STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2011
v	No. 288373 Wayne Circuit Court
EDWARD JAMAL BARNETT, Defendant-Appellant.	LC No. 08-006407-01-FC

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Edward Jamal Barnett appeals by right his jury convictions of assault with the intent to rob while armed, MCL 750.89, and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced Barnett to serve two years in prison for his conviction of felony-firearm, which sentence was to be served consecutive to his sentence for assault with the intent to rob while armed. The trial court sentence Barnett to serve 70 months to 20 years in prison for his conviction of assault with the intent to rob while armed. On appeal, Barnett argues that the trial court erred when it prevented his lawyer from questioning a witness about the substantial amount of cash that he had at the time of the events at issue and erred when it gave the jury an instruction on flight from the scene. These errors, he maintains, deprived him of a fair trial and warrant reversal of his convictions. Barnett also argues that the trial court erred in calculating his minimum sentence and, therefore, even if this Court does not reverse his convictions, it should vacate his sentences and remand for resentencing. Because we conclude that there were no errors warranting relief, we affirm.

[1] The jury found Barnett not guilty on a third charge that was for assault with the intent to murder.

I. BASIC FACTS

This case has its origins in a shooting that occurred in October 2007 in Detroit.

Franklin Cooper testified that he and three of his friends, Stanley Johnson, Leslie Rockymore, and DeLorean Williams, went out to eat on the night at issue. Cooper said that Johnson drove them to dinner in his new four-door pickup truck. Cooper sat behind Stanley, Rockymore sat in front on the passenger's side of the truck, and Williams sat behind Rockymore. Cooper said that, after dinner, Johnson drove them all back to Cooper's grandmother's house on Edsel in Detroit. Johnson parked across the street from the house and they talked for a couple minutes. It was around 11:00 at night. Johnson testified that he drove his friends to dinner in his two-day-old pickup. He stated that he owned a .40 caliber handgun, which he had with him. He also stated that he had a valid permit to carry a concealed weapon.

Williams testified that, as they sat in the truck, two men approached the truck—one on either side. The men were dressed in black, had guns, and had something covering their faces. Williams said that the man approaching on the passenger's side of the truck said, "Get the f[***] out the car." The man then opened the rear passenger door and began to pull him out. Cooper stated that he first noticed something when he heard Williams say "oh, shit. Oh, shit." It was then that he noticed that two men had approached the truck—one by the rear passenger door and one by the driver's door. Both men had handguns and wore masks; the man on the driver's side was wearing a black coat and khaki pants. Rockymore also noticed the men after Williams' exclamation.

Cooper said that the back door on the passenger's side "swung open" and the man on that side said "get the f[***] out the car." He saw Williams get out and heard the driver's door open too. Johnson testified that he heard Williams say "oh shit" and turned to see Williams being pulled out of the truck. He then saw his own door swing open and the man on his side of the truck was trying to point his gun into the cab. That man was wearing a black jacket and khaki pants. As the man opened the door, Johnson fired two shots at him. Johnson said that the man grabbed his chest, tried to run, and fell in the grass. Williams stated that, after he got pulled out of the truck, he heard shots and began to run. Rockymore and Cooper also heard shots shortly after the driver's side door opened. They both testified that it sounded like there were more than 20 shots.

Johnson stated that he got out of the truck after he fired his first shots. At that point, he saw the man who fell in the grass shoot at him. Johnson fired again at the man and the man fired still more shots. Johnson said he fired about seven times. At about this time, he heard a shot from the second man; this shot grazed the back of his head. He then turned to that man and fired at him. The second man shot back and then ran into a nearby field. He saw the first man run down the street and cut between two houses. Johnson saw Williams run off, but Rockymore and Cooper were still in the truck. Johnson got back in and drove down the street; when they got to the intersection he heard two more shots. He suspected that the second man was the shooter. He then drove to his mother's house and, after speaking with her, went to a police station where he and his friends reported the incident. Williams stated that his friends eventually got a hold of him by phone to see if he was alright. He then went to the police station as well.

Thomas Smith testified that he was an evidence technician with the Detroit Police and that he collected spent shell casings, a bullet, and samples from a blood trail found at the scene. Smith said that the blood trail went down the sidewalk away from the area of the shell casings and then between two houses. Detective Lieutenant David Vroman, an expert on firearms identification, testified that he examined nine shell casings found at the scene as well as one bullet. He determined that five casings were fired from Johnson's handgun. The other four casings and the bullet were fired from the same gun, but not from Johnson's gun. Smith stated that Johnson's truck had a bullet hole in the cab as well as damage from a bullet in the rear. Smith also noted that it was cold on the night in question and that he would not expect someone who was shot to bleed out immediately if he were wearing heavy clothing.

Kenneth Emerson testified that he was an investigator with the Detroit police. He stated that he learned that Barnett had been admitted to the hospital with gunshot wounds on the night at issue. Emerson went to the hospital and recovered Barnett's clothing. The clothing included a black jacket and khaki pants. David Hansberry testified that he was a sergeant with the Detroit Police and that he too went to the hospital where Barnett was being treated. Hansberry said he observed a nurse take a DNA sample from Barnett. Glenn Hall testified as an expert on DNA. He stated that the samples of blood taken from the blood trail matched the DNA profile from Barnett.

Barnett testified on his own behalf after the prosecution closed its case. He stated that, on the night in question, he was walking home from a nearby gas station where he had purchased some items. He heard some shots that he thought were coming from the south and began to cut through a field to the north when he encountered a man. The man was just standing in the field and began to shoot him for no reason. The man shot him in the arm, groin, left arm, right arm, side and leg. Barnett said he ran down the street and cut between two houses. He waited there for about "five minutes until all the gunshots was over with, and then that is when I came back out, and I saw a car." He said the car had "two females" in it and they "put me in the car" and took "me to the hospital."

In closing, Barnett's trial counsel suggested that the evidence showed that Barnett was an innocent victim who just happened to be at the wrong place at the wrong time. He suggested that there was a shooting and that it was likely "a neighborhood beef" and that it involved different shooters. He also suggested that Johnson, Cooper, Williams, and Rockymore were not telling the full story and that they contrived the story that they gave to the police to cover something up.

The jury rejected the notion that Barnett was just an innocent by-stander and found him guilty of assault with the intent to rob while armed and of felony-firearm. This appeal followed.

II. ADMISSION OF EVIDENCE

A. STANDARDS OF REVIEW

Barnett first argues that the trial court erred when it precluded his trial counsel from soliciting testimony concerning the amount of cash that Johnson had on him at the time in question. Barnett argues that this evidentiary decision deprived him of his constitutional right to present a defense and, for that reason, states that this Court must review the decision de novo.

Although we agree that Barnett has a constitutionally guaranteed right to present a defense, it is well-settled that this right is not absolute: the defendant must still comply with the rules of procedure and evidence that are designed to ensure the fairness and reliability of the trial. See *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). And it is equally well-settled that this Court does not review a trial court's evidentiary decisions de novo; rather, this Court reviews them for an abuse of discretion. *Id.* at 353. A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *Id.*

B. THE TRIAL COURT'S RULING

Before the start of voir dire, the prosecutor made an oral motion in limine asking the trial court to preclude Barnett's trial counsel from questioning Johnson about the amount of cash he had during the incident and about the jewelry that he was wearing. The prosecutor made the motion because Barnett's trial counsel inquired about the cash and jewelry at the preliminary exam and suggested that Johnson did not come by the cash and jewelry through his employment at a local hospital. The prosecutor argued that this testimony was not relevant and, even if it were, "it would be more prejudicial than probative, the jury being left with the inference that Mr. Johnson is somehow up to no good because he has more jewelry or cash than he should working at a hospital."

Barnett's trial counsel argued that the jewelry and cash were relevant because the evidence tended to provide much needed context. Specifically, he argued that the shooting might have been "a retaliation type shooting" and might have occurred because Johnson was nervous because he had "two Allison coats, a $2,500.00 navigation unit" and "$3,000.00 in cash." The prosecutor responded that there was no evidence that Johnson shot for any reason other than self-defense.

The trial court determined that the evidence concerning how Johnson was dressed—including his jewelry—was relevant because a potential robber would be more likely to target someone who was well-dressed. The court also allowed testimony about the expensive coats because they might have been visible. Further, it determined that any potential for prejudice was not such that it warranted preclusion under MRE 403. However, it determined that the cash was not "open and obvious" to view and, because there was no evidence that anyone demanded the money, the fact that Johnson had the cash was not relevant. For that reason, it determined that Barnett's trial counsel could not inquire about the cash.

C. ANALYSIS

Relevant evidence is generally admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Nevertheless, even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403.

Here, Barnett's trial counsel argued that the evidence that Johnson had $3,000.00 in cash on him at the time of the shooting was relevant for two purposes: to show that the shooting was a "retaliation-type shooting" and to show that Johnson might have shot Barnett because he was

excessively nervous. The fact that Johnson had a substantial amount of cash did not—standing alone—permit an inference that the shooting involved a neighborhood dispute or was retaliatory. Indeed, in order to reach this strained conclusion, one would have to first infer that Johnson came by the cash through illicit means. Then one would have to infer that, because he came by the cash illicitly, he must have been involved in activities that resulted in some sort of dispute. Further, one would have to infer that the dispute culminated in the shooting. This conclusion is entirely speculative and does not follow from the mere fact that he had a substantial amount of cash. Accordingly, the trial court did not err when it concluded that the evidence concerning the cash was not relevant. See MRE 401. Even if Barnett had other evidence that, when combined with the evidence that Johnson had the cash, collectively permitted such inferences, that use of the evidence involves an improper character to conduct inference. See MRE 404.

On appeal, Barnett argues that the fact that Johnson had so much cash could also have been used to show that Johnson was "paranoid" and, as a result, prone to "misapprehend" a robbery or "shoot a random passerby." That is, Barnett maintains that this evidence was relevant to show that Johnson got out of his truck—leaving his three friends behind—approached Barnett, and then shot him six or seven times solely out of fear that Barnett might be out to rob him. And this without any evidence to suggest that Barnett did something to trigger such an extreme response. Given the tenuous connection between the evidence and the suggested inference, we cannot conclude that the trial court was incorrect when it stated that the evidence concerning the cash was not relevant in that way. Further, even accepting that it might have been relevant to show that Johnson was nervous—albeit not paranoid to the point of irrationality—there was a clear danger that the jury might make improper character inferences about Johnson, given the new truck, the neighborhood, the evidence that he had a substantial amount of cash and jewelry, and the expensive items. Not all young men of Johnson's background come by their wealth through illicit activities. And this danger substantially outweighed any legitimate probative value that the evidence might have had. See MRE 403; MRE 404.

For these reasons, we cannot conclude that the trial court abused its discretion in prohibiting Barnett's trial counsel from eliciting testimony about the cash. At best, the trial court's decision involved a close decision; and this Court will not find an abuse of discretion simply because we might have come to a different conclusion on a close evidentiary matter. See *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Finally, even if we were to conclude that the trial court erred when it excluded this evidence, we would nevertheless decline to grant Barnett any relief. There was compelling testimony by the four eyewitnesses that established—along with the physical evidence—that Barnett was the masked man who approached the truck from the driver's side, and opened Johnson's door while brandishing a handgun. Given the overwhelming evidence that Barnett actually possessed a firearm and assaulted Johnson with that firearm with the intent to rob him, any error in the exclusion of this evidence likely did not affect the result and would not, for that reason, warrant any relief. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

III. FLIGHT INSTRUCTION

A. STANDARDS OF REVIEW

Barnett next argues that the trial court should not have given the jury a flight instruction. Specifically, he argues that the flight instruction was inappropriate because there was no evidence that he left the scene of the shooting to evade capture by the police. This Court reviews the trial court's determination that a particular instruction is applicable to the facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, this Court reviews de novo the instructions as a whole to determine whether they sufficiently protected the defendant's rights and fairly presented the issues to the jury. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

B. ANALYSIS

A trial court must give an instruction requested by a party if there is evidence to support the instruction. *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). The prosecutor in this case asked the trial court to instruct the jury that it could consider Barnett's flight from the scene of the shooting as evidence that he had a guilty conscience. Barnett's trial counsel did not object to this instruction and the trial court gave the requested instruction to the jury. Specifically, the trial court told the jury that there was evidence that Barnett ran from the scene of the shooting, but that this "evidence does not prove guilt." Rather, he noted, a person "may run or hide for innocent reasons such as panic, mistake or fear" and may run "because of a consciousness of guilt." In the end, the trial court instructed, it was up to the jury to "decide whether the evidence [of flight] is true, and if true, whether it shows that the defendant had a guilty state of mind."

Evidence of flight is admissible: "Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). However, mere departure from the scene of a crime is not sufficient to warrant an instruction on flight. See *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). There must be some evidence that permits an inference that the defendant feared apprehension. *Id.* Flight has been applied to actions such as fleeing the scene, leaving the jurisdiction, running from police officers, resisting arrest, and attempting to escape from custody. *Coleman*, 210 Mich App at 4.

Here, there was eyewitness testimony that established that, after unsuccessfully attempting to rob the men in the truck, Barnett ran from the scene. In addition, Barnett himself testified that he fled the scene of the shooting, hid between two homes, and then left the area after two persons stopped to help. Although his flight can readily be explained—and perhaps more plausibly explained—as flight from danger, it is also possible that his flight was motivated by consciousness of guilt. Indeed, if the eyewitnesses are to be believed, Barnett possessed a gun and was masked in some way during the shooting; yet, he appeared at the hospital without a mask or gun. Taken as a whole, it is possible to infer from the evidence that Barnett ran from the scene of the shooting to escape danger, evade capture, or dispose of the more incriminating evidence—the gun and mask—or any combination of the three. And, under these circumstances,

it is for a properly instructed jury to decide what inferences are to be drawn from the evidence. See *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927).

Because there was evidence to support the flight instruction, we cannot conclude that the trial court abused its discretion when it agreed to give the instruction. *Gillis*, 474 Mich at 113. Further, as read to the jury, the instruction adequately protected Barnett's rights by clarifying that flight can be used to show consciousness of guilt, but can also be innocent. *Martin*, 271 Mich App at 337-338. Finally, we cannot agree that Barnett's trial counsel's failure to object to this instruction fell below an objective standard of reasonableness under prevailing professional norms. See *Yost*, 278 Mich App at 387. As already noted, the trial court properly gave the jury the instruction on flight; as such, Barnett's trial counsel cannot be faulted for failing to make a meritless objection. See *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

IV. SENTENCING ERROR

Lastly, Barnett argues that the trial court erred when it scored offense variable (OV) 10 at 15 points. See MCL 777.40 (requiring a trial court to score points for conduct involving the exploitation of a vulnerable victim). Specifically, Barnett argues that, under our Supreme Court's decision in *People v Cannon*, 481 Mich 152, 160-161; 749 NW2d 257 (2008), the trial court could only score OV 10 at 15 points if it found that Barnett directed pre-offense conduct at a vulnerable victim. Because there was no evidence that he directed pre-offense conduct at the men in the truck or that those men were particularly vulnerable, he maintains, the trial court could not properly score OV 10 at 15 points. However, Barnett concedes on appeal that, even if the trial court had scored OV 10 at zero points, that would not have altered his minimum sentence range. See MCL 777.62. Because the trial court sentenced Barnett using the correct guidelines range, any error in the scoring of this variable does not warrant resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

There were no errors warranting relief.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly