

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFF WILLIAM HURLEY,

Defendant-Appellant.

UNPUBLISHED

July 14, 2011

No. 298463

Wexford Circuit Court

LC No. 2009-009267-FH;
2010-009319-FH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of resisting and obstructing a police officer, MCL 750.81d(1), operating a motor vehicle while intoxicated (OWI), MCL 257.625(1), possessing open intoxicants in a motor vehicle, MCL 257.624a, carrying a concealed weapon in a motor vehicle, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. Defendant also challenges the sentence imposed by the trial court. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

During the early morning hours of November 20, 2009, Joshua Baldwin sustained a gun shot wound to his left leg after a night of drinking with friends. Evidence established that, earlier in the evening, Baldwin, defendant, and other friends gathered at the home of Baldwin's mother to play cards and drink alcohol. Later, the group went to Wal-Mart in a white van where a security camera showed Baldwin purchasing a box of .45-caliber ammunition at 12:24 a.m. Thereafter, while drinking with friends at the home of Tamitha Simmons, defendant went outside to the van and retrieved a .45-caliber pistol. Though testimony differed about whether the gun was loaded at the time, evidence shows that defendant and Baldwin played with the gun, pointing it at themselves and pulling the trigger.

The circumstances that led to Baldwin's injuries are somewhat unclear. Residents who lived near Simmons' home testified that they heard four gun shots between approximately 2:50 a.m. and 3:05 a.m. Residents then saw a vehicle leaving the area. The next morning, Simmons found a .45-caliber shell casing inside her front door. Just before 3:25 a.m., a white van similar to the one defendant was driving that evening pulled up to a McDonald's drive-thru. The driver placed an order and paid for it, but drove off without picking up the food. Thereafter, defendant

appeared at the home of Theresa O'Farrell and Justin Coutu. He pounded on the door and said he needed a licensed driver to take someone to the hospital. Defendant said Baldwin had been shot, but he assured Coutu that he did not have the gun in the van. Defendant also told O'Farrell that he "got rid" of the gun.

Coutu drove defendant and Baldwin to Mercy Hospital in the white van. The van stopped for two to four minutes near the hospital before pulling up to the entrance. Defendant pulled Baldwin out of the vehicle and, with the help of a security guard, wheeled Baldwin into the hospital at 3:48 a.m. Coutu returned home in the white van. At approximately 3:50 a.m., a hospital surveillance video showed defendant running out of the hospital. The record reflects that a bullet was lodged in Baldwin's left leg and he lost a tremendous amount of blood. Baldwin testified that hospital personnel had to bring him back to life twice that night and he continues to suffer numerous physical problems because of damage caused by the gun shot. However, Baldwin has no memory of how he was shot or where the shooting occurred.

After defendant left the hospital, he briefly returned to Coutu and O'Farrell's house. Both Coutu and O'Farrell testified that defendant said the shooting occurred at McDonald's. Cadillac police officers began to patrol the area for a white van after they received calls about the gun shots in Simmons' neighborhood and the victim who was dropped off at the hospital. Two officers spotted defendant driving the white van and the officers activated their overhead lights. After a couple of blocks, defendant pulled the van into a driveway and stopped partially on a lawn. Defendant was not fully cooperative with the officers when he got out of the van. He did not walk backwards toward the officers as instructed and, when asked, he failed to turn around and failed to get down onto the ground. After he was handcuffed, defendant also attempted to bring his hands from behind his back to his front by pulling his legs through his shackled arms. Officers found large quantities of blood in the van as well as open containers of alcohol. Defendant had slurred speech, red, watery eyes, coordination problems, and he smelled of alcohol. Defendant refused to submit to breathalyzer tests, so officers obtained a search warrant to test his blood alcohol content. At the hospital, defendant was combative, he spit at the officers, he had to be held down for a photograph, and he had to be forcefully returned to the police car. Laboratory test results showed that defendant's blood alcohol content was .13.

Defendant testified that he was drinking that night with Baldwin and some other friends, but he denied that he ever had a gun or that he ever saw Baldwin with a gun. He also denied knowing that Baldwin bought ammunition at Wal-Mart. According to defendant, after he and Baldwin left Simmons' house, they went to the trailer home of another friend of Baldwin's. Defendant could not identify the address of the trailer or any of the people present. Defendant testified that Baldwin stayed at the trailer while defendant drove an unnamed man and his girlfriend to McDonald's. Defendant recalled that, while they were at the drive-thru, the man received a call on his cell phone that Baldwin had shot himself, so defendant left without picking up the food and he returned to the trailer to take Baldwin to the hospital. Defendant maintained that he asked Coutu to drive the van to the hospital because he had been drinking and did not have a driver's license.

As noted, following the close of proofs, the jury found defendant guilty of resisting and obstructing a police officer, OWI, possessing open intoxicants in a motor vehicle, carrying a concealed weapon in a motor vehicle, felon in possession of a firearm, and felony-firearm.

II. ANALYSIS

A. ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel. Specifically, defendant maintains that trial counsel should have stipulated to an unnamed prior felony conviction for purposes of his felon in possession of a firearm charge instead of allowing the prosecutor to submit a copy of defendant's prior record of conviction. "Our review of this unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record." *People v Mesik (On Recon)*, 285 Mich App 535, 542; 775 NW2d 857 (2009). As the Court in *Mesik* further explained:

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). [*Id.* at 542-543.]

We hold that defendant has failed to overcome the presumption that defense counsel's conduct amounted to sound trial strategy. After conferring with defendant, defense counsel did not object to the submission of defendant's record of conviction on a charge of obstruction of justice. While defendant is correct that this is similar to the resisting and obstructing charge at issue here, in light of defendant's extensive criminal record and the gun charges in this case, it was reasonable for counsel to disclose the nature of the predicate felony rather than allow the jury to speculate about whether defendant's prior conviction may have involved firearms or violence. Moreover, defendant cannot show that, absent this decision, the result of the proceedings would have been different. The reference to defendant's prior conviction was brief and ample evidence established that defendant had the firearm in his possession and that he resisted and obstructed the police officers during his arrest.

Defendant also claims that trial counsel provided ineffective assistance when he failed to object during the prosecutor's cross-examination of defendant. Defendant maintains that, although he had exercised his *Miranda*¹ right to remain silent, the prosecutor asked defendant why he failed to tell police officers the version of events he offered at trial. According to defendant, counsel should have objected because this violated his due process rights.

Defendant is correct that, "when a defendant chooses to exercise his right to remain silent, that silence may not be used against him at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Here, the prosecutor asked defendant, "Was there a reason you

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

never told this string of events to the police or anyone else?” Defendant responded by explaining that, in his prior “dealings with police” they did not believe him and he does not like police officers. Defendant’s surprisingly candid response aside, it appears that the prosecutor’s question could have related to either the pre-*Miranda* and post-*Miranda* period of defendant’s arrest, and was also clearly focused on statements defendant made to other witnesses that were wholly inconsistent with his trial testimony. But, were we to find the prosecutor’s questioning improper, defendant has again failed to show prejudice. As discussed, there was ample evidence to establish defendant’s guilt of the charged offenses and the testimony of various witnesses, the timeline established by the evidence, and the video images thoroughly disproved defendant’s version of events. Accordingly, he cannot establish that, absent counsel’s failure to object, the outcome of the trial would have been different.

B. SENTENCE

Defendant contends that the trial court erred in scoring two offense variables at sentencing. “We review sentencing guidelines scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). “Any statutory interpretation concerning the application of the sentencing guidelines presents a question of law subject to review de novo on appeal.” *Id.*

The trial court scored 25 points for offense variable three (OV 3), physical injury to the victim, which is permitted if a victim sustains life threatening or permanent incapacitating injury. MCL 777.33. Here, Baldwin undeniably sustained life threatening injuries and evidence showed that defendant produced, carried, and presented Baldwin with the gun that caused those injuries. Baldwin testified that he did not own a gun, evidence showed that defendant retrieved the gun that evening, he played with it along with Baldwin, he carried it in the white van, and he “got rid” of the gun after Baldwin was shot. Moreover, though defendant was not charged with the actual shooting of Baldwin, circumstantial evidence clearly permits the inference that defendant may, indeed, have fired the weapon. In either case, because a victim, Baldwin, sustained a life threatening injury, the trial court correctly scored OV 3.

Defendant also claims that the trial court erred in scoring 10 points for offense variable 19 (OV 19). MCL 777.49 provides:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice.

Defendant argues that the conduct that relates to his interference with the administration of justice occurred after the charged crimes were complete and that, therefore, that conduct cannot

be used for purposes of scoring OV 19. As defendant acknowledges, the case of *People v Smith*, 488 Mich 193; 793 NW2d 666 (2010), was pending in our Supreme Court when defendant filed his brief on appeal. In *Smith*, the Court specifically ruled that OV 19 “may be scored for conduct that occurred after the sentencing offense was completed.” *Id.* at 195. Accordingly, defendant is not entitled to resentencing on this basis. Moreover, we observe the ample evidence supports the trial court’s score. Defendant disposed of the gun by throwing it after the shooting, he failed to follow the directives given to him by the arresting officers, police had to further restrain defendant after he was nearly able to get his hands in front of his body while handcuffed, he fought and spit at police officers during his blood draw which required them to place a hood on him, and he had to be forcibly removed from the hospital. Defendant’s claim is without merit.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Pat M. Donofrio