S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK LAURIE TULK,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 166122
LC No. 93-005454-FH

Before: MacKenzie, P.J., and Saad and C.F. Youngblood*, JJ.

PER CURIAM.

Defendant fired several shots at three hunters who had entered the property on which defendant rented a house. The hunters had entered the property in order to retrieve a wounded goose. Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082 and was sentenced to three to six years' imprisonment, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying defendant's motion for a bill of particulars. We disagree. The trial court's decision to provide a defendant with a bill of particulars to inform him of the charge against him is reviewed for an abuse of discretion. *People v Harbour,* 76 Mich App 552, 557; 257 NW2d 165 (1977). Where a preliminary examination adequately informs a defendant of the charge against him, the need for a bill of particulars is obviated. *Id.* In this case, defendant was present with counsel at the preliminary examination to hear both the prosecutor's recitation of the offense and the court's recitation of the elements of the offense. He heard the testimony of the complainant, and he fully cross-examined the witnesses. Clearly, defendant knew he was charged with shooting at the hunters; whether he intended to injure them or frighten them was not dispositive since either intent is sufficient under MCL 750.82; MSA 28.277, and whether his intent was merely to scare the geese was a jury question. We find no abuse of discretion.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that the trial court should have suppressed certain statements he made after he was arrested in his home. Again, we disagree. The statements were not the product of an illegal arrest. A review of the record establishes that defendant consented to the arresting officers entering his home, and the facts and circumstances within the arresting officers' knowledge at the time of the arrest could reasonably lead a prudent person to believe that defendant fired his gun at the hunters. See *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). Furthermore, the trial court did not clearly err in finding that defendant subsequently gave a voluntary statement at the sheriff's department. *People v Marshall,* 204 Mich App 584, 587; 517 NW2d 554 (1994). Defendant was given his *Miranda* rights [*Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] and freely waived them. The court correctly noted that there was nothing in the record to indicate that defendant was suffering from any disability or infirmity that would tend to coerce a statement. The trial court's refusal to suppress the statement was not clearly erroneous, *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983), and does not require reversal.

We also reject defendant's argument that his felonious assault conviction was against the great weight of the evidence. The verdict finds reasonable support in the record and was not against the clear weight of the evidence. *People v DeLisle,* 202 Mich App 658, 661; 509 NW2d 885 (1993). The trial court did not abuse its discretion in denying defendant's motion for new trial on this ground. *Id.*

Defendant next claims the trial court improperly instructed the jury with regard to the offense of felonious assault. The court read CJI2d 17.9 virtually verbatim, and defendant did not object to the instruction as read. Further, following the instructions, the court stated on the record that, with certain exceptions not relevant here, the instructions comported with defendant's requests. We find no error.

Defendant contends that his sentence was disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The claim is without merit. Because defendant was sentenced as an habitual offender, the sentencing guidelines do not apply, but are merely a starting point in determining whether defendant's sentence was disproportionate. *People v Gatewood,* 214 Mich App 211, 213; 542 NW2d 605 (1995). The key test is whether the sentence is proportionate to the seriousness of the offense and the circumstances of the offender. *Id.,* p 214 n 2. In this case, it is. Defendant shot at individuals who entered land he did not own. There was evidence that he had threatened other persons, as well. Defendant had one prior felony, involving stealing a pickup truck which he believed he needed more than the owner did. As noted by the court, defendant had exhibited increasing signs of crossing the line from eccentricity into criminal activity, and his criminal conduct had escalated into more dangerous actions in the form of shooting at people. Defendant's sentence is proportionate in light of his pattern of criminal conduct and his actions in this case. *Milbourn, supra.* We find no abuse of discretion.

Defendant also contends that the trial court erred in failing to address specifically each of the errors that defendant contended were contained in his presentence report. After reviewing the sentencing transcript, we find that the trial court adequately responded to defendant's objections and

that neither a remand nor resentencing is necessary. See *People v Daniels,* 192 Mich App 658, 675-676; 482 NW2d 176 (1991).

In six related issues, defendant, in his supplemental brief, argues that it was lawful for him to fire warning shots at the hunters because they were trespassing on the property he rented. We disagree. No one may, in defense of mere land against trespassers, assault the invaders with a dangerous weapon. *People v Doud,* 223 Mich 120, 130; 193 NW 884 (1923). "The law forbids such a menacing of human life for so trivial a cause." *Id.* Defendant claims that, absent an attempted battery, he had a right to discharge his gun to scare away the hunters. However, the precise issue in this case was whether there *was* an attempted battery; the jury concluded that there was. Defendant also claims that he did not know what "unlawful act" the prosecutor was charging. This argument is also without merit because the statute defining felonious assault is in the disjunctive; if there is an attempted battery – which the proofs clearly support – it does not matter whether there was an unlawful act. We find no error requiring reversal.

Defendant, in his supplemental brief, also maintains that the trial court committed error requiring reversal by denying defendant's motion for directed verdict of acquittal. Again, we disagree. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Here, the complainant testified that defendant pointed a gun at him, fired, and that one of the bullets landed twelve inches from his feet. From this testimony, a rational trier of fact could find that the essential elements of felonious assault were proven beyond a reasonable doubt.

Finally, defendant contends that he was denied a fair trial due to prosecutorial misconduct. Appellate review of alleged prosecutorial misconduct is precluded when no timely objection has been made unless failure to consider the issue would result in a miscarriage of justice. *People v Crawford,* 187 Mich App 344, 354; 467 NW2d 818 (1991). A miscarriage of justice arises when the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Vaughn,* 186 Mich App 376, 385; 465 NW2d 365 (1990). No such miscarriage of justice resulted here.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood