

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MARTIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 15, 2006

No. 259434

Van Buren Circuit Court

LC No. 03-013710-FH

Before: O’Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree home invasion, MCL 750.110a(2), and one count each of possession of a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. Defendant appeals as of right. We affirm.

Defendant was convicted following home invasions of the Mulka and Polston residences. Upon returning home, Dennis Mulka and his wife Peggy heard noises coming from the upstairs of their home. They walked to the living room and observed two black men run down their stairs and out the front door. Dennis chased the two men. While doing so, he and Peggy heard a gunshot. Dennis lost sight of the two men when they ran into the wooded, swampy area behind a fish hatchery, which was across the road from their house.

After arriving at the fish hatchery, members of the local sheriff’s department set up a perimeter around the area, and defendant and his codefendant, Charles Peterson, were found hiding behind a pump house. After apprehending defendant and Peterson, the arresting officers discovered a black Pharmacia bag near the location where defendant was found. The bag contained a .22 caliber handgun registered to Larry Polston, an unregistered .38 caliber handgun, and two six-inch fillet knives belonging to Dennis Mulka. A later search of defendant’s vehicle revealed a .22 caliber rifle registered to Larry Polston, and numerous other items taken from the Polston master bedroom.

Defendant first claims on appeal that the trial court erred in denying his request for a competency examination or evaluation. Specifically, he argues that the trial court ignored clinical certificates, which stated that defendant had a mental illness; ignored a record that was replete with bizarre actions by defendant; and should not have relied on its own lay opinion that defendant was merely unable to cope with the reality of possibly spending the rest of his life in

prison. We review a trial court's determination regarding a defendant's competency to stand trial for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). An abuse of discretion is found when an unprejudiced person "considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A defendant is deemed "incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial." MCL 330.2020(1).

The trial court did not ignore the clinical certificates. Although both clinical certificates stated that defendant was "mentally ill having substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality or ability to cope with the ordinary demands of life," one of the certificates also stated that defendant "understands the charges [against him] and he is able to discuss the consequences of his charges." The trial court's conclusion that defendant understood the charges against him and was merely unable to cope with the reality of possibly spending life in prison was also supported by other evidence. Defendant made numerous weekly requests for legal information that directly related to his charges, which also reflects an ability to assist in the preparation of a defense. Defendant's alleged suicide attempt and his suicidal threats further lend support for a conclusion that he understood the charges against him and was nervous about the outcome of his impending trial. In addition, the trial court did not ignore an alleged record that was replete with bizarre actions taken by defendant. Defendant points only to one bizarre action, an outburst he made before the trial court. A reasonable explanation for this outburst existed. Defendant was upset after the trial court denied four of his pretrial motions. Furthermore, the record supports the trial court's conclusion that defendant was a "game player" who was using the issue of his competency as "tactic to delay" further proceedings. More than a month before trial, defendant requested that the trial court remove his second appointed counsel. Two weeks before trial, defendant requested that the trial court remove his third appointed counsel.

There was evidence in the record to support a conclusion that defendant understood the charges against him and had the ability to assist in his defense. Moreover, defendant had a history of delay tactics. On this record, we cannot find that an adequate showing was made compelling a psychiatric examination on competency. See MCL 330.2026. We conclude that the trial court did not abuse its discretion in denying defendant's late motion for a competency examination.

Defendant next claims on appeal that there was insufficient evidence for the district court to bind him over on the felonious assault charge and that, as a result of the trial court's refusal to grant his motion to quash the information or dismiss that charge, his right to due process was violated because the jury heard irrelevant and highly prejudicial evidence related to that charge.¹ We disagree. We review a district court's decision to bind over a defendant for an abuse of

¹ A directed verdict on the charge of felonious assault was granted at trial.

discretion. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). “A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony.” *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Probable cause is a less demanding evidentiary standard than guilt beyond a reasonable doubt. *People v Justice (After Remand)*, 454 Mich 334, 343-344; 562 NW2d 652 (1997). “Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged.” *Orzame, supra* at 558.

