

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUQUIL DION LOVE,

Defendant-Appellant.

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UNPUBLISHED

September 18, 2007

No. 270410

Wayne Circuit Court

LC No. 05-007039-02

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to rob while unarmed, MCL 750.88, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 19 to 30 years' imprisonment for each of the two assault with intent to rob convictions, and 5 to 15 years' imprisonment for the felon in possession of a firearm conviction. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm his convictions and sentences.

This case arises out of a botched armed robbery at a gas station in Detroit, Michigan, at approximately 1:00 a.m. on June 27, 2005. According to witnesses, defendant and Shamarrie Bright,<sup>1</sup> exited the same car and approached two men, Anthony Bynum and Maurice Murphy, while they were pumping gas. A third person was sitting in the victims' car. Initially, Bright pointed an automatic revolver at the two men and stated, "run y'all pockets." Within moments, another man, later identified as defendant, approached the two men as well. One of the men was an off-duty campus security officer and was licensed to carry a concealed weapon. Fearful that defendant might discover the gun and use it against him, he pulled his weapon and shot both Bright and defendant. At trial, defendant claimed that he heard shots fired while he was in the gas station, and when he approached the subjects, he was shot.

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<sup>1</sup> Bright pled guilty to one count of assault with intent to rob, MCL 750.89 and possession of a firearm during the commission of a felony, MCL 750.227b. Bright was sentenced to 13 to 20 years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. His appeal of his plea was dismissed by this Court for "lack of merit." *People v Bright*, unpublished order of the Court of Appeals, entered October 16, 2006 (Docket No. 272787).

First, defendant asserts that there was insufficient evidence to convict him of felon in possession of a firearm. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Wilkens, supra* at 738.

To prove the offense of felon in possession of a firearm, the prosecution must establish that the defendant has been convicted of a specified felony and possessed a firearm. *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996). Possession of a firearm may be actual or constructive, and it may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if its location is known and the firearm is reasonably accessible to him or her. *Burgenmeyer, supra* at 438.

Here, it was stipulated that defendant had previously been convicted of a felony and was ineligible to possess a firearm at the time of the offense. A review of the record supports the conclusion that defendant had knowledge of the presence of the firearm carried by his accomplice, Shamarrie Bright, and the firearm was reasonably accessible to defendant. Bynum testified that he was having a conversation with Murphy while Murphy pumped gas into his car, when Bright got out of the passenger side of a nearby car, pointed a gun at Murphy, and told both Murphy and Bynum to empty their pockets. Defendant then emerged from the driver's side of the same car and searched Bynum's pockets. Lesley Washington, Bynum's then-girlfriend, sat in the backseat of Murphy's car and witnessed defendant search Bynum's pockets. Murphy testified that while Bright pointed a gun at him, Bright's accomplice searched defendant. Although Murphy did not get a good look at the man searching Bynum, the record readily supports the inference that the accomplice was defendant.

Although Bright claimed that defendant knew nothing of the robbery until it was over, the evidence shows otherwise. Given the collaborative nature of the robbery, it is difficult to conceive that defendant did not know that Bright possessed a gun or that the gun, a mere few feet away from defendant and in the hands of his accomplice, was not reasonably accessible to defendant. Accordingly, a rational jury could find that the elements of felon in possession of a firearm were proven beyond a reasonable doubt.

Aiding and abetting is an additional theory upon which to find defendant guilty of felon in possession of a firearm. To establish aiding and abetting, a prosecutor must show that: (1) the charged crime was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave the aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). The evidence here was that Bright, a felon ineligible to possess a firearm, confronted Murphy and Bynum with a firearm and directed them to empty their pockets. Defendant knew that Bright possessed a firearm, and defendant assisted Bright in the possession of a firearm by searching Bynum's pockets and wrestling with Bynum in an attempt to subdue him. A rational jury could have found defendant guilty beyond a reasonable doubt of this charge as an aider and abettor.

Next, defendant contends that the trial court erred by failing to instruct the jury concerning the specific intent element of assault with intent to commit robbery while unarmed. However, defense counsel affirmatively expressed approval of the jury instructions as they were given. A defendant's affirmative statement indicating his satisfaction with the jury instructions constitutes express approval of the instructions and extinguishes any error, thereby waiving appellate review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Finally, defendant argues that the trial court erred when it assessed him ten points for Offense Variable (OV) 4. This Court reviews a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Questions of statutory interpretation are reviewed de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

Pursuant to MCL 777.34(1)(a), a defendant is to be assessed ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." "In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). There is no requirement that the victim actually receive professional treatment; it may be sufficient that the victim was fearful during the encounter. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

In assessing defendant ten points for OV 4, the sentencing court reasoned:

Well, certainly this event was, based on the Court's recollection, traumatic coming at early morning hours, trying to buy gas, and the parties had the intent to do a robbery, and the victim responded by shooting Mr. Love and shooting at Mr. Bright who shoots back at him. I think I'm going to leave that scored as it is.

As discussed, the victims here arrived at a gas station in Detroit at approximately 1:00 a.m., and they were accosted by two men while pumping gas. One of the men not only pointed a firearm at Murphy, but actually placed the gun against Murphy's body and nudged him with it. Bynum eventually pulled his own firearm from his waistband and fired at Bright and defendant, at which point defendant and Bynum began to wrestle. A gunfight ensued, with Bright chasing and firing at Bynum, and Bynum running away from the scene while firing at Bright and defendant. Bright and defendant were wounded as a result of the shootings. Bynum testified that he was terrified by the incident; Murphy testified that he was scared and startled; Washington testified that she was very frightened and shocked throughout the incident.

The factors that contribute to a finding that Bynum and/or Murphy and/or Washington suffered serious psychological injury include: (1) the robbery occurred late at night; (2) there were two perpetrators who acted in concert; (3) one of the perpetrators was armed and pointed his firearm at both Bynum and Murphy and directed them to empty their pockets; (4) defendant put Bynum in a choke hold and the two wrestled; (5) gunfire ensued, including Bynum shooting defendant to get him to release the choke hold, and Bright firing at Bynum while chasing him; and (6) most notably, Bynum, Murphy and Washington testified to being startled and terrified by the incident. The trial court had the opportunity to view the demeanors of Bynum, Murphy and

Washington and hear their description of events. *Wilkins, supra* at 740-741 (it was not an abuse of discretion to assess ten points for OV 4 where the trial court saw a videotape of the CSC incident and observed the demeanor of the victims to be frightened and troubled). The totality of the circumstances surrounding the robbery supports a finding that Bynum and/or Murphy and/or Washington suffered serious psychological injury that might require professional treatment in the future. Thus, the trial court's decision to assess ten points for OV 4 was properly supported by the record and was not an abuse of discretion.

Defendant filed a supplemental brief in propria persona, raising numerous issues, including a claim of ineffective assistance of counsel, a contention that the trial court coerced the jury into reaching a verdict, and general claims of prosecutorial misconduct. We find only one merits discussion: during jury deliberations on April 6, 2006, a juror sent the trial judge a note explaining that the juror would forfeit a \$3,000 paid vacation if he had to return the following day. Following a discussion with the juror, the trial court announced that if the jury was unable to reach a verdict by the end of the day, deliberations would be suspended until the juror returned on April 17, 2006. Defense counsel objected to the trial court's decision; defendant now contends that under the circumstances, defense counsel's failure to request an appropriate instruction was unreasonable.

"Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992), *lv den* 441 Mich 925 (1993). A trial court has broad discretion to control trial proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2s 526 (2002). "[A]n abuse of discretion standard acknowledges that there will be circumstances in where there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 246, 269; 666 NW2d 231 (2003). When the trial court selects one of these principles outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

There is no indication that the jury was coerced into reaching a hasty verdict. Unlike the fact scenario cited by defendant in *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989), there is no reason provided by defendant or by our review of the record to find that the jury in this case was given the impression that it would be permanently discharged if it did not reach a verdict by the end of the day. For that reason, we find this court's opinion in *Vettese, supra*, controlling. In *Vettese*, the trial court instructed the jury that if it did not reach a verdict by 5:00 p.m., they would be excused for the day and be asked to return at 8:30 a.m. the following morning. This Court concluded, "[i]t is clear that the trial court's instruction was not coercive and merely indicated that the jurors would have to return the next day if they did not reach a verdict by 5:00 p.m. There is nothing in the trial court's instruction to suggest that the juror had to reach a verdict by that time." *Id.* Similarly, in this case, there was no suggestion by the trial court that the jury must reach a verdict by the end of the day merely by telling them they would have to return at a later date. Nor do we find it inherently coercive for a trial court to suggest to a sitting jury that a scheduling exigency may require the jury to suspend deliberations for a time and resume at a later date. Because the trial court did not err in such an instruction, there cannot be a claim of ineffective assistance of counsel for failure to request an additional instruction.

Having reviewed the remainder of defendant's claims and finding them to be without merit, we affirm.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello