STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2012
v	No. 304521 Allegan Circuit Court
FREDERICK JOSEPH HARRIS, JR., Defendant-Appellant.	LC No. 09-016475-FC

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted of two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant argues that certain evidence should not have been admitted, that irregularities at trial require reversal, and that certain offense variables (OVs) were improperly scored during sentencing. For the reasons set out below, we affirm.

I. FACTS

Bobby Jo Felty and Brandon Beardsley testified at trial that when they repossessed defendant's 2008 Chevrolet Silverado pickup truck, defendant came out of his house with a long gun and threatened to kill them. As they towed the truck away, Felty and Beardsley saw the white Pontiac Bonneville in defendant's driveway start up and later saw it come toward the tow truck. Felty and Beardsley could not see who was driving the white Bonneville, but neither man had seen anyone but defendant at defendant's house.

The Bonneville sped toward the tow truck, and Felty and Beardsley heard a gunshot. While Beardsley called 911, Felty swerved across the road to prevent the Bonneville from coming alongside, and there was another gunshot. Felty testified that the gunshots sounded similar to those from a .22-caliber rifle, while Beardsley testified that the gunshots sounded like rifle shots. At the next intersection, Felty turned, and the Bonneville turned around and left the scene.

Shortly thereafter police officers came to defendant's home and he gave them permission to search his property. The officers found a shotgun and .22-caliber rifle in the bed of a dump

truck. Though the truck was covered in a layer of dew, the guns were dry and the rifle smelled as though it had been fired recently.

Defendant testified at trial that two Mexicans stole his truck, and that he tried to follow them in his Bonneville but could not find them. He then called 911 to report the theft of his truck and went home. He testified that the guns belonged to his brother, and that he had put them in the dump truck because he was afraid that the police might shoot him if they found the guns.

A jury convicted defendant of two counts of assault with intent to commit great bodily harm less than murder, possession of a firearm during the commission of a felony, and felon in possession of a firearm. He was acquitted of two charges of assault with intent to murder. Defendant now appeals.

II. ANALYSIS

Defendant first argues that that the trial court erred by allowing evidence of a statement defendant made during interrogation by the police after defendant invoked his right to remain silent. In considering a trial court's decision on a motion to suppress, we review the trial court's factual findings for clear error. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). We review de novo the trial court's application of its factual findings to the constitutional standards. *People v Stevens* (*After Remand*), 460 Mich 626, 631; 597 NW2d 53 (1999).

An accused, when subject to a custodial interrogation, must be warned that he has a right to remain silent, that his statements can be used against him, and that he has a right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A defendant's statements are admissible if he voluntarily, knowingly and intelligently waives these rights. *Id.*

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked. [*Id.* at 473-474].

The trial court found, after reviewing the DVD of the interview, that defendant invoked his right to remain silent by stating "We're done here, we're not talking." However, the prosecution maintained and the trial court agreed that defendant's assertion of his right to remain silent was waived when he continued to participate in the conversation. Unfortunately, significant portions of the DVD are no longer playable, and the partial transcript of the interview does not contain the critical section. As there was no testimony regarding what occurred during this interview, and the trial court does not specifically describe the course of the interrogation

after defendant said "we're done here, we're not talking", we cannot effectively review this decision for error.

However, under the facts of this case, we conclude that if there was an error, it was harmless beyond a reasonable doubt and so does not require reversal. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Defendant does not identify anything in his statement that he claims prejudiced his case. From the record, it appears that the only parts of his statement that were inclupatory were his admission that he always kept "a .22" at his house, and that he did put the gun in the dump truck before the police before the police arrived. However, it was not disputed that the rifle was found in defendant's dump truck, and at trial defendant himself testified that he had guns in his home although they were owned by his brother.

The defense points out that the prosecutor also used defendant's statement to impeach his credibility, but there was substantial other evidence that impeached his credibility, and the case was not simply a credibility contest between complainants and the defendant. There was physical evidence that supported the prosecution's theory that defendant chased and shot a firearm at Felty and Beardsley. The .22-caliber rifle recovered in the dump truck smelled like it had been recently fired. Also, the pickup truck that was towed away had a hole in one tire, a smear on the rim, and a broken window. Under these circumstances, we think it clear beyond a reasonable doubt that, even without defendant's custodial statement, the jury would have found defendant guilty of assault with intent to commit great bodily harm, felony-firearm, and felon in possession. Accordingly, the erroneous admission of defendant's custodial statement does not require reversal.

Defendant next argues that the trial court erred by allowing Deputy Ross Mysliwiec to testify that the hole or dent in the window frame of the pickup was consistent with a .22-caliber bullet. Defendant argues that this was expert testimony and that Mysliwiec was not qualified to give expert testimony. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008).

