

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

DWAYNE ADAMS,

No. 309679
Oakland Circuit Court
LC No. 2011-237608-FC

Defendant-Appellant.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of two counts of assault with intent to murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to 28 to 50 years' imprisonment for each assault with intent to murder conviction and to 3 to 7-½ years' imprisonment for the felon-in-possession conviction, to be served consecutive to concurrent sentences of two years' imprisonment for the felony-firearm convictions. Because the evidence was sufficient to support defendant's assault with intent to murder convictions, the trial court did not abuse its discretion by admitting the female victim's statements to the police pursuant to MCL 768.27c, and the trial court properly scored 50 points for Offense Variable (OV) 6, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution presented insufficient evidence to support his convictions of assault with intent to murder because it failed to establish that he had the requisite intent to kill. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In reviewing such challenges, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could reasonably conclude that the essential elements of the offense had been proven beyond a reasonable doubt. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011).

The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Erickson*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). "The intent to kill may be proven by inference from any facts in evidence." *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999) (quotation marks and citation omitted).

Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of an offense. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Further, a jury may properly consider whether the weapon used during the assault was likely to cause death. *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985).

Defendant's conduct before, during, and after the shooting supports a finding that he had the requisite intent to kill Katina McDonald, his former girlfriend and the mother of his child, and her new boyfriend, Mitchell Still. The evidence demonstrated that defendant and McDonald's relationship ended in December 2009 against defendant's wishes; that McDonald believed that defendant shot at her in January 2010 because he was upset with her; and that immediately before the shooting at the Red Roof Inn, a hotel guest saw defendant circling the parking lot where McDonald had left her car overnight. A rational trier of fact could reasonably infer from such evidence that defendant was stalking McDonald and that after finding her car in the parking lot of the Red Roof Inn, he waited with his gun ready for McDonald and Stills to return so that he could kill them.

During the assault, defendant blocked Still's vehicle with his car and fired three shots with a .45 caliber semi-automatic handgun at Still's vehicle while Still and McDonald were inside. One of the bullets went through the passenger door and struck the front passenger seat where McDonald had been sitting before she crouched down on the floor of the car for her protection. After the shooting, McDonald noticed a hole in her jacket that she believed had been caused by the bullet. When the police recovered the gun, they observed that there were three more "live" bullets in the gun, but that the gun had jammed, preventing defendant from firing additional shots. It can reasonably be inferred that if the gun had not jammed, defendant would have fired additional shots. It may also be inferred that if McDonald had not crouched down on the floor of the car, she could have been struck and killed by the bullet that had hit the passenger seat where she had been sitting.

After the shooting, defendant abandoned his car and hid his gun near a tree in the vicinity of his car. He then fled and was not apprehended for more than one year, during which time the police actively searched for him. "(E)vidence of flight is admissible to support an inference of consciousness of guilt and the term flight includes such actions as fleeing the scene of the crime." *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) (quotation marks and citation omitted). Defendant's flight and abandonment of his car and gun support a reasonable inference that he had the requisite intent to kill McDonald and Still. Thus, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant intended to kill the victims. Accordingly, the prosecution presented sufficient evidence to establish the elements of assault with intent to murder.

II. ADMISSION OF MCDONALD'S STATEMENTS TO POLICE

Defendant next argues that the trial court erred by admitting McDonald's written and oral statements to Detective Cummings because the evidence unfairly prejudiced him by allowing the jury to hear that he was stalking McDonald and that she had a pending case against him. The decision to admit evidence is within the trial court's discretion, and will be reversed only when the court abuses its discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable

and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). “[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo.” *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). When such preliminary questions of law are at issue, a court abuses its discretion by admitting evidence that is inadmissible as a matter of law. *Id.*

“‘Hearsay’ is a statement, other than the 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). Hearsay is generally inadmissible unless it falls under a particular hearsay exception. *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). “Our Legislature enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases.” *People v Meissner*, 294 Mich App 438, 445; 812 NW2d 37 (2011). “In MCL 768.27c, the Legislature determined that under certain circumstances, statements made to law enforcement officers are admissible in domestic violence cases.” *Id.* MCL 768.27c, provides, in relevant part:

(1) Evidence of a statement by a declarant is admissible if all of the following apply:

(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement’s trustworthiness.

(e) The statement was made to a law enforcement officer.

(2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

McDonald's written and oral statements describing the shooting to the detective were admissible under MCL 768.27c, as statements made to a law enforcement officer describing the threatened infliction of physical injury in a case involving domestic violence. Detective Cummings testified that McDonald told him that she had parked her car in the back of the Red Roof Inn complex because she was "kind of weary" of defendant based on his "previous stalking type behavior." The trial court also admitted McDonald's written statement to the police explaining what had happened on the day of the shooting and asserting, "[t]his is the second time he has done this to me. He is currently in the court system." This case involves domestic violence because defendant and McDonald were previously involved in a dating relationship and have a child in common. MCL 768.27c(5)(c)(iii) and (iv). Further, McDonald made the statements to law enforcement officers on the day of the shooting under circumstances indicative of their trustworthiness. MCL 768.27c(1)(c), (d), and (e). Notably, other evidence corroborated McDonald's statements. MCL 768.27c(2)(c).

Defendant's argument that he was prejudiced by the statements is without merit. The charges against defendant that arose from the previous shooting incident were consolidated with the instant charges for trial. McDonald testified concerning the events of the first shooting and maintained that she was scared of defendant because of the previous shooting. She testified that everywhere she went she would "just kind of look to make sure [defendant] was nowhere around." Thus, the jury was informed of defendant's stalking behavior and the fact that McDonald believed that defendant had previously shot at her. Therefore, defendant was not prejudiced by the testimony as he claims, and the trial court did not abuse its discretion by admitting the evidence pursuant to MCL 768.27c.

III. OV 6

Finally, defendant argues that the trial court erred by scoring 50 points for OV 6 because the evidence did not show that he had a premeditated intent to kill. This Court reviews de novo the application of the statutory sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotation marks and citations omitted). "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leverage*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

MCL 776.36(1)(a), pertaining to the "offender's intent to kill or injure another individual," directs a sentencing court to score 50 points for OV 6 if "[t]he offender had premeditated intent to kill" Contrary to defendant's argument, the trial court properly scored 50 points for OV 6 because the evidence demonstrated defendant's premeditated intent to kill the victims. To establish premeditation, there must be "some time span between [the] initial homicidal intent and [the] ultimate action" *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979) (quotation marks and citation omitted). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person the time to take a 'second look.'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (citations omitted).

Premeditation and deliberation may be inferred from the surrounding circumstances. See *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

It can be inferred from the evidence presented during trial that defendant circled the Red Roof Inn parking lot while waiting for the victims to return so that he could shoot and kill them. While circling the parking lot, defendant had adequate time to take a “second look” before going forward with the ultimate action of blocking Still’s car so that Still could not drive away and firing three shots into the car. Defendant would likely have fired additional shots, but the gun jammed. One of the shots struck the passenger seat where McDonald had been sitting. After the shooting, defendant abandoned the car and the gun, fled the scene, and eluded capture for more than one year. Because the record evidence supported the trial court’s score of 50 points for OV 6, we must uphold the court’s scoring decision. *Hornsby*, 251 Mich App at 468.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens