

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ADIR CARTER, JR.,

Defendant-Appellant.

UNPUBLISHED

May 20, 2010

No. 289986

Wayne Circuit Court

LC No. 08-011715-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of felonious assault, MCL 750.82; discharge of a firearm at a building, MCL 750.234b; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, third offense, MCL 750.227b. The trial court sentenced defendant to a mandatory ten years' imprisonment for the felony-firearm conviction. Applying a fourth-offense habitual offender enhancement under MCL 769.12, the trial court sentenced defendant to concurrent sentences of 19 months to 15 years for the remaining convictions, to be served consecutively with the felony-firearm sentence. We affirm.

Defendant argues that the prosecutor presented insufficient evidence to sustain his convictions of felonious assault and discharging a firearm at a building. Specifically, defendant contends that the prosecutor failed to adequately disprove that defendant acted in self-defense.

We review a challenge to the sufficiency of the evidence in a bench trial *de novo*. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). We view the evidence in the light most favorable to the prosecutor to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

As noted in *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996), "[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt" (citation and quotation marks omitted). An assault may be justified "if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

Allyn Henderson testified that during a gathering at his house during the early morning hours of August 23, 2008, defendant kept trying to pay a woman, Lisa Hood, to have sex with him. Defendant began hitting Hood, and some unidentified men pulled him away from her. Some unidentified men then tried to keep defendant away from Henderson, but defendant managed to run towards him. At that point Henderson hit defendant with his fist. Defendant then stumbled and walked “two houses down.” Defendant returned with a gun and “start[ed] firing.” Defendant was firing the gun in Henderson’s direction. Henderson noticed several new bullet holes in his house after the incident.

Hood corroborated Henderson’s testimony that defendant solicited sex from her and also assaulted her on the day in question. She stated that she was inside the house when she heard shots being fired.

Davone Murray testified that he attended the party at Henderson’s house. Murray stated that defendant was arguing and having a physical altercation with a woman and then Henderson “pulled out a big long knife” and subsequently reached for a gun. Murray said that defendant and Henderson argued and Henderson hit defendant with the gun. Murray then “heard shots.” He testified that he did not witness the shooting but that he saw Henderson with a gun and did not see defendant with a gun.

Warren Baker testified that he also attended the party. He provided testimony substantially similar to Murray’s.

Defendant testified that he did argue with Hood on the night in question; he stated that they ended up hitting each other. Henderson then struck him with a gun and also fired a shot somewhere, possibly in the air. Defendant stated that he picked a gun off the ground and fired it in the air once or twice to stop Henderson from shooting.

Sergeant James Metiva of the Detroit Police Department testified that he interviewed defendant, who stated the following regarding the incident:

“I was at 3071 Lakewood at an after hours strip party. Lisa Hood charged me \$50.00 for sexual intercourse. I didn’t pay her or have sex with her. Allyn wanted to charge me \$100.00 so me and Allyn started to argue. He goes in his pocket and pulls out a pistol and hits me in the right ear. Then he fires a shot in the air. Then I pull out my gun and fired a shot in the air. We were outside. More arguing took place and the police came.”

Defense counsel argued during her closing statement that defendant acted in self-defense. The court ruled: “There is testimony that it was three bullet holes. Guilty of Discharge in or at a Building” The court also ruled:

guilty of Count 4, Assault With a Dangerous Weapon, that being using a dangerous weapon to cause reasonable apprehension or fear in the mind of Mr.

Henderson, which was accomplished in this particular case based upon the testimony and the evidence presented.^[1]

Defendant's argument that the prosecutor presented insufficient evidence to rebut defendant's claim of self-defense is without merit. Henderson's testimony in particular indicated that defendant *walked away from the scene and then returned to fire a gun*. This was sufficient to prove that defendant committed the crimes in question without honestly and reasonably believing that his life was in imminent danger or that there was a threat of serious bodily harm. *Heflin*, 434 Mich at 502. While the testimony from various witnesses differed, "[a]ll conflicts with regard to the evidence must be resolved in favor of the prosecution." *Wilkins*, 267 Mich App at 738.

Defendant contends that the trial court's factual findings were inadequate. However, defendant did not raise this issue in the statement of his questions presented for appeal and also did not adequately brief the issue. Accordingly, this issue has been abandoned. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). At any rate, we find that the trial court "was aware of the issues, correctly applied the law, and sufficiently articulated its findings to satisfy MCR 2.517." *People v Wardlaw*, 190 Mich App 318, 321; 475 NW2d 387 (1991).

Defendant argues that the trial court erred in determining that self-defense is not a proper defense to a charge of felon-in-possession or felony-firearm. We need not address this issue because the trial court, by way of its factual findings, clearly *rejected* defendant's claim of self-defense. Therefore, even if the court had considered the self-defense claim in the context of felon-in-possession and felony-firearm, the outcome of the trial would not have differed.

Defendant next argues that the trial court erred in failing to suppress the statement given to Sergeant Metiva because defendant's intoxication and limited mental capacity rendered the statement involuntary.

The issue of the voluntariness of a statement is a question of law for a court's determination. In reviewing a trial court's findings, this Court examines the entire record and makes an independent determination of voluntariness. However, this Court gives deference to a trial court's findings, unless they are clearly erroneous. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. [*People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994) (citations omitted).]

As stated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his

¹ The court rejected the two possible higher charges of assault with intent to murder and assault with intent to commit great bodily harm less than murder.

lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Metiva testified as follows during a pretrial hearing: He read defendant his constitutional rights and defendant initialed them. Defendant indicated to Metiva that he understood his rights. Defendant appeared to understand what Metiva was saying and never complained of being injured or ill. Defendant stated that he had had nine years of schooling. At no time did defendant indicate that he wanted a lawyer or that he did not want to speak with Metiva. Metiva did not recall defendant's having had "the appearance of strong fatigue." Defendant did not appear to be visibly intoxicated when Metiva spoke with him, and did not appear to be mentally disabled to Metiva when Metiva was reading him his rights.

Defendant testified that he was "[h]urting" and "high" during the interrogation. He also testified that he attended "special ed classes" for reading and English during school. Defendant stated that he needed to go to the hospital during the interrogation because he had been "pistol-whipped." Defendant further stated that he asked for a lawyer. Defendant was arrested at 4:00 a.m. and was interrogated at 10:00 a.m. He claimed that "Ecstasy pills . . . last longer than six hours."

The court ruled, in part:

[Defendant] indicated, in fact, that he understood he had a right to counsel. In fact, he claims that he asserted that. And the – the reason that he understands that obviously is because of his prior experience with the criminal justice system.

The – and the defendant acknowledges that he made most of the statements in that statement . . . except disclaims the inculpatory statements No question that that's a signature, no question about his initials, no question that he understood – understood what was read to him.

The statement is admissible in this particular case. . . . The – based upon the evidence and the testimony and my assessment of the credibility of the witnesses.

We find no basis for reversal. Sergeant Metiva's testimony sufficiently established the voluntariness of defendant's statement. Moreover, the trial court assessed the credibility of the witnesses and concluded that admission of the statement was appropriate. As noted earlier, we must "give[] deference to a trial court's findings, unless they are clearly erroneous." *Jobson*, 205 Mich App at 710. The findings were not clearly erroneous.

Defendant next argues that his trial attorney rendered ineffective assistance in failing to object to offense variable (OV) 9 and OV 12 of the sentencing guidelines.

OV 9 is based on the number of victims, and defendant was assessed ten points under this variable. Ten points are to be assessed under OV 9 if there were “2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss.” MCL 777.39(1)(c). MCL 777.39(2)(a) provides that a trial court is to “[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim.”

Defendant notes that the sentencing offense was felon-in-possession and argues that this offense was complete “at the moment [defendant] grabbed the gun from Mr. Henderson’s friend while lying on the ground.” Thus, defendant argues, no victims were placed in danger because of his possession. Defendant cites *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009), in which the Court stated that “a defendant’s conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise.”

Defendant’s argument is without merit. As noted in *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), “[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” Moreover, “[s]coring decisions for which there is any evidence in support will be upheld.” *Id.* Here, a commonsense interpretation of the crime is that the offense of felon-in-possession continued during the entire period that defendant was in possession of the gun. See, generally, *People v Cooks*, 446 Mich 503, 532 n 4; 521 NW2d 275 (1994) (opinion of LEVIN, J.). There were numerous people attending the party on the night of the incident. Defendant placed over two people in danger during his possession of the gun, and thus OV 9 was properly scored. Defense counsel was not ineffective for failing to raise a meritless objection. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant cannot demonstrate that absent counsel’s error, the result of the proceedings would have differed. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

OV 12 deals with contemporaneous felonious criminal acts. Defendant received a score of ten points under this variable for “[t]wo contemporaneous felonious criminal acts involving crimes against a person . . .” or for “[t]hree or more contemporaneous felonious criminal acts involving other crimes . . .” MCL 777.42(1)(b) and (c).²

MCL 777.42(2) includes limitations on the conduct that may be counted as a contemporaneous felonious criminal act. An act is contemporaneous if it occurred within 24 hours of the sentencing offense and has not and will not result in a separate conviction. MCL 777.42(2)(a). A violation of the felony-firearm statute, MCL 750.227b, also cannot be counted. MCL 777.42(2)(b).

² Both MCL 777.42(1)(b) and (c) provide for ten points and it is not clear under which subsection defendant was assessed the ten points.

Defendant argues that because he was convicted for the additional crimes that occurred during the incident, he should not have been assessed ten points under this variable.

In analyzing this issue, we find guidance in the case of *People v Lovett*, 90 Mich App 169; 283 NW2d 357 (1979). In *Lovett*, the defendant “fired a pistol at Morris Cheatham but the bullet missed him and hit Troy Barbier, who was standing across the street.” *Id.* at 171. The defendant was convicted of two counts of assault with intent to do great bodily harm less than murder. *Id.* The Court first held that defendant’s intent to assault Cheatham could be transferred to Barbier, stating, “[m]erely because [defendant] shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person.” *Id.* at 172.

The defendant then argued that he could not “be convicted of two counts of assault since he only did a single act with specific intent to injure one person.” *Id.* The Court rejected this argument, stating that “a person, by a single act, can violate more than one criminal statute and thus be found guilty of multiple offenses.” *Id.* at 174. The Court stated:

Where crimes against persons are involved we believe a separate interest of society has been invaded with each victim and that, therefore, where two persons are assaulted, there are two separate offenses.

Furthermore, even though the doctrine of transferred intent is involved in this case the result is not altered. [*Id.* at 174-175.]

The Court concluded that “defendant was properly found guilty of two counts of assault with intent to do great bodily harm less than murder.” *Id.* at 175.

MCL 750.82(1) states, in pertinent part:

a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

“The elements of felonious assault . . . are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery.” *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). An assault is “made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.” *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979) (citation and quotation marks omitted).

Here, defendant had the requisite state of mind to commit a felonious assault against Henderson. Moreover, Henderson stated the following during his testimony: “When [defendant] had the gun, a lot of people that were out there started trying to disperse, running, jumping fences, everything.” We conclude that when defendant returned to the party with the gun, obviously inciting fear in the attendees (as evidenced by their flight), defendant committed “an unlawful act which place[d] [these people] in reasonable apprehension of receiving an immediate

battery.” *Id.* Under the rationale of *Lovett*, defendant committed multiple counts of felonious assault, and we therefore cannot, on this record, find any basis to disturb the scoring of OV 12.³ Once again, we note that “[s]coring decisions for which there is any evidence in support will be upheld.” *Endres*, 269 Mich App at 417. Defendant cannot demonstrate that absent counsel’s failure to object to the scoring of OV 12, the result of the proceedings would have differed. *Carbin*, 463 Mich at 600.

In a supplemental brief, defendant argues that he should not have been convicted of third-offense felony-firearm. Defendant’s argument is disjointed and hard to follow. Defendant first claims that his two prior felony-firearm convictions arose on the same date in 1993 and that the court in that case erred by ordering that the two sentences for those offenses were to run consecutively. Defendant then makes reference to aiding and abetting and evidently suggests that he was improperly convicted of felony-firearm in 1993 using inapplicable aiding and abetting principles. It appears that defendant’s arguments are directed at the validity of his 1993 convictions, which are not at issue in this appeal.

MCL 750.227b(1) states, in pertinent part:

A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. *Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.* [Emphasis added.]

Defendant has failed to show how the court inappropriately applied this statute, and reversal is unwarranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray

³ We do not share the concern of the concurring judge that we are interpreting OV 12 too broadly. The specific factual circumstances at issue here supported the scoring of the variable. Defendant had an altercation with Henderson, left the gathering to obtain a gun, and returned holding it. At the moment of returning to the gathering (i.e., even before the actual shooting), defendant clearly had the requisite state of mind to commit a felonious assault against Henderson, and he also, at that moment, committed “an unlawful act which place[d] [the other attendees] in reasonable apprehension of receiving an immediate battery.” *Johnson*, 407 Mich at 210. This was corroborated by the attendees’ flight. This factual scenario indicates that defendant did in fact commit multiple acts of felonious assault.