

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERNON EDWARD BROWN,

Defendant-Appellant.

UNPUBLISHED

June 23, 2009

No. 284823

Ingham Circuit Court

LC No. 07-000859-FC

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 15 to 40 years in prison for assault with intent to commit murder, and to a consecutive two-year term for felony-firearm. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Complainant was driving to a gas station when he found his path blocked by two cars in the street. Complainant stepped out of his vehicle to ask the drivers to move. After speaking with the drivers, complainant heard someone yelling behind him, and he turned around to see defendant running toward him. Defendant pointed a gun at complainant and fired several shots. After either the first or second shot, complainant ran from his car and ran between two houses while defendant continued to shoot at him. Complainant testified that defendant shot at him five or six times. Complainant testified that defendant was wearing a white t-shirt at the time of the shooting, but noted that by the time defendant was arrested, defendant had changed his clothes.

Complainant's son, who was a passenger in complainant's car, testified that defendant shot at complainant. The son testified that he saw defendant's face, and that he had known defendant for about five years. Another witness described the shooter as a heavyset black male who was wearing a white t-shirt. This witness identified defendant as the shooter. Still other witnesses described the shooter as dressed in a white t-shirt.

A police officer responded to the scene, and was told by both complainant and complainant's son that defendant was the shooter. The officer collected two spent shell casings and one bullet from the scene. The shell casings indicated that they were from 9-millimeter Luger bullets. A trooper arrived on scene to help search for the shooter. This trooper observed

two males standing in a yard and advised them to go inside because a shooting had occurred. Shortly thereafter, the trooper received a description of the shooter, and immediately realized that the description fit one of the males that he had just advised to go inside. When the trooper finally made contact with the male, the male was wearing a long black t-shirt and was acting very nervous and sweating. The trooper testified that the black male with whom he had made contact was defendant.

Three days prior to the incident, a woman from Tennessee was staying with her daughter at a hotel in room 233. The woman owned a 9-millimeter handgun, and had brought it with her from Tennessee. The woman testified that she believed that her gun was loaded with Luger ammunition. The woman testified that she left her gun in the hotel room in its case under a book in a bottom drawer when she left her room. She testified that as she left her room, a black man with a large build approached her and made her feel uncomfortable. The woman identified this man as defendant. The woman placed a “do not disturb” card in her room’s keycard slot and left for the day. When she returned, the “do not disturb” card was not in the slot, there was a roll-away bed in her room that she had not requested, and her gun was missing.

The front desk supervisor/evening manager of the hotel testified that defendant had been employed at the hotel three days prior to the shooting. Defendant was a maintenance worker and had a keycard that allowed him access to all rooms. The manager testified that each door lock contained a chip that recorded which keys accessed the room and the time of each access. The manager testified that defendant’s keycard accessed room 233 twice three days prior to the shooting, once at 1:50 p.m. and again at 2:45 p.m. Room 233 was accessed a third time at 2:50 p.m. by a different employee’s keycard. Another employee testified that she saw defendant take a roll-a-way bed into room 233 that day. The employee whose keycard had accessed room 233 at 2:50 p.m. testified that defendant asked to borrow her keycard that day. This employee stated that she did not lend her keycard to anyone else that day nor did she enter room 233 that day.

Defendant testified that he had not seen complainant for one and one-half or two years prior to the day of the shooting. Defendant testified that he had never owned a gun, and had no familiarity with guns. Defendant testified that a young lady in room 233 had asked him for a roll-a-way bed three days prior to the shooting. Defendant testified that he accessed room 233 twice that day because he realized that he had not delivered a pillow with the roll-a-way bed the first time. He did not recall seeing a “do not disturb” keycard in the slot. Defendant denied taking the gun, and denied shooting at complainant.

Defendant first argues that the trial court improperly admitted evidence under MRE 404(b) that defendant stole a gun from his place of employment. We disagree.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant’s history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). To be admissible under MRE 404(b), generally bad acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Lewis v Legrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). A proper purpose is one other than establishing the defendant’s character to show his propensity

to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); *Johnigan*, *supra* at 465.

The admissibility of bad acts evidence is within the trial court's discretion, and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). A court abuses its discretion when it chooses an outcome that lies outside the range of principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

MRE 404(b)(1) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In this case, the prosecution presented evidence that defendant stole a gun from a hotel room at his place of employment, and the trial court held that this was admissible under MRE 404(b). We agree with the trial court's decision. First, the evidence was used for a proper purpose. The evidence that defendant might have stolen the handgun, if believed by the jury, was offered to show that defendant had access to the same caliber of handgun that was used in the assault and to show that the stolen handgun was loaded with the same ammunition that was found at the scene. The evidence was not offered to establish defendant's character to show his propensity to commit an assault with intent to murder. See *VanderVliet*, *supra* at 74; *Johnigan*, *supra* at 465. Access to, and theft of, that handgun shows opportunity, and evidence that shows opportunity is properly admissible under MRE 404(b).

Second, the evidence was relevant. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Whether or not defendant shot at complainant with a gun was of consequence to the outcome of the trial. Because defendant maintained that he did not have a gun, and the prosecution was alleging that defendant did have a gun, the presentation of evidence to show that defendant stole a gun from his place of employment tended to show that defendant did have a gun, making the evidence relevant.

Third, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. *Magyar*, *supra* at 416. The trial court was in the best position to determine this balance under MRE 403. Defendant was charged with assault with intent to commit murder and felony-firearm; he was not charged with any crime similar to stealing. The probative value of the evidence that defendant had access to the same caliber of gun that was used in the assault, a gun that was loaded with the same brand of ammunition found at the scene, substantially outweighed any prejudicial effect that would tend to show that defendant was a

thief. We find that the trial court did not abuse its discretion in admitting evidence that defendant stole a gun from his place of employment.

Defendant next argues that the evidence presented was insufficient to prove beyond a reasonable doubt that he was the shooter. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence de novo in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008).

We must resolve all conflicts in the evidence in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987). We are required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). A complainant's testimony alone may be sufficient evidence to establish a defendant's guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

The elements of assault with intent to murder are assault with actual intent to kill, which, if successful, would make the killing murder. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). The elements of felony-firearm are that the defendant possessed a firearm during the commission of or the attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Defendant does not argue that complainant was not the victim of an assault; rather, defendant argues only that he was not the shooter. However, multiple witnesses, including complainant and complainant's son, identified defendant as the shooter. Complainant and other witnesses testified that defendant wore a white t-shirt at the time of the shooting. Although defendant denied being the shooter and was arrested wearing a black shirt, the jury was entitled to reject defendant's testimony. Questions of credibility and intent are to be resolved by the trier of fact. *Avant, supra* at 506; *Queenan, supra* at 55. The jury could have convicted defendant solely on complainant's testimony that defendant was the shooter. *Taylor, supra* at 8. We find that the evidence was sufficient to prove that defendant was the shooter, and that he committed the offense of assault with intent to commit murder.

The jury also found defendant guilty of felony-firearm. Since it was reasonable for the jury to find that defendant was the shooter, and committed assault with intent to commit murder, it was reasonable for the jury to find that defendant possessed a firearm during the commission of a felony. The evidence was sufficient to support the jury's finding that defendant committed felony-firearm.

Finally, defendant argues that his sentence constitutes cruel and unusual punishment. We disagree.

As a general rule, we are required to affirm a sentence that falls within the guidelines unless the trial court erred in scoring the guidelines or relied upon inaccurate information in determining the defendant's sentence. *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005); MCR 769.34(10). However, defendant's claim of error is constitutional in nature. We review claims of constitutional error de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The limitations imposed on sentence review by MCL 769.34(10) do not apply to claims of constitutional sentencing error. *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006).

At sentencing, defendant agreed with the scoring of the guidelines, and the minimum sentence was within the appropriate guidelines range. A sentence within the appropriate guidelines range does not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006). Moreover, the sentence was not disproportionate in light of the circumstances of the offense and defendant's own circumstances. A sentence that is proportionate is not unconstitutional. *Id.* at 92.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jane E. Markey