# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 10, 2020 |
| v<br><br>KISHA MCCRAY,<br><br>Defendant-Appellant. | No. 350623<br>Wayne Circuit Court<br>LC No. 18-005136-01-FH |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>KISHA MCCRAY,<br><br>Defendant-Appellant. | No. 350624<br>Wayne Circuit Court<br>LC No. 18-004668-01-FH |

Before: JANSEN, P.J., and K. F. KELLY and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant appeals as of right her bench trial convictions of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, an additional count of felony-

[1] *People v McCray*, unpublished order of the Court of Appeals, entered September 25, 2019 (Docket Nos. 350623 and 350624).

firearm, and assault with a dangerous weapon (felonious assault), MCL 750.82.[2] She was sentenced to 4 to 10 years' imprisonment for AWIGBH, one to four years' imprisonment for felonious assault, one to five years' imprisonment for felon-in-possession, and two years' imprisonment for each felony-firearm conviction. Finding no errors warranting reversal, we affirm. This appeal is decided without oral argument. MCR 7.214(E)(1)(b).

## I. BASIC FACTS

In 2018, defendant was residing with her five-month-old son, her adult daughter Britiney Ready, Latrisha Ward, and Willie Hayes. Hayes leased the home, and defendant rented a room. On June 12, 2018, defendant had a disagreement with Hayes, and the police were called to intervene at least three times. Because defendant and her infant son would be homeless if asked to leave, Hayes agreed to depart for the evening provided the police ensured that defendant did not move anything in the house. Consequently, defendant, her infant son, Ready, and Ward remained at the house. Shortly after the police left, defendant and Ward got into a fight when defendant tried moving her son's belongings from the living room to defendant's bedroom. Ward testified that the fight was verbal at first, but became physical after defendant "bumped" her. Ward admitted that she punched defendant several times. The fight ended when Ready intervened. Ward and defendant separated from each other and went their own ways. But according to Ward and Ready,[3] defendant emerged from the bathroom minutes later with a gun and shot Ward in her left thigh. They also indicated that defendant waved the gun about while threatening to shoot Ward if she did not get out of the house. Ward and Ready both retreated to the porch. Defendant then left the house on foot with her infant son in a stroller. The police located defendant and recovered the gun that defendant tossed into the bushes.

Defendant, on the other hand, testified that she was in her room after the initial altercation with Ward ended. As she was hanging her son's clothes, Ward came in with a gun in hand and pointed it toward defendant's stomach. Fearing for her safety, as well as that of her children, defendant tried to take the gun from Ward. Defendant claimed that the gun discharged during this struggle. After removing it from Ward's grasp, defendant took the gun and left the house with her son. She threw the gun under the bushes in front of a nearby house.

The trial court opined that the case required an examination of the credibility of the witnesses to determine the circumstances in which Ward was shot. The court noted that several portions of defendant's testimony made little sense, and it found the accounts offered by Ward and Ready more credible and more consistent with the physical evidence. The court determined that defendant reached a breaking point after the fight with Ward that caused defendant to shoot Ward

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[2] In Docket No. 350623, defendant appeals her convictions of felon-in-possession and felony-firearm. In Docket No. 350624, defendant appeals her convictions of AWIGBH, felony-firearm, and felonious assault. All charges were presented at a single bench trial.

[3] Ready did not want to testify against defendant, her mother, and was arrested and brought to court to ensure that she would appear at trial. Additionally, the day before the shooting, Ready and defendant argued. However, Ready testified that the prior argument had no bearing on her testimony, but rather, defendant had to bear the consequences of her actions.

"without justification" and subsequently point the gun at Ready. It therefore found defendant guilty of AWIGBH, felonious assault, felon-in-possession, and two counts of felony-firearm.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that her convictions should be reversed because a reasonable view of the evidence demonstrated that the shooting was an accident or that she acted in self-defense. We disagree.

"Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence." *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). This Court reviews de novo a challenge to the sufficiency of the evidence. *People v McFarlane*, 325 Mich App 507, 513; 926 NW2d 339 (2018). It must determine whether, based on the evidence presented, any rational trier of fact could have found guilt beyond a reasonable doubt for each element of the crime charged, and "must resolve all conflicts in the evidence in favor of the prosecution." *Id.* When reviewing a challenge to the sufficiency of the evidence, the appellate court does not interfere with the trier of fact's assessment of the weight and credibility of the witnesses or the evidence. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). To give proper effect to this deferential standard of review, we must "draw all reasonable inferences and make credibility choices" in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant does not directly challenge the proofs supporting any particular element of the convicted offenses. Instead, she contends that the evidence supporting her defenses—self-defense and accident—was of sufficient strength to preclude the trial court from finding her guilty of any of the charged offenses beyond a reasonable doubt. We disagree.

An individual who is not engaged in the commission of a crime may use *deadly* force defensively without a duty to retreat if he or she "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual." MCL 780.972(1)(a); see also *People v Guajardo*, 300 Mich App 26, 35-36; 832 NW2d 409 (2013). Additionally, an individual may use *nondeadly* force without a duty to retreat if "he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual," again, provided that the individual "has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force . . . ." MCL 780.972(2). However, "a defendant does not act in justifiable self-defense when he or she uses excessive force . . . ." *Guajardo*, 300 Mich App at 35. A defendant who claims self-defense as justification for a criminal act must first produce "some evidence from which [the fact-finder] could conclude that the elements necessary to establish a prima facie defense of self-defense exist[.]" *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014) (quotation marks and citation omitted). The burden then shifts to the prosecution to "exclude the possibility of self-defense beyond a reasonable doubt." *Id.* (quotation marks and citation omitted).

The model jury instruction regarding the defense of accident provides:[4]

> The defendant says that [he / she] is not guilty of [*state crime*] because [he / she] did not intend to [*state specific intent required*]. The defendant says that [his / her] conduct was accidental. If the defendant did not intend to [*state specific intent required*], [he / she] is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended to [*state specific intent required*]. [M Crim JI 7.3a.]

Consequently, an accident defense negates the specific intent required for a criminal offense. See also *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995) ("[W]hen some form of intentional act must be established as an element of the crime, the occurrence of the crime is inconsistent with accident."). Although the prosecution "need not negate every reasonable theory consistent with innocence," *Nowack*, 362 Mich at 400, it must present enough evidence for the trier of fact to find the essential elements of the offense beyond a reasonable doubt, *McFarlane*, 325 Mich App 507 at 513. Because AWIGBH and felonious assault both require proof of a particular specific intent as an essential element of the respective offenses,[5] the prosecution's proofs in this case had to demonstrate that defendant had the requisite intent, which would necessarily negate any claim of accident.[6]

Defendant's claim of error is predicated on her contention that the version of events she described at trial was just as likely as the events described by Ward and Ready, and therefore, the trial court could not have found, beyond a reasonable doubt, that defendant was guilty of the

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[4] Although the model jury instructions do not have the force and effect of a court rule, pertinent portions of the model jury instructions must be given if applicable, if it accurately states the relevant law, and if requested by a party. MCR 2.512(D)(1) and (2)(a-c).

[5] See *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (identifying "the intent to injure or place the victim in reasonable apprehension of an immediate battery" as an element of felonious assault) (quotation marks and citation omitted); and *People v Brown*, 267 Mich App 141, 149; 703 NW2d 230 (2005) (explaining that AWIGBH requires "the specific intent to do great bodily harm, otherwise described as the intent to do serious injury of an aggravated nature.").

[6] "A crime requiring a particular criminal intent beyond the act done is generally considered a specific intent crime; whereas, a general intent crime merely requires 'the intent to perform the physical act itself.' " *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004) (further citation omitted). A conviction for felon-in-possession requires proof that "(1) the defendant is a felon who possessed a firearm (2) before his right to do so was formally restored under MCL 28.424." *People v Bass*, 317 Mich App 241, 268; 893 NW2d 140 (2016). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Id.* at 268-269 (further quotation omitted). Because neither of these offenses involve a specific-intent element, *People v Dupree*, 284 Mich App 89, 120; 771 NW2d 470 (2009) (MURRAY, J., dissenting), aff'd 486 Mich 693 (2010), the defense of accident would not apply to the weapon offense in any event. Moreover, defendant testified that she purposely took the gun from Ward, so there is no factual basis to apply an accident defense to the felon-in-possession offense or the related felony-firearm charge.

charged offenses. In other words, defendant asks this Court to reassess the witnesses' credibility. Defendant fails to appreciate that the task of determining the weight of the evidence and the credibility of witnesses is delegated to the fact-finder, rather than appellate courts. *Dunigan*, 299 Mich App at 582. Viewing the evidence in the light most favorable to the prosecution, as we must do on appeal, *McFarlane*, 325 Mich App at 513, we conclude that defendant's position lacks merit.

It is undisputed that Ward and defendant engaged in a physical altercation before the shooting, and Ward testified that she stopped fighting when Ready intervened. Ward also stated that when the fight ended, defendant walked away toward the living room before going into the bathroom, and Ward went to look for her cell phone, first in her own bedroom, then in defendant's bedroom. Ready testified similarly, indicating that Ward and defendant walked away from each other before defendant returned with the gun. Ready also recalled defendant waving the gun about and pointing it at her as she tried to help Ward out of the house.

Although defendant claimed that Ward was the one to introduce the gun into the situation, the trial court found much of defendant's testimony illogical and improbable, which had a damaging effect on her overall credibility. Further, defendant had called the police earlier in the evening in response to her altercations with Hayes. However, as the trial court noted, defendant did not call the police to seek Ward's removal from the home after their physical altercation. And according to both Ward and Ready, there was no struggle over the gun that could have resulted in an accidental discharge. In addition, the initial physical altercation—along with any reasonable belief defendant may have held regarding her need to act in self-defense—had clearly ceased before defendant retrieved the gun, shot Ward, or brandished the gun at Ready. Resolving the conflicting evidence in favor of the trial court's verdict, there was sufficient evidence from which the trial court could find that defendant was not acting in self-defense and did not accidently discharge or brandish the gun.