At the preliminary examination, the prosecutor presented no direct evidence that either defendant or Peterson fired a gun. However, while Dennis Mulka was chasing defendant and Peterson, he observed both of them turn around immediately before he heard the gunshot. Peggy Mulka testified that she saw one of the men slow down with his arm coming over his shoulder immediately before she heard the gunshot. These movements would lead a cautious person to infer that the gunshot came from either defendant or Peterson. This inference is strengthened by Dennis’s testimony that he believed the gunshot came from either defendant or Peterson. Therefore, a cautious person could believe that defendant fired the gun at Dennis or aided and abetted in the firing of a gun at Dennis. Also, the black Pharmacia bag contained two handguns, providing defendant or Peterson with the means of shooting at Dennis. Under the circumstances, the district court did not abuse its discretion in binding defendant over on the felonious assault charge. For these reasons, we also reject defendant’s accompanying argument that the trial court’s decision to deny his motion to quash or dismiss the felonious assault charge was erroneous. Moreover, even if the felonious assault charge should have been dismissed before trial, defendant was not prejudiced, nor were his due process rights infringed, because the charge was dismissed on a directed verdict and because the jury could have nonetheless heard evidence out of which the felonious assault charge arose as this evidence formed part of the *res gestae* as well as being a potential link to the dangerous weapon element of the first-degree home invasion charges; any error was harmless. MCL 769.26; MCL 750.110a(2)(a); MCR 2.613(A); *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

Defendant next claims on appeal that he was arrested without probable cause. Defendant failed to preserve this issue, and we review for the existence of plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). For a custodial arrest to be valid, the arresting officers “must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). “Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Id.*

The sheriff’s department had reason to believe that the two men who committed the Mulka home invasion were hiding in the wooded, swampy area behind the fish hatchery. Dennis Mulka saw the men run into the wooded area behind the fish hatchery. After arriving at the fish hatchery, the sheriff’s department received information that two black men were seen a few hundred yards south. The sheriff’s department set up a perimeter around the hatchery, and a canine unit and another officer searched for the men. Defendant and Peterson were discovered

hiding nearing a pump house. Even though they were not wearing clothing similar to that described by the Mulkas, the reasonably trustworthy information indicated that two men ran from the Mulka residence and were in the wooded area behind the hatchery. A reasonably cautious man could conclude that defendant and Peterson were the two men. Accordingly, defendant's argument that he was arrested without probable cause is without merit.

Defendant also claims that the trial court erred in failing to suppress the contents of a black Pharmacia bag. Defendant failed to preserve this issue below, and therefore, we review for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

We conclude that defendant does not have standing to challenge the search of the bag. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999); *People v Armendarez*, 188 Mich App 61, 70-71; 468 NW2d 893 (1991). A defendant has standing to challenge the search if, in light of the totality of the circumstances, he had an expectation of privacy in the bag and that expectation is one that society is prepared to recognize as reasonable. *Id.* The bag was found near where defendant was hiding, but it was not with him at the time of his arrest. And, it was not on his property. He had no expectation of privacy in the bag. Under the evidence presented at trial, a juror could reasonably infer that defendant once had possession of the bag and then tossed it aside in an effort to avoid being implicated in the crimes. A defendant can abandon property, which entirely deprives the defendant of the ability to contest a search and seizure of that property. *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002). "The search and seizure of property that has been abandoned is 'presumptively reasonable,' because the owner no longer has an expectation of privacy in the abandoned property." *Id.* Here, defendant's argument lacks merit and reversal is unwarranted.

Defendant also claims that the trial court erred in denying his motion to suppress the items found in his vehicle. The trial court held that no "search" occurred when Lieutenant Stump opened the trunk of defendant's 1995 Lumina and peered inside while attempting to locate defendant's vehicle through use of a remote door opener. A search warrant was subsequently obtained, and the vehicle was searched. In reviewing a trial court's decision on a motion to suppress, we review the trial court's factual findings for clear error and its application of constitutional standards de novo. *People v Sobczak-Obetts*, 253 Mich App 97, 103; 654 NW2d 337 (2002). We tend to agree with the trial court's assessment that no search relative to the vehicle had been conducted when Stump merely popped the trunk with the remote in an effort to simply identify and locate defendant's vehicle that was sitting in a parking lot and exposed for all to see. Regardless, the police would have inevitably discovered that the Lumina belonged to defendant, and discovery of the vehicle's contents was similarly inevitable; therefore, suppression of the items found in defendant's vehicle would not have been required. The inevitable discovery doctrine permits the admission of evidence obtained in violation of the Fourth Amendment if it can be shown by a preponderance of the evidence that the items found would have ultimately been obtained in a constitutionally accepted manner. *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999); *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989). Three concerns arise in the inevitable discovery analysis: (1) are the legal means truly independent; (2) are both the use of the legal means and the discovery by that means truly inevitable; and (3) does the application of the inevitable discovery doctrine provide an incentive for police misconduct or significantly weaken Fourth Amendment

protections. *Stevens, supra* at 638, quoting *United States v Silvestri*, 787 F2d 736, 744 (CA 1, 1986).

In the present case, after locating a set of keys and a remote control on defendant, officer Stump wanted to find defendant's vehicle. He was concerned that a person other than defendant and Peterson were involved in the home invasions. Defendant indicated to Stump that he and Peterson arrived in a car, but he would not tell the officer the car's location. Officer Stump went to the hatchery's parking lot to find defendant's vehicle after searching the wooded area around the Mulka residence. Nothing prevented Stump from gathering and running the VINs and license plate numbers of the approximately ten vehicles sitting in the parking lot to determine if one of those cars belonged to defendant. After opening the trunk of defendant's car with a remote control, officer Stump actually verified that the Lumina belonged to defendant before obtaining a search warrant. Accordingly, if Stump had checked the VINs of the ten vehicles sitting in the parking lot, instead of pushing the trunk opener on the remote door operator, he would have discovered that the Lumina was registered to defendant. On the record before us, we find unquestionable that the police would have inevitably discovered that the Lumina in the fish hatchery parking lot belonged to defendant, and thus would have inevitably found the incriminating evidence in the vehicle.

Defendant next claims on appeal that he is entitled to a new trial because his request to represent himself was not unequivocal where it was based on his dissatisfaction with his attorney. In determining whether a defendant validly waived his right to counsel, we review the trial court's factual findings for clear error and its application of constitutional standards de novo. *People v Willing*, 267 Mich App 208, 218-219; 704 NW2d 472 (2005).

Before granting a defendant's request to represent himself, a trial court must determine, among other factors, that the defendant's request is unequivocal. *Willing, supra* at 219. The trial court previously denied a request by defendant to represent himself because defendant stated that he would represent himself only if the trial court refused his request for new appointed counsel. The trial court determined that the request was not unequivocal. Defendant later requested again to represent himself, after the jury was selected. At that point, he clearly and specifically told the trial court that "[a]t this point, I'm going to represent myself." The trial court expressed its concerns to defendant about self-representation and asked defendant if he "seriously" and "unquestionably" wanted to represent himself. Defendant replied in the affirmative both times. Defendant did not express any dissatisfaction with his appointed counsel, nor did he express any hesitation about representing himself without advisory counsel present. Contrary to his argument on appeal, his request was unequivocal, and the trial court did not err in allowing defendant to represent himself.²

² In a single sentence, defendant argues that his decision to represent himself was not knowing and voluntary; there is no elaboration. We deem the argument abandoned because defendant fails to properly and adequately discuss the issue, nor has he provided the relevant law, any legal analysis, and the application of law to the facts. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next claims on appeal that his conviction for first-degree home invasion of the Polston residence is not supported by sufficient evidence. Specifically, he argues that there is a distinction between possessing a firearm and being armed with a firearm and that, even if he had possession of firearms stolen from the Polston residence when he left that residence, there is no evidence that he was armed with the firearms while committing the home invasion. Determining the scope of a criminal statute is a matter of statutory interpretation, which we review de novo. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

MCL 750.110a(2), provides, in pertinent part, that a person is guilty of first-degree home invasion, rather than second degree home invasion, if “at any time while the person is entering, present in, or exiting the dwelling,” the person is either “armed with a dangerous weapon” or “[a]nother person is lawfully present in the dwelling.” Our goal in statutory interpretation is to give effect to the intent of the Legislature. *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 370; 711 NW2d 391 (2006). In determining the intent of the Legislature, we look to the specific language of the statute. *Id.*

The Legislature did not define “armed” in MCL 750.110a(2), nor did it define “armed” in MCL 750.529, the armed robbery statute. However, in construing MCL 750.529, this Court has held that a person may be convicted of armed robbery if he possessed a dangerous weapon because “the mere possession of a dangerous weapon escalates the risk of violence and the degree of danger to the victim, even if the weapon is not seen by the victim.” *People v Hayden*, 132 Mich App 273, 294; 348 NW2d 672 (1984). We find that this same logic applies to home invasion. The risk of danger to victims and to perpetrators greatly increases when the perpetrator possesses a dangerous weapon at any time during the criminal act. In fact, the Legislature broadly defined “dangerous weapon” to include both unloaded and inoperable firearms. MCL 750.110a(1)(b)(i). Furthermore, the plain meaning of the words “armed with a dangerous weapon” clearly encompasses or contemplates a situation where a perpetrator is involved in a home invasion while simply having a dangerous weapon in his or her possession. Thus, we believe that the Legislature plainly intended for the mere possession of any firearm while committing a home invasion to constitute an aggravating circumstance. Accordingly, we reject defendant’s argument that to be “armed” with a dangerous weapon under the statute requires something more than mere possession. There was sufficient evidence presented to support the first-degree home invasion convictions, and reversal is unwarranted with respect to this issue.

Defendant also claims on appeal that the trial court erred in admitting the black Pharmacia bag and its contents because the prosecution failed to establish the necessary chain of custody of the bag and its contents. We disagree. We review a trial court’s decision to admit evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

“[A]n adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged. If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to

be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation." [*People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994), quoting 2 McCormick, Evidence (4th ed), § 212, pp 7-8.]

In the present case, Deputy Walker testified that the black Pharmacia bag, which the prosecutor sought to admit into evidence, was the same bag he saw in the area where defendant and Peterson were apprehended. Deputy Walker also testified that the .22 caliber handgun and the six-inch fillet knives that the prosecutor sought to admit into evidence were the same handgun and knives that were found in the bag. Defendant has provided no information to support the proposition that the bag, the handgun, and the knives were not of such a nature to make them readily identifiable and impervious to change. The trial court had broad discretion to admit the bag and its contents based on deputy Walker's testimony, which testimony provided adequate foundation for admission, and any gap in the chain of custody would affect only the weight to be given to the evidence, not its admission. *White, supra* at 133 ("Once a proper foundation has been established, any deficiencies in the chain of custody go to weight afforded to the evidence, rather than its admissibility."). We do not conclude that the trial court abused its discretion in admitting the bag and its contents.

Defendant next claims that the trial court erred in scoring twenty-five points for offense variable (OV) 1, MCL 777.31, and ten points for OV 14, MCL 777.44. We disagree. The trial court has discretion with regard to the number of points to be scored, provided that there is record evidence to support the particular score. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). We will uphold a scoring decision "for which there is any evidence in support." *Id.* at 454.

Twenty-five points may be scored for OV 1 if "[a] firearm was discharged at or toward a human being[.]" MCL 777.31(1)(a). Defendant first argues that the trial court erred in scoring OV 1 because there was no evidence that either he or Peterson fired a gun. However, immediately before the Mulkas heard the gunshot, Dennis saw both defendant and Peterson stop and one of them "swivel." Peggy saw either defendant or Peterson slow down and put his arm over his shoulder. This movement provides the inference that either defendant or Peterson shot the firearm that produced the gunshot heard by the Mulkas. And, we find no merit in defendant's argument that, even if there was evidence that he or Peterson shot a gun, there was no evidence indicating that the gun was aimed at or toward Dennis rather than up in the air. The men were being chased by Dennis, they made movements in Dennis' direction, and then there was a shot. An inference may be drawn that the shot was in Dennis' direction and not in the air. Because there is some evidence in the record to support a finding that a firearm was discharged at or toward Dennis Mulka, we do not conclude that the trial court abused its discretion in scoring 25 points for OV 1.

In reaching our conclusion, we reject the claim that the trial court erred in scoring OV 1 because it did not score twenty-five points for OV 1 for codefendant Peterson. A trial court must assess the same OV 1 score for each offender in a multiple offender situation. MCL 777.31(2)(b); *People v Morson*, 471 Mich 248, 259-260; 685 NW2d 203 (2004). After reviewing the transcript of defendant's sentencing hearing, however, we find that the record does not support the claim that OV 1 was scored differently for defendant than for Peterson.

We also conclude that OV 14 was properly scored. Ten points may be scored for OV 14 if “[t]he offender was a leader in a multiple offender situation.” MCL 77.44(1)(a). “The entire criminal transaction should be considered when scoring” OV 14. MCL 77.44(2)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). The trial court believed that defendant was the leader in the home invasions because he was older and more experienced and because his car was used. Defendant is older than Peterson and his car was used in the commission of the home invasions. Additionally, items from one of the home invasions were found in defendant’s car. A reasonable inference arising from this evidence is that defendant was the leader, and thus the evidence was sufficient to support the trial court’s ruling. Accordingly, we reject defendant’s argument that the trial court erred in scoring OV 14.

Defendant finally claims on appeal that, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), Michigan’s sentencing scheme violates his Sixth Amendment right to jury. Our Supreme Court has held that *Blakely* does not affect Michigan’s sentencing scheme. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).³

Affirmed.

/s/ Peter D. O’Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder

³ *Drohan* is currently pending in our Supreme Court after the Court granted leave in order to address *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).