STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May17, 2007
v	No. 267335 Kent Circuit Court
JOSE MATEO-CASTELLANOS, Defendant-Appellant.	LC No. 04-011365-FC

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm, MCL 750.84, and two counts of possessing a firearm during the commission of a felony, MCL 750.227b(1). The trial court sentenced defendant to prison terms of 15 to 30 years for the assault with intent to commit murder conviction and 5 to 10 years for the assault with intent to commit great bodily harm conviction, which were to be served consecutively to 2-year terms for each felony-firearm conviction. Defendant appeals as of right. We affirm.

Sergeant Jason Howe and Officer Andy Veen were among the police officers dispatched to Alt Dairy Farms, at Bristol and 6 Mile Road in Walker, after Carlos Ruiz informed the police that defendant was standing outside his front door holding a gun. After arriving at the scene, Howe and Veen trailed defendant to his trailer. The two officers backed up to a berm to keep watch on the trailer. Approximately 20 minutes later a silhouette appeared in the trailer's doorway. Veen illuminated the silhouette with his flashlight and, after seeing that it was defendant, identified himself as police and ordered defendant to drop his gun. Instead, defendant raised his gun and fired one shot at Veen. Defendant then turned and pointed his gun at Howe, who had also illuminated defendant with his flashlight, and fired one shot at Howe.

Defendant first argues that it was an abuse of discretion for the district court to bind him over on Count I, the charge of assault with intent to commit murder with respect to Officer Veen, because insufficient evidence was presented at the preliminary examination of his intent.[1] He

[1] Although the district court bound defendant over for trial on two counts of assault with intent to commit bodily harm less than murder, defendant was only convicted as charged on one of those (continued…)

further argues that the evidence presented at trial was insufficient to support the conviction of assault with intent to commit murder. He contends that intent to kill cannot be inferred merely from the pointing and shooting of a gun "at someone." To preserve the issue whether the district court erred in binding a defendant over for trial, the defendant must file a motion to quash before or during trial. *People v Noble*, 238 Mich App 647, 658-659; 608 NW2d 123 (1999). Defendant filed a motion to quash; however, it was never set for hearing, never argued by defendant, and never decided by the trial court. Therefore, this Court's review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Even if the district court erroneously concluded that sufficient evidence was presented at the preliminary examination to bind defendant over for trial, the error is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In other words, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *Hall, supra* at 601-603, and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003).

In establishing assault with intent to commit murder, the prosecution must prove beyond a reasonable doubt the following elements: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). The intent to kill may be inferred from all the facts in evidence, including the seriousness of the injury and the use of a lethal weapon. See *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). An intent to kill can also be inferred from conduct the natural tendency of which is to cause death or great bodily harm. *People v Eisenberg*, 72 Mich App 106, 114; 249 NW2d 313 (1976). Because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Viewed in the light most favorable to the prosecution, the evidence established that defendant's .380 caliber gun could hold six bullets at the most. Ruiz heard two or three gunshots soon after calling police for the first time. Officers then heard three or four gunshots after they took Ruiz into custody. Because fired .380 caliber casings were found near Ruiz's trailer, it is reasonable to infer that defendant fired the gunshots heard by Ruiz and the officers and that defendant's gun was empty by the time he returned to his trailer after being ordered by officers to drop his gun. While Veen and Howe stood at the corner of defendant's trailer, they heard moving and banging coming from inside of defendant's trailer. An empty box of ammunition that would be used in a .380 caliber gun was found in defendant's trailer. It is reasonable to infer from this evidence that defendant reloaded his gun while in his trailer. Approximately twenty minutes later defendant was observed in the doorway of the trailer. Howe and Veen illuminated

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counts. Because defendant is seeking a remand *or* "entry of a judgment for assault with intent to commit great bodily harm less than murder," his argument on appeal pertains only to the bindover and conviction for one count of assault with intent to commit murder.

defendant with their flashlights and observed that defendant was holding a handgun. Veen directed defendant to raise his hands. Defendant raised his gun, fired a shot at Veen, then turned and fired a shot at Howe. The evidence was sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant fired the shot at Veen with an intent to kill. *Yost, supra* at 126. Accordingly, because defendant was fairly convicted at trial of assault with intent to commit murder, he is precluded from raising on appeal the issue whether the evidence at the preliminary examination was sufficient to warrant a bindover. *Wilson, supra* at 1018; *Hall, supra* at 601-603.

Defendant next claims that he did not present a voluntary intoxication defense and, therefore, the trial court erred in instructing the jury that voluntary intoxication was not a defense to the charges. We review de novo a defendant's claim that an erroneous jury instruction was given. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). However, a trial court's determination whether a jury instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Except for one narrow circumstance, which is not applicable to the present case, voluntary intoxication is not a defense to any crime. MCL 768.37; *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004). Thus, the trial court's instruction that defendant's voluntary intoxication was not a defense to the charged offenses was an accurate statement of the law. Further, because the jury heard testimony that defendant appeared to be intoxicated and was, in fact, intoxicated the night he shot at Veen and Howe, the trial court did not abuse its discretion in determining that the instruction regarding voluntary intoxication was applicable to the present case. The trial court did not prejudice defendant and deny him a fair trial when it instructed the jury that his voluntary intoxication was not a defense to the charged offenses.

Defendant also claims that the trial court denied him a fair trial when it failed to give a curative instruction regarding Louis Hunt's testimony that a known set of fingerprints for Juan Caravante, an alias used by defendant, matched a known set of fingerprints for defendant. He argues that the court's failure to instruct the jury that Hunt's testimony could only be used for the purpose of establishing that defendant used two names was error requiring reversal. After the trial judge denied defendant's motion for a mistrial, he told defendant he would be glad to give a curative instruction at defendant's request. Defendant never requested the court to give a curative instruction. Error requiring reversal must be predicated on the trial court's actions and not upon alleged error to which the appealing party contributed by plan or negligence. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Because defendant failed to request a curative instruction, any error was caused by his negligence and is not grounds for reversal.

Finally, defendant claims that the trial court erred in scoring ten points for offense variable (OV) 19, MCL 777.49, because defendant did nothing before or after shooting at Veen and Howe to interfere with the administration of justice. We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). We will uphold a scoring decision for which there is any evidence in support. *Id.*

Ten points may be scored for OV 