probation for the home invasion conviction, with the first 12 months to be served in the county jail. He was granted a work release on September 13, 2006. On September 25, 2006, defendant became involved in a confrontation with Sims's mother, Kathleen, who lived next door to defendant, following which Pruitt and Brown intervened. Defendant eventually went inside his house, obtained a shotgun, and shot Brown in the abdomen. Defendant also fired a shot at Kathleen's house while Pruitt was on the porch.

I. Great Weight of the Evidence

Defendant argues that the trial court's verdict is against the great weight of the evidence because he acted in self-defense. We disagree.

The appropriate test for determining whether a verdict is against the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Generally, conflicting testimony, even when impeached to some degree, is not a sufficient basis for granting a new trial. *Id.* at 638. A reviewing court may not act as a "thirteenth juror" in deciding whether a new trial is warranted, nor may the court attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Initially, contrary to what defendant argues, the new Self-Defense Act, MCL 780.971 et seq., does not govern this case because the instant offense occurred on September 25, 2006, six days before the new act became effective on October 1, 2006. Accordingly, the case is governed by the pre-statutory common law of self-defense.

Under the common law, defendant was entitled to claim self-defense as a legal justification for the shooting if "he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The prosecution has the burden of disproving self-defense beyond a reasonable doubt once evidence of self-defense is introduced. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

The trial court found that defendant's actions were "not reasonable" because they were "motivated by his frustrations and feelings" regarding his history with Sims and her family, not by an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death or great bodily harm. This finding is not against the great weight of the evidence. Kathleen testified that defendant approached her and threatened her family before the incident. The prosecution's witnesses testified that defendant initiated the confrontation by arguing with and threatening Pruitt and Kathleen Sims, and by hitting Timothy Brown with a shoe. They also testified that defendant escalated the conflict by obtaining a shotgun, although neither Pruitt nor Brown were armed. Although defendant claimed that Pruitt was armed with a gun, he also stated that he did not feel threatened because Pruitt was not aiming the gun. He stated that he believed that Brown posed the more serious threat. There was also substantial evidence of longstanding animosity between defendant and persons associated with Melanie Sims. Defendant believed that he had been unjustly convicted of home invasion, and that Pruitt and Brown's son, Timothy Bennett, had escaped justice for the March 2006 shooting incident at defendant's house. This evidence supports the trial court's rejection of defendant's self-defense claim.

Although defendant contends that the prosecution's witnesses were inherently unbelievable because they were "acting in concert to terrorize" him, their testimony did not contradict "indisputable physical facts or laws," nor was it patently incredible or "so inherently implausible that it could not be believed by a reasonable juror." *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Accordingly, the trial court's determination that defendant's actions were motivated by his frustration and perceived lack of justice, rather than a reasonable belief of imminent danger, is not against the great weight of the evidence.

II. Defendant's Supplemental Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

A. Dr. Taylor

Defendant argues that the trial court improperly permitted Dr. Taylor to testify from a medical dictation made by a resident, Dr. Smith, who worked under Dr. Taylor's supervision. Defendant did not object to Dr. Taylor's use of the medical dictation or to any other aspect of his testimony. Therefore, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights.[1] MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 110, 113; 631 NW2d 67 (2001).

Defendant argues that the dictation was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin*, *supra* at 651. MRE 803(6) provides the following exception to the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The medical dictation falls within this exception because Dr. Taylor testified that the dictation was made and kept in the ordinary course of the hospital's business. Additionally, to the extent that the dictation refers to statements made by Brown to Dr. Smith concerning his condition, those statements qualify as statements made for purposes of medical treatment and diagnosis, which are admissible under MRE 803(4). *People v Yost*, 278 Mich App 341, 365; 749 NW2d 753 (2008).

Defendant's reliance on the exception in MRE 803(8) pertaining to "matters observed by police officers and other law enforcement personnel" is misplaced because that rule does not apply to medical records. Furthermore, the rationale for excluding police reports from the ambit of MRE 803(6) and MRE 803(8) is that adversarial investigatory reports prepared in anticipation

[1] Indeed, defendant arguably waived this issue by stating that he had no objection to the admission of the exhibit. See *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001).

of litigation lack the requisite indicia of trustworthiness. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003); *Solomon v Shuell*, 435 Mich 104, 130-133; 457 NW2d 669 (1990). These concerns do not apply to medical records.

We also reject defendant's argument that admission of the medical dictation violated his rights under the Confrontation Clause. Because the declarations were not made to a government official, and there was "nothing to indicate that the statements were made with the intent to preserve evidence for later possible use in court," the statements were not "testimonial" and the Confrontation Clause was not implicated. *People v Bauder*, 269 Mich App 174, 182; 712 NW2d 506 (2005).

Defendant also argues that the trial court violated MRE 703 by permitting Dr. Taylor to testify based on data that was not properly entered into evidence. Because the medical dictation was admissible under MRE 803(4) and (6), there is no merit to this argument.

Finally, because neither Dr. Taylor's testimony nor the medical dictation exhibit constituted plain error, the trial court properly could rely on that testimony to support a 25-point score for offense variable 3 of the sentencing guidelines, which is appropriate when a victim suffers a life-threatening injury. MCL 777.33(1)(c).

B. Offense Variable 13

Defendant argues that the trial court erroneously scored 25 points for OV 13. We disagree. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court will uphold a scoring decision if there is any evidence in support of the trial court's score. *Id.* Questions concerning the interpretation of the statutory sentencing guidelines are questions of law subject to de novo review. *Id.*

MCL 777.43(1)(b) provides that OV 13 is properly scored at 25 points when the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant does not dispute that the trial court properly could consider the prior home invasion crime against Sims for purposes of OV 13, but argues that the trial court erred by focusing on the total number of victims in the two incidents. He argues that because the crimes against Pruitt and Brown occurred during a single criminal incident, they could not both be counted for purposes of OV 13. We disagree. In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court held that OV 13 is appropriately scored at 25 points for multiple, contemporaneous felonies arising out of the same criminal incident. Accordingly, the trial court did not err in scoring 25 points for OV 13.

C. Sentence Credit

Defendant argues that the trial court erred by awarding him only 12 days of sentence credit. We disagree.

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

In *People v Prieskorn*, 424 Mich 327, 341; 381 NW2d 646 (1985), the Supreme Court concluded that in enacting this statute, "[t]he Legislature sought . . . to give a criminal defendant a right to credit for any presentence time served 'for the offense of which he is convicted,' and not upon any other conviction." The Court reasoned that "[h]ad the Legislature intended that convicted defendants be given sentence credit for all time served prior to sentencing day, regardless of the purpose for which the presentence confinement was served, it would not have conditioned and limited entitlement to credit to time served 'for the offense of which [the defendant] is convicted.'" *Id.* Thus, "to be entitled to sentence credit for presentence time served, a defendant must have been incarcerated 'for the offense of which he is convicted.'" *Id.* at 344.

Here, defendant committed the instant offenses while on work release status for a probationary jail sentence imposed in a prior case. After committing the offenses, defendant's work release status was revoked and defendant was incarcerated in the county jail to serve the remaining portion of his probationary jail term. Because this period of confinement was unrelated to the offenses of which defendant was convicted in this case, defendant was not entitled to sentence credit for that period against his current sentences. Rather, defendant was only entitled to credit for his continued confinement after his probationary jail term expired on July 13, 2007, which the trial court properly awarded. Therefore, defendant is not entitled to additional credit under MCL 769.11b.

We also reject defendant's argument that the time served for his probationary jail sentence must be credited against his new sentences as a matter of due process, equal protection, and principles of double jeopardy. Defendant relies on authority addressing the denial of credit to offenders who are convicted of new crimes while on parole and are incarcerated on a parole detainer pending disposition of the new charges. Even in that context, however, this Court has rejected constitutional due process and equal protection challenges to the denial of credit against the new sentences. See *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994) (holding that it is constitutionally permissible to treat offenders differently depending on whether they are parole detainees or nondetainees, because "they *are* different)" (emphasis in the original). Likewise, the fact that defendant here was liable to serve an unrelated sentence in a distinct case while awaiting trial on new charges distinguishes him from other offenders who are incarcerated only "because of being denied or unable to furnish bond for the offense of which [they are later] convicted." Therefore, the period of incarceration attributable to defendant's prior sentence in a distinct case is not required to be credited against defendant's new sentences as a matter of due process or equal protection.

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect a defendant from multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 10 (2001). Thus, a defendant sentenced to prison on a probation violation is constitutionally entitled to credit for time served as a condition of probation for that *same* offense. *People v Sturdivant*, 412 Mich 92, 97; 312 NW2d

622 (1981). In this case, however, defendant seeks credit for time spent in jail serving a distinct sentence for a distinct offense. Because defendant was incarcerated for a separate offense, the refusal to credit the time served for that offense against defendant's new sentences does not offend the double jeopardy protection against multiple punishments for the same offense. Accordingly, there was no double jeopardy violation.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood