

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRINITY MILFORD MATTHISEN,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 253295

Calhoun Circuit Court

LC No. 2003-000940-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant Trinity Milford Matthisen appeals as of right from his jury trial convictions of assault with intent to murder,¹ felon in possession of a firearm,² and three counts of possession of a firearm during the commission of a felony.³ Defendant was sentenced as a third habitual offender⁴ to forty to seventy years' imprisonment for his assault conviction, 57 months to 120 years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for each felony-firearm conviction. The felony-firearm sentences run concurrently to each other, but consecutively to defendant's other sentences. We affirm in part and remand for the correction of defendant's judgment of sentence.

I. Factual Background

Late in the evening on March 7, 2003, Quincy Olds and his cousin, Deandro Sweet, went to Pablo's Bar in Battle Creek. Mr. Olds met his friend, Paul Heise, at the bar, who invited Mr. Olds and Mr. Sweet to an after-hours party at his home. Mr. Olds and Mr. Sweet arrived shortly after 2:00 a.m. on March 8, and joined a party of twenty-five to thirty people in Mr. Heise's

¹ MCL 750.83.

² MCL 750.224f.

³ MCL 750.227b. Defendant's assault conviction, and one of his felony-firearm convictions, arose from the shooting of Quincy Olds. Defendant was acquitted of a second count of assault with intent to murder based on the shooting of Deandro Sweet. This charge was the underlying felony for another felony-firearm conviction.

⁴ MCL 769.11.

living room. At some point, a fight erupted in which defendant became involved. He pushed Mr. Sweet, who responded by punching defendant. The two fell onto the couch. Mr. Olds walked over and grabbed Mr. Sweet in an attempt to leave the party. Defendant pulled out a handgun and began shooting. Mr. Olds saw defendant with the gun and stated that defendant shot him twice. Defendant then stood over Mr. Olds, who had fallen backward, and attempted to shoot a third time, but the gun jammed. Mr. Sweet recalled that he fought with a white man with braids, but did not know exactly who shot him. However, defendant was the only person seen with a weapon that evening.⁵

Following the shootings, everyone went outside. Defendant left with his friend, Josh Goyings, who drove defendant to his home one hour away. Defendant admitted that he left with Mr. Goyings because he heard that an ambulance and police were on the way. Defendant was afraid that he would be arrested for being at the party in violation of his parole. On the ride home, defendant showed Mr. Goyings a gun and told him “I got them guys.” The next day, Battle Creek police officers and Cass County deputy sheriffs went to defendant’s home. Defendant’s wife invited the officers inside and told them that defendant was not home. Officers saw defendant hiding underneath a comforter in a nearby bedroom. Defendant resisted arrest and officers were forced to use pepper spray. A subsequent search revealed a handgun hidden inside a mattress box spring. The handgun matched bullet casings found at the scene and had a broken magazine consistent with plastic shards found after the party.⁶

II. Flight Instruction

Defendant contends that the trial court erroneously dismissed his objection to the jury instruction regarding flight as evidence of consciousness of guilt. We disagree. We review claims of instructional error de novo.⁷ As a general rule, “[w]e review jury instructions in their entirety to determine if error requiring reversal occurred.”⁸ It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.⁹ Even if somewhat imperfect, reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.¹⁰

⁵ It appears from the testimony of the eyewitnesses that the fight in the crowded living room resulted, literally, in a pile of people. Several witnesses testified that the only person seen with a weapon was a man fitting defendant’s distinctive description—defendant was the only white man at the party with braids.

⁶ Defendant testified that he found the gun at the party and placed it under a couch cushion. After the shootings, he testified that he found the gun on the floor again. He grabbed the gun as he ran outside “for safety reasons.” He testified that he hid the gun from his wife.

⁷ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

⁸ *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

⁹ *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

¹⁰ *Aldrich*, *supra* at 124.

A jury may properly be instructed that flight is evidence of consciousness of guilt. As the defendant's intent is for the jury to determine, the jury must also be informed that flight can demonstrate other factors as well.¹¹ The trial court properly instructed the jury of the various motives a person may have for fleeing the scene of a crime in accordance with CJI2d 4.4.

Defendant also contends that insufficient evidence was presented to support this instruction. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories *if the evidence supports them*.¹² Defendant admitted that he left the party after he learned that police were coming to avoid apprehension for violating his parole. He went to his home, which was one hour away from the crime scene. When police came to arrest him, defendant attempted to hide and resisted arrest. Defendant testified regarding his motives for leaving the scene of the crime; however, it was the province of the jury to weigh the evidence and determine defendant's actual motive. Accordingly, the trial court properly instructed the jury that flight can show consciousness of guilt based on the evidence presented at trial.

III. Sentencing

Defendant contends, and the prosecution concedes, that defendant's felony-firearm conviction based on the underlying dismissed charge for assault with intent to murder improperly runs consecutively to his sentences for assault with intent to murder and felon in possession of a firearm. We agree. A felony-firearm sentence may only be consecutive to the sentence for the specific underlying felony.¹³ As this error did not affect defendant's overall sentence, however, we remand solely to allow the trial court to correct the judgment of sentence.¹⁴

Defendant also contends that the trial court improperly increased the scores given to several offense variables based on facts not determined by the jury in violation of *Blakely v Washington*.¹⁵ However, the Michigan Supreme Court has already determined that *Blakely* does not apply to this state's sentencing guidelines.¹⁶ Accordingly, we must reject defendant's claims of error.

¹¹ *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).

¹² *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975).

¹³ *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000).

¹⁴ *Id.* at 465.

¹⁵ *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹⁶ *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan).

Affirmed in part. We remand to the trial court to allow for the correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper