STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 293377 Genesee Circuit Court
ALVIN DALE LEWIS, Defendant-Appellant.	LC No. 09-024319-FH

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of felon in possession of a firearm (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and third-degree fleeing and eluding, MCL 750.479a(3). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 4 to 20 years' imprisonment on the felon-in-possession conviction, the CCW conviction, and the fleeing and eluding conviction, and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. Because defendant was not denied his constitutional right to present a defense, and the trial court did not err in assessing 25 points for Offense Variable (OV) 1, we affirm.

On May 27, 2008, defendant approached Frederick Blackmon's home, looking for the mother of Blackmon's child. Defendant was advised she was not there and left. Several hours later, defendant returned, and, holding a gun at his side, angrily told Blackmon that he knew the woman was there and ordered Blackmon to send her out. Blackmon, who was standing outside, advised again that she was not there and started backing up toward his home. Defendant fired the gun in the direction of Blackmon's home as he was backing away and, when Blackmon went into the house, he heard another gunshot. Blackmon called the police, who arrived at the home and took down information regarding the incident. A short time after the police left, a different vehicle drove by Blackmon's home and a shot was again fired at the home. Blackmon again called the police and, when he went outside, observed holes in his front door that had not been there previously. Defendant was ultimately determined to be associated with the shootings and, when police attempted to apprehend him, he fled. Defendant was eventually located and charged in connection with the incidents.

Defendant first argues on appeal that he was deprived of his constitutional right to present

a defense, when the trial court precluded questioning of a police officer regarding previous drug raids or arrests at the victim, Frederick Blackmon's, home. Defendant argues that the evidence was necessary for his defense, i.e., that there were alternative reasons for the presence of bullet holes in Blackmon's front door. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion, but reviews de novo whether a defendant was denied his right to present a defense. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). See also *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002) (de novo review of constitutional issues, such as those related to the right to present a defense).

A defendant has a due process right to present a defense. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). However, an accused's right to present evidence in his defense is not absolute. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). "A defendant's interest in presenting evidence may thus bow to accommodate other legitimate interests in the criminal trial process," such as the implementation of evidentiary rules. *Id*. at 250 (internal quotations and citation omitted). Evidentiary rules do not abridge an accused's right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve. *Id*.

Here, defense counsel sought to examine Officer Villarreal regarding specific instances of Blackmon's conduct, namely, drug activity at his home. His purpose in doing so was to raise doubt in the jurors' minds that defendant had shot at Blackmon's residence, by suggesting that bullets in the front door stemmed from past drug activity. MRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

While there is no suggestion that the defense sought the testimony because it tended to show that Blackmon was not a truthful person in general, defendant did seek the evidence to rebut Blackmon's expected testimony that prior to the alleged shooting by defendant, there had been no bullet holes in the door. In other words, defendant sought to attack Blackmon's credibility regarding the origin of the bullet holes by presenting extrinsic evidence of specific instances of Blackmon's conduct. Such evidence is inadmissible under MRE 608(b).

Similarly, the proffered testimony was not admissible under MRE 609. MRE 609 generally permits introduction of prior convictions in order to impeach a witness's credibility

only where the "crime contained an element of dishonesty or false statement," or "the crime contained an element of theft" and meets certain other requirements.[1] The trial court properly excluded evidence regarding Blackmon's drug-related convictions, if any, because such crimes do not contain elements of theft, dishonesty, or false statement, and were thus inadmissible under MRE 609.

Regardless of whether the proffered evidence sought to attack Blackmon's credibility, it was nonetheless inadmissible because, while it may have been marginally relevant, it was more prejudicial than probative. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "Unfair prejudice" arises where:

> . . . there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist. Unfairness might not exist where . . . the proponent of this evidence has no less prejudicial means by which the substance of this evidence can be admitted. [*People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983).]

In this case, evidence of previous drug raids or arrests at Blackmon's house could make it slightly less probable that the bullet holes in the door were caused by defendant shooting at the house on May 26, 2008, and thus, could be considered relevant. Nonetheless, the probative

---

[1] Where the crime involves an element of theft, the proponent of the evidence must additionally show that:

> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect. [MRE 609(a)(2).]

value of such evidence is minimal, at best. Defendant's offer of proof did not include any suggestion that Blackmon's house had, in fact, been shot at prior to May 26, 2008. At best, defendant hoped that the jury would presume that Blackmon's house was a drug house, a drug house *could have been* shot at, and that the existing bullet holes were a result of such a hypothetical shooting. Accordingly, any relevant evidence that could have come from the proffered testimony was not only entirely speculative, but was minimally probative, and was outweighed by the danger of prejudice. The trial court did not abuse its discretion by denying the admission of the proffered testimony.

Finally, the trial court's exclusion of testimony regarding prior drug raids or arrests at Blackmon's home did not impair defendant's right to present the substance of his defense. Defendant had the opportunity to introduce an alternative theory regarding the origin of the bullet holes in Blackmon's front door by cross-examining Blackmon about them. The prosecutor raised the issue on direct examination of Blackmon and established that, prior to May 26, 2008, there had been no bullet holes in the door. However, defense counsel chose not to pursue the issue on cross-examination.

Next, defendant argues that the trial court erred when, in determining the proper sentence range, it assessed 25 points for Offense Variable (OV) 1. Again, we disagree. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Scoring of the sentencing guidelines need not be consistent with a jury verdict, because a jury is required to apply the reasonable doubt standard, whereas the sentencing court applies a preponderance of the evidence standard. *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993). Thus, a trial court is permitted to consider evidence presented at trial that the defendant committed another crime even if he was acquitted of that charge. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Scoring decisions for which there is any evidence in support will be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 1 assesses points for the aggravated use of a weapon. MCL 777.31; *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). Defendant received 25 points because the trial court concluded that "[a] firearm was discharged at or toward a human being. . . ." MCL 777.31(1)(a). Defendant argues that there was no evidence presented at trial that he shot at or toward a human being. The testimony at trial, however, demonstrated that defendant fired the first shot while Blackmon was backing away from defendant toward his house, moments after speaking to him. Blackmon testified that he just made it to the door before he heard the shot. Immediately after he got inside the door, Blackmon heard another shot. One of the shots hit Blackmon's van, which was parked in the driveway in front of his house. This evidence supports the inference that defendant shot at or toward Blackmon just as he was entering his home through the front door. Furthermore, there was no evidence presented that the shots had been directed elsewhere. Accordingly, there was evidence to support the trial court's scoring of OV 1, and defendant's request for resentencing is without merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio