STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2009
v	No. 284892 Jackson Circuit Court
RICKY LEE BALDWIN, Defendant-Appellant.	LC No. 07-003910-FC

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He also appeals his conditional guilty plea to felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 23 to 50 years' imprisonment for the conviction on assault with intent to commit murder, 2 years' imprisonment for the felony-firearm conviction, and 5 to 7 years' imprisonment for the felon in possession conviction. We affirm.

We shall begin by addressing defendant's guilty plea to felon in possession, which plea was entered on a conditional basis pursuant to MCR 6.301(C)(2). Defendant had argued to the trial court that the felon-in-possession statute and charge violated the Second Amendment of the United States Constitution under *District of Columbia v Heller*, __ US __; 128 S Ct 2783; 171 L Ed 2d 637 (2008). The trial court rejected the argument and would not dismiss the charge, and defendant then entered the conditional plea in an effort to preserve the constitutional challenge on appeal. Defense counsel indicated his belief that entry of the conditional plea under MCR 6.301(C)(2) not only preserved the constitutional challenge, but also provided defendant the right to argue the issue to this Court on an appeal as of right, without the need to file an application for leave. The trial court proceeded under that same belief, and the prosecutor agreed to the entry of the conditional plea. On appeal, defendant argues that the felon-in-possession statute violates the Second Amendment under *Heller* and violates the Michigan Constitution's right to bear arms, which provides that "[e]very person has a right to keep and bear arms for the defense of himself and the state," Const 1963, art 1, § 6.

Defendant and the trial court were mistaken in concluding that defendant could challenge the court's rejection of the constitutional argument in an appeal by right, given the following

language in MCR 6.301(C)(2), which addresses pleas requiring consent by the court and prosecutor:

> A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. *The appeal is by application for leave to appeal only*. [Emphasis added.]

On appeal, the prosecutor, in an attempt to keep the guilty plea from being invalidated because of the confusion below, requests us to construe defendant's brief as an application for leave to appeal, grant leave, and then address the substantive issues, which the prosecution contends lack merit. Given the circumstances and the prosecutor's request, and for purposes of properly exercising our jurisdiction, we shall treat defendant's claim of appeal as to the felon-in-possession argument as an application for leave to appeal, grant leave, and address the substantive issues presented to us. *Newton v Michigan State Police*, 263 Mich App 251, 259; 688 NW2d 94 (2004) ("we choose to treat the defective claim of appeal as an application for leave to appeal and to grant leave to consider the substantive issue raised by the appeal"), overruled in part on other grounds in *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006); *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

With respect to the federal constitutional argument, US Const, Am II, the United States Supreme Court in *Heller, supra*, 128 S Ct at 2816-2817, stated:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding *prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Emphasis added.[1]]

We read this language as indicating that the Second Amendment is not offended by felon-in-possession statutes. Accordingly, we reject defendant's Second Amendment argument.

With respect to defendant's argument under the Michigan Constitution, Const 1963, art 1, § 6, this Court in *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998), held:

[1] *Heller* addressed the question whether the "District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." *Heller, supra*, 128 S Ct at 2787-2788. The Court found a Second Amendment violation.

> Defendant Green next argues that the felon-in-possession charge violated his right to bear arms under the Michigan Constitution. We disagree. A person's right to bear arms under Const 1963, art 1, § 6 is not absolute and is subject to the reasonable limitations set forth in MCL 750.224f . . . as part of the state's police power. *People v Swint*, 225 Mich App 353, 375; 572 NW2d 666 (1997). Accordingly, Green's right to bear arms under the Michigan Constitution was not violated by the felon-in-possession charge.

This Court's opinion in *Swint*, cited in *Green*, included an exhaustive analysis of the question whether the Michigan Constitution's right to bear arms precluded a prosecution under the felon-in-possession statute. *Swint, supra* at 358-375. The Court held:

> Even assuming that the felon-in-possession statute infringes upon defendant's right to keep and bear arms under the Michigan Constitution, we find that MCL 750.224f . . . represents a reasonable regulation by the state in the exercise of its police power to protect the health, safety, and welfare of Michigan citizens. [*Id.* at 363.]

Defendant acknowledges *Swint* and *Green*, but argues that our Supreme Court's opinion in *People v Zerillo*, 219 Mich 635; 189 NW 927 (1922), demands a contrary result. We first note that, while *Swint* did not cite *Zerillo*, the *Swint* panel stated that it found "no Michigan cases on point[.]" *Swint, supra* at 364. Further, in *Zerillo, supra* at 642, the Court, addressing a challenge under the Michigan Constitution's right to bear arms, which provision in 1922 was nearly identical to the present day provision, held:

> The part of the act making it a crime for an unnaturalized foreign-born resident to possess a revolver, unless so permitted by the sheriff, contravenes the guaranty of such right in the Constitution of the state, and is void. The statute must be construed in accord with the provisions of our Constitution, and it may stand as an act prohibiting the use of firearms by unnaturalized foreign-born residents in hunting or capturing or killing any wild bird or animals, either game or otherwise, of any description, excepting in defense of person or property, but so far as it makes it a crime for unnaturalized residents to possess a revolver for the legitimate defense of their persons and property it is void.

Zerillo did not address the right to bear arms in relation to convicted felons and a penal statute precluding such felons from possessing firearms; rather, it dealt with law-abiding, unnaturalized, foreign-born residents. We thus find *Zerillo* distinguishable and inapplicable to the case at bar; *Green* and *Swint* control. The *Swint* panel was indeed correct in concluding that there existed no Michigan caselaw on point, where *Zerillo* is not on point. Defendant's guilty plea stands.

Defendant next contends that the prosecutor failed to present sufficient evidence to prove that he was guilty of assault with intent to commit murder. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a

reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). On appeal, defendant challenges the intent element. Defendant maintains that the evidence revealed that he acted in the heat of passion with adequate provocation and that he should have been found guilty only of assault with intent to cause great bodily harm less than murder, which is a lesser-included offense that was presented to the jury for consideration. We note that defendant does not argue that the verdict was against the great weight of the evidence; it is a pure sufficiency claim.

In regard to the intent to kill needed to support the assault charge pursued here, the Supreme Court in *People v Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985), stated that the jury could rely on circumstantial evidence and reasonable inferences drawn from the evidence in finding the requisite intent. The Court elaborated:

> "And in considering the question [the jurors] may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." [*Id.* at 568 (citation omitted).]

In this case, defendant assaulted the victim, his former wife, with a gun over an alleged affair she was having with a friend. Defendant became angry at the victim while at a bar and upon returning to the marital residence, defendant gained entry to a home office where the gun was located, he removed the gun from a shoebox and a holster, removed the plastic safety strips from the gun, and he then loaded it with multiple rounds of ammunition. After defendant harassed the victim into admitting the affair, he went back into the office, concealed the gun, brought it into the living room, and sat close to the victim. When the victim stood to leave, defendant held the gun to her head and stated that he was going to kill her, and he fired the gun multiple times at the victim while she was in close proximity and as she attempted to escape through a doorway. Bullets struck her in the head and neck area. We hold that, under these factual circumstances, there was more than sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant acted with intent to commit murder.

Next, defendant contends that the trial court erred in scoring several offense variables (OVs) at sentencing. In *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), our Supreme Court stated that the scoring of sentencing variables is governed by the standard of preponderance of the evidence. The trial court's factual findings at sentencing on the scoring

variables are reviewed for clear error. *Id.* Questions involving interpretation of the scoring-variable statutes are reviewed de novo. *Id.* at 107.

MCL 777.33 governs the scoring of OV 3, physical injury to victim, and it provides in relevant part that 25 points be assessed when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). We find that the trial court's assessment of 25 points for OV 3 is supported by evidence on the record. The evidence showed that the victim was shot in her right ear and near her clavicle, that she now requires hearing aids, and that she still has bullet fragments lodged in her skull. Additionally, a treating physician testified that the victim was fortunate to survive a gunshot wound to her head and neck area.

MCL 777.36 governs the scoring of OV 6, intent to kill or injure, and it provides in relevant part that 50 points be assessed when "[t]he offender had premeditated intent to kill." MCL 777.36(1)(a). The term "premeditated" is not defined in the statute. In general, premeditation means to think about beforehand, and while the minimum time necessary to exercise the thought process is incapable of exact determination, the interval between the initial thought to kill and the ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The *Plummer* panel also expressed:

> Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. [*Id.* at 300-301 (citations omitted).]

The trial court assessed 50 points for this variable. In this case, defendant harassed the victim over an alleged affair after becoming angry with her at a restaurant. When the couple arrived at their residence, defendant insisted that the victim allow him access to the home office where the gun was kept and he then removed the gun from storage, removed the plastic safety strips, loaded the gun, concealed it, and he then waited until the victim began to leave the living room before pointing it at her, stating that he was going to kill her. Defendant proceeded to fire multiple shots at the victim from close range, hitting her in the head and neck. This record amply supports the conclusion that defendant acted with a premeditated intent to kill the victim.

MCL 777.39 governs the scoring of OV 9, number of victims, and provides in relevant part that ten points be assessed when there were two to nine victims "placed in danger of physical injury or death." MCL 777.39(1)(c). The statute directs the court to count "each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). Here, defendant fired his weapon on multiple occasions during the commission of the assault for which he was convicted, and stray bullet holes were found in two neighboring trailers that were occupied at the time of the shooting. The evidence supports the trial court's score of ten points for OV 9.

We need not address defendant's remaining scoring arguments relative to OV 10, MCL 777.40, and OV 13, MCL 777.43, because, even if we assume that both of those variables should have been scored at zero points, thereby reducing the OV total score by 35 points, defendant would still be placed at the top OV level of VI, where 100 plus points is needed for that level and defendant would have 125 untainted points. See MCL 777.16d (assault with intent to murder is class A felony); MCL 777.62 (class A felony grid); MCL 777.21(3)(a) (increase in upper limit of range due to second-habitual offender status).[2] Without a change in the sentencing grid and guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.).

Defendant lastly contends that he is entitled to have the presentence investigation report (PSIR) corrected because inculpatory and inflammatory post-trial hearsay statements supposedly made by defendant to another inmate were included in the report, the trial court did not verify the information, and because the prosecutor agreed that the challenged information could be stricken from the report. The trial court was adamant that it would not redact the challenged information, indicating its belief that the statements were true and that it would have held a hearing on the matter had the prosecutor sought one. Defense counsel did not claim that the statements were inaccurate, but simply indicated that there was no verification of the statements and no opportunity to cross-examine the inmate. Defense counsel did not respond when the court asked counsel whether his client was "suggesting that it's factually inaccurate." A rather extensive brief submitted by defendant before the sentencing hearing challenged the scoring variables addressed above, but it made no mention of issues with the information in the PSIR. The trial court did not wholly disregard the statements, referring to them in the process of issuing the sentence, e.g., "[y]ou certainly told your cellmate . . . later on [that you contemplated killing the man allegedly engaged in the affair with your wife]."

This Court reviews a sentencing court's response to a challenge regarding the accuracy of a defendant's PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). "The sentencing court must respond to challenges to the accuracy of information in a presentence report; however the court has wide latitude in responding to these challenges." *Id.* A court "may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id*. at 648-649. If the court concludes "that the challenged information [is] inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *Id*. at 649.[3] Also, hearsay

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[2] As is evident, had the court erred relative to OV 9 (ten points), or, alternatively, had the court erred relative to OV 3 (25 points), the guidelines range would still not have been altered.

[3] MCL 771.14(6) provides:

> At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended,

(continued…)

evidence and criminal activity for which a defendant was not charged or convicted can be included in a PSIR. *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004).

Although a close call, we conclude that defendant never actually asserted that the challenged information was inaccurate; therefore, correction of the PSIR is not required. Defense counsel could have, and might have, conferred with defendant regarding the accuracy of the information and then expressly conveyed to the court that the information was inaccurate, if that indeed were the case. However, no argument was made in defendant's sentencing brief or at the sentencing hearing that the information was inaccurate. Defense counsel simply complained about a lack of verification. Accordingly, the trial court was not required to conduct any further inquiry or hearing into the issue and could consider the information in sentencing defendant.

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra

(…continued)

> and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

MCR 6.425(E)(2) provides:

> If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to
>
> (a) correct or delete the challenged information in the report, whichever is appropriate, and
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> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.