The trial court held, pursuant to *People v Oliver*, 170 Mich App 38; 427 NW2d 898 (1988), mod 433 Mich 862 (1989), that Mysliwiec would be allowed to offer a lay opinion that the damage to the pickup could have been caused by small caliber bullets as long as Mysliwiec had sufficient experience to distinguish damage from small caliber bullets from other things. At trial, Mysliwiec testified that, as an evidence technician and owner of firearms, he was familiar with .22-caliber bullets. Mysliwiec testified that it was his opinion that the dent or hole in the window frame of the pickup "was the size and consistency of a .22 caliber bullet." On cross examination, Mysliwiec admitted that the hole or dent could have been caused by a rock or anything "small enough and hard enough." When examined by the court, Mysliwiec testified that he owned a .22-caliber rifle and that he has "put probably thousands of rounds through it." However, he could not recall whether he had ever witnessed any damage to a hard metal surface from a .22-caliber bullet. Immediately thereafter, in the presence of the jury, defendant moved to strike Mysliwiec's opinion that the dent or hole could have been caused by a .22-caliber bullet. He claimed that the opinion was not based on personal knowledge. The trial court sustained the objection and struck "the officer's testimony as to the .22 caliber weapon or slug that may have caused this . . . ." It stated that the testimony would not be considered by the jury. The trial court then instructed the jury to "disregard the officer's testimony rendering an opinion

concerning the cause of the damage to the pickup that he observed. Everybody understand that that [sic] that's a direct and specific direction to you not to consider that . . . ." At the conclusion of trial, the court again instructed the jury not to consider any stricken testimony.

Defendant argues that Mysliwiec should not have been allowed to testify in the first place because the subject of his testimony required expert knowledge. However, we have previously held that police officers may offer opinion testimony as lay witnesses on topics on which they have personal knowledge or experience. *People v Oliver*, 170 Mich App at 50. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In this case, the trial court did not abuse its discretion when it initially allowed Mysliwiec to offer opinion testimony that damage to the pickup could have been caused by .22-caliber bullets. The testimony was not dependent on scientific, technical, or other specialized knowledge. Moreover, Mysliwiec observed the damage to the pickup and, as an evidence technician and owner of firearms, was familiar with .22-caliber bullets. Mysliwiec's testimony would have assisted the jury in determining whether the damage to the window was caused by a bullet. However, after Mysliwiec admitted that he had never seen damage to a hard metal surface caused by a .22-caliber bullet, the trial court sustained defendant's objection to Mysliwiec's opinion testimony and struck the testimony. In other words, the trial court agreed with defendant that Mysliwiec's testimony was inadmissible.

In addition, the court twice instructed the jury to disregard Mysliwiec's testimony. A jury is normally presumed to "follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001) (citation omitted).

Finally, even absent Mysliwiec's opinion testimony, the evidence, as reviewed above, was very strong. A mistrial is warranted where an error in the proceedings prejudices the defendant and impairs his ability to get a fair trial. *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). Under these circumstances, defendant is not entitled to relief, particularly because he did not request a mistrial below.

Defendant also argues that the trial court misscored OVs 1, 2, and 17. The interpretation and application of the sentencing guidelines involve questions of law that this Court reviews de novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). However, a trial court's scoring decisions are reviewed for an abuse of discretion. *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010). This Court will uphold a scoring decision for which there is any evidence in support. *Id.* at 179-180.

On appeal, defendant argues that the trial court erred in scoring 25 points for OV 1, MCL 777.31, and five points for OV 2, MCL 777.32. According to defendant, there was insufficient evidence to establish that he possessed a firearm and discharged it at Felty and Beardsley.

A trial court may score 25 points for OV 1 if "[a] firearm was discharged at or toward a human being." MCL 777.31(1)(a). A trial court may score five points for OV 2 if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife." MCL 777.32(1)(d). The trial court found that the testimony at trial supported a finding that defendant possessed and fired a rifle. There was testimony from Felty and Beardsley that defendant had a gun, and that they heard gunshots fired. There was also evidence that a rifle was found on defendant's property that smelled as if it had been recently fired. Thus, there was sufficient evidence to support the scoring of OVs 1 and 2.

Defendant also argues that the trial court erred in scoring ten points for OV 17, MCL 777.47, which involves the degree of negligence exhibited. Ten points may be scored for OV 17 if "[t]he offender showed a wanton or reckless disregard for the life or property of another person." MCL 777.47(1)(a). It is to be scored for all crimes against a person "if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." MCL 777.22(1).