## III. SENTENCING

Defendant also argues that she is entitled to resentencing because the trial court erred in its scoring of offense variables (OVs) 3 (injury to victim) and 9 (number of victims). We disagree.

This Court reviews the trial court's factual findings at sentencing for clear error, which exists when the reviewing court is left with a definite and firm conviction that an error occurred. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). The trial court's factual findings must be supported by a preponderance of the evidence. *Id*. In scoring the guidelines, the trial court may consider all record evidence, the presentence investigation report, the defendant's admissions, and reasonable inferences arising from the record. *McFarlane*, 325 Mich App at 532. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hershey*, 303 Mich App 330, 336; 844 NW2d 127 (2013) (citation omitted).

### A. OV 3

Defendant first challenges the trial court's assessment of 25 points for OV 3. MCL 777.33(1)(c) directs the trial court to assess 25 points when "[l]ife threatening or permanent

incapacitating injury occurred to a victim[.]" Defendant argues that the trial court erred in its scoring of this variable because there was no evidence the gunshot wound to Ward's leg was life threatening. The trial court rejected the same argument at sentencing, reasoning that people "die from gunshot wounds to the leg all the time because you can bleed to death from being shot in the leg." The court also said, "And were it not for the quick response of 911 and medical professional police getting there and helping her, she certainly could have died from being shot in the leg." Defendant emphasizes on appeal that MCL 777.33(1)(c) refers to a life threatening injury as the prerequisite for assessing 25 points, not an injury that *could* be life threatening.

Construing this provision of MCL 777.33(1)(c), this Court has determined that the term "life threatening" refers to an injury that is "capable of causing death: potentially fatal." *People v Chaney*, 327 Mich App 586, 589; 935 NW2d 66 (2019) (quotation marks and citation omitted). Accordingly, to assess 25 points on the basis of a life threatening injury, there must be "evidence indicating that the injuries were, in normal course, potentially fatal." *Id*. at 590-591 (footnote omitted). This Court also observed that "there are many conditions that if not treated can become life-threatening," so courts "must take into account the effect of medical treatment." *Id*. at 591 n 4. Absent evidence that "[the victim's] life was placed at risk or more general evidence establishing that the injury suffered was by nature life-threatening," OV 3 should not be scored at 25 points. *Id*. at 591.

Ward was shot in her left thigh. Although the crime scene photographs admitted at trial have not been produced for this Court's review, the trial court indicated in its ruling following the bench trial that there was a "large amount of blood on the floor" of defendant's bedroom, "a significant amount of blood" pooled in the hallway, and "a bunch of blood on the porch." Defendant does not seem to dispute the trial court's descriptions, and defense counsel likewise referred to "a large concentration of blood" during closing argument. Given the evidence of substantial blood loss, the trial court did not clearly err by finding that Ward's gunshot wound was, by nature, life threatening for purposes of OV 3, even though Ward received prompt medical attention.

B. OV 9

Defendant also challenges the trial court's assessment of 10 points for OV 9. Relative to this appeal, 10 points should be assessed when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). Defendant argues that no points should have been assessed for OV 9 because that variable focuses on offense-specific conduct, and Ward was the only victim placed in danger as a result of defendant's AWIGBH. We disagree.

"[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). This rule, however, does not limit the trial court's consideration of the victim against whom the specific sentencing offense was committed. As the Court explained in *Sargent*, "[I]n a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *Id*. at 350 n 2. In *People v McGraw*, 484 Mich 120, 132; 771 NW2d 655 (2009), the defendant pleaded guilty to several counts of breaking and entering with

intent to commit larceny, MCL 750.110. The defendant fled from the scene, and a police officer crashed his vehicle in the pursuit. *McGraw*, 484 Mich at 132. In contrast to the hypothetical scenario described in *Sargent*, the *McGraw* Court concluded that counting the police officer as a victim was clearly erroneous because "OV 9 does not provide for consideration of conduct after completion of the sentencing offense." *Id*. at 133-134.

Here, the trial court reasoned that OV 9 should be scored at 10 points because defendant threatened Ward and Ready with the gun. Because the evidence suggests that those threats were made after defendant had completed AWIGBH by shooting Ward, it appears that the trial court erred by focusing on conduct beyond the sentencing offense. *Id*. But a trial court's error will not ordinarily warrant relief when it reaches the right result for the wrong reason. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). Defendant's AWIGBH conviction was based on shooting Ward, so Ward is undoubtedly a victim placed in danger of physical injury or death for purposes of OV 9. The shooting occurred in a narrow hallway, and Ready testified that she was standing close enough that her wrist was burned by gunpowder. In light of Ready's close proximity to the muzzle of the gun when it was fired, the trial court did not err by treating Ready as a victim placed in danger of physical injury for purposes of scoring OV 9.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Thomas C. Cameron