

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 28, 2013

v

THOMAS JEROME HARRIS, JR.,

Defendant-Appellant.

No. 308183
Wayne Circuit Court
LC No. 11-006975-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of assault with intent to commit murder (AWIM), MCL 750.83, one count of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, four counts of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.10, to 20 to 40 years' imprisonment for the AWIM conviction, 32 to 48 months' imprisonment for each felonious assault conviction, 40 to 60 months' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm in all respects, except as to the AWIGBH conviction, which must be vacated on double jeopardy grounds, given that both the AWIM and AWIGBH convictions pertained to defendant's act of shooting at one particular victim.¹ We remand for modification of the judgment of sentence to reflect our ruling vacating the AWIGBH conviction.

This case arises from a shooting in Detroit on November 8, 2010. Defendant first argues that the prosecution presented insufficient evidence for the jury to conclude that defendant was the shooter, and the jury did so based solely on the unreliable and speculative testimony of one witness. We disagree.

¹ While the trial court clearly recognized the double jeopardy implications, considering that no sentence was imposed on the AWIGBH conviction, we find it necessary to also vacate the conviction itself.

In criminal cases, due process requires that the evidence establish a defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court reviews de novo a sufficiency argument, examining the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.* at 175-176. The weight of the evidence, the credibility of witnesses, and the nature of any inferences that can be fairly drawn from the evidence are decided by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

The shooting involved a single episode of multiple discharges of a firearm directed at a motor vehicle in which defendant's former girlfriend, her new boyfriend, and her two children were riding. There was damage to the vehicle caused by the gunshots. Defendant was found guilty of AWIM and AWIGBH with respect to his former girlfriend, but not guilty of either of those charges in relationship to the other three victims. Defendant was found guilty of felonious assault in connection with all four victims, along with being found guilty of the two weapons charges. Defendant argues that there was insufficient evidence to identify him as the shooter. In support, defendant notes that it was dark outside, there were two other males in the company of defendant, all three men were wearing black clothing, and the sole testifying eyewitness – the new boyfriend – did not have a good vantage point from which to see the shooter.

Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

The boyfriend testified that he saw defendant, not one of the other men, with his arm raised and holding a black object that looked like a gun at the time shots were being fired at the vehicle. The boyfriend also heard defendant's former girlfriend yell that defendant had a gun. Further, the boyfriend testified that he recognized defendant because of his height and because he could see defendant's face; he was sure it was defendant who was the shooter. The boyfriend had previously met defendant when they were introduced to each other by defendant's former girlfriend, but the boyfriend did not know the other two males accompanying defendant at the time of the shooting. We also note that defendant's ex-girlfriend and defendant argued immediately before the shooting. "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v Jackson*, 292 Mich App 583, 587-588; 808 NW2d 541 (2011) (citation omitted). Viewing the evidence in a light most favorable to the prosecution, abstaining from examining issues concerning witness credibility and the weight of the evidence, and resolving all conflicts in the evidence in favor of the prosecution, we hold that a rational trier of fact could find beyond a reasonable doubt that it was indeed defendant who was the shooter.

Defendant next argues that, while his sentence on the AWIM conviction was within the minimum sentence guidelines range, and was even near the low end of that range, it nevertheless constituted cruel and unusual punishment. We disagree.

To preserve a constitutional challenge for appellate review, a defendant must first raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Because defendant did not do so, this issue is unpreserved, and we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

The United States Constitution prohibits "cruel and unusual punishments," and the Michigan Constitution forbids "cruel or unusual punishment." US Const, Am VIII; Const 1963, art 1, § 16. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). However, "this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). The purpose of sentencing guidelines is to facilitate proportionate sentences, and proportionality review contemplates whether a sentence is proportionate to the seriousness of the conduct engaged in by a defendant and proportionate to the defendant on consideration of his or her criminal record. *People v Smith*, 482 Mich 292, 304-305; 754 NW2d 284 (2008). The more egregious the offense, and the more recidivist the defendant, the more extensive the punishment. *Id.* at 305. A sentence within the guidelines range is presumed to be proportionate, and a proportionate sentence is not cruel or unusual punishment. *Powell*, 278 Mich App at 323.

Defendant's minimum guidelines range was 225 to 468 months. His minimum sentence of 20 years, or 240 months, is toward the low end of that range. Accordingly, his sentence is presumed to be proportionate, and none of the arguments posed by defendant regarding strong family support and a minimal criminal history are sufficiently convincing to overcome the presumption of proportionality. The sentence was proportionate to the offender and the offense, especially given that it was simple good fortune that no one was killed by the hail of bullets fired at the vehicle, including the two young children sitting in the backseat.² Accordingly, the sentence was neither cruel nor unusual.

Defendant argues, in his Standard 4 brief, that the felony information was defective because it did not state facts sufficient to prove defendant's intent to kill. We hold that, on review of the felony information, there was nothing defective about the information, as it was entirely consistent with MCR 6.112(D) and MCL 767.45. See *People v Waclawski*, 286 Mich App 634, 705-706; 780 NW2d 321 (2009). To the extent that defendant is arguing that the evidence was insufficient to sustain the AWIM conviction because of a failure to establish an intent to kill, the argument lacks merit. "The intent to kill may be proved by inference from any facts in evidence." *Jackson*, 292 Mich App at 588. There was sufficient record evidence for the jury to have inferred defendant's intent to kill relative to his former girlfriend. The evidence

² An officer testified that a bullet shattered a rear window on the passenger side of the car and that another bullet entered a rear passenger side door and exited through the front windshield of the vehicle. The boyfriend testified that he heard three or more gunshots.

showing that the relationship had ended, that they were arguing just prior to the shooting, that the former girlfriend was sitting in the front passenger seat and bullets struck the passenger side of the vehicle, and that there were multiple discharges of the weapon directed at the vehicle, all give rise to a reasonable inference that defendant had the intent to kill his ex-girlfriend.

Defendant next argues, in his Standard 4 brief, that the trial court erred in admitting the boyfriend's hearsay testimony that defendant's former girlfriend yelled that defendant had a gun. We hold that the evidence of the ex-girlfriend's out-of-court statement was properly admitted at trial under the excited utterance exception to hearsay. MRE 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). The former girlfriend was about to be shot at, or was being shot at, when she yelled out that defendant had a gun, which certainly would qualify as a startling event. An officer who met with her after the shooting testified that she "was obviously upset," she was "distracted," and that she engaged in "rapid conversation," which clearly reflected that she had been and remained under the stress of excitement as caused by the shooting. We also reject defendant's argument that the testimony should have been excluded under MRE 403. The evidence was extremely probative on the issue of the shooter's identity, and it cannot be said that the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Finally, defendant argues that his constitutional right to be protected against double jeopardy was violated when he was convicted and sentenced on the AWIM and AWIGBH offenses, which both pertained to his former girlfriend. Again, we note that the trial court did not impose a sentence on the AWIGBH conviction. We would further note that the one count of felonious assault that also related to his former girlfriend did not create any double jeopardy problems. See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007) (felonious assault and AWIGBH each have different elements and therefore there is no double jeopardy violation).³ On the other hand, AWIGBH is a necessarily included lesser offense of AWIM. *People v Brown*, 267 Mich App 141, 150-151; 703 NW2d 230 (2005) ("[I]t is impossible to commit the offense of assault with intent to commit murder without first committing the offense of assault with intent to do great bodily harm less than murder;" "the elements of assault with intent to do great bodily harm less than murder are completely subsumed in the offense of assault with intent to commit murder.").

Double jeopardy protection is not implicated when each of the crimes at issue "has an element that the other does not." *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007). Here, because all of the elements of AWIGBH are subsumed by the offense of AWIM, double jeopardy precludes multiple convictions and sentences, given that the shooting related to a single

³ The offense of AWIM requires proof of an intent to kill, which is not required for felonious assault, and felonious assault requires proof that a dangerous weapon was used, which is not required for AWIM. MCL 750.82; MCL 750.83; *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

victim and a single transaction. See *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002) (rejecting claim that convictions for AWIM and AWIGBH violated double jeopardy principles where one crime was completed before the other crime took place). “The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge.” *People v Meshell*, 265 Mich App 616, 633-634; 696 NW2d 754 (2005), citing *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). Accordingly, we affirm the AWIM conviction and vacate the AWIGBH conviction, as well as affirming all of the other convictions.

Affirmed in all respects, except in regard to the AWIGBH conviction, which must be vacated on double jeopardy grounds. We remand for modification of the judgment of sentence to reflect our ruling vacating the AWIGBH conviction. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Jane M. Beckering