Defendant argues that this means OV 17 may only be scored if the use of a vehicle is an element of the offense for which defendant was convicted. We disagree. MCL 777.22(1) states that OV 17 should be scored if the offense "involves the operation of a vehicle." It does not say that OV 17 may *only* be scored if a vehicle is involved. Obviously, where use of a vehicle is not an element of the offense, the wanton or reckless disregard must relate specifically to the operation of a listed vehicle, as is the case here. There was testimony that defendant chased Felty and Beardsley in a white Pontiac, and tried to pull up alongside them causing Felty to fear that he would lose control of his vehicle. Based on these facts, the trial court would not have erred in scoring OV 17 even if MCL 777.22(1) did not require it because there was sufficient evidence to support a conclusion that defendant operated his vehicle with "wanton or reckless disregard for the life or property of another person." MCL 777.47.

In his standard IV brief, defendant claims that he did not receive effective assistance of counsel because his counsel did not object to the fact that the police searched defendant's house and grounds without a search warrant. However, no warrant is necessary where a property owner consents to a search. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). Defendant consented to the search in this case, so any objection to evidence revealed by the search would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also argues in his standard IV brief that counsel was ineffective for failing to prepare a defense and present witnesses. This claim appears to be based on the fact that counsel did not present any evidence concerning "911 Genetic Markers." Felty testified that when Beardsley called 911, the cellular telephone call was routed to a Van Buren County 911 operator. Defendant argues that the "911 Genetic Markers" ensure that if a 911 call is made in Allegan County, the call is received by an Allegan County 911 operator. There is absolutely nothing in the record to indicate that any evidence or testimony about the "911 Genetic Markers" would

support defendant's assertions that, if Beardsley's 911 telephone call was answered by a 911 operator in Van Buren County, Beardsley and Felty could not have been in Allegan County when Beardsley called 911. Accordingly, defendant has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also argues that the trial court forced the jury to change its verdict and so engaged in judicial misconduct. No claim of misconduct or of alteration of the verdict was made below. According to defendant, the jury found defendant not guilty on all charges except for the charge of felon in possession of a firearm, of which it thought defendant might be guilty because, as the jury foreman explained, defendant owned the land. Defendant claims that after the jury announced its verdict, the trial court, visibly upset, asked the jury foreman if the jury had read its order, which was on a "pink sticky pad" that had been delivered to the jury with coffee cups during deliberations. The trial court then demanded that the jury obey its order and "check the box's [sic] the sticky pink pad told them to check." We have reviewed with care the record of the jury's presentation of the verdict and the court's receipt of that verdict and find that defendant's allegations of misconduct are wholly inconsistent with that record. While there was some brief confusion when the jury read its verdict, the judgment accurately reflects the jury's verdict as confirmed by the jurors and there was no judicial misconduct.

Next, defendant claims that the prosecutor engaged in misconduct. He asserts that the prosecutor created a charge—defendant's 1986 conviction for attempted felonious assault—and showed a "fake document" of the charge to the jury. Defendant also asserts that the prosecutor created a fake DVD of his interrogation. Defendant did not assert these claims of prosecutorial misconduct below. However, there is nothing in the record to indicate that the prosecutor presented a "fake document" to the jury. Defense counsel stipulated that defendant had a 1986 conviction for attempted felonious assault. Counsel agreed that the judgment of sentence from the Delta Circuit Court was an "authenticating document" and was admissible[1] In addition, there is nothing in the record to indicate that the prosecutor in any way fabricated the DVD recording of defendant's interrogation. Defendant also argues that the prosecution engaged in a vindictive prosecution but bases this claim solely on the number of charges brought. A prosecutor has discretion in charging a defendant. *People v Goold*, 241 Mich App 333, 342; 615 NW2d 794 (2000). Defendant, who having been previously convicted of a felony, was barred from possessing a firearm, was accused of firing multiple rifle shots at two men. He was therefore properly charged with multiple assault counts and with the felony firearm and felon in possession charges. Defendant also objects to the fact that he was charged in a separate prosecution for having failed to appear in this case, but such a charge is also plainly a proper exercise of discretion.

Defendant appears to make a claim that his convictions are not supported by sufficient evidence. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v*

[1] Defendant claims that he refused to waive the "unauthentication" of the judgment of sentence. However, there is no indication on the record that defendant disagreed with defense counsel's decision to stipulate to defendant's 1986 conviction for attempted felonious assault.

Cline, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecutor proved the elements of the crime beyond a reasonable doubt. *Id.*

The elements of assault with intent to commit great bodily harm less than murder are "(1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). As we have detailed above, the evidence in this case was very strong, and any claim that the evidence was insufficient is wholly without merit.

Lastly, defendant argues that retrial is required on the basis of cumulative error, but this claim fails in light of our conclusion that there was only one error and that it was harmless.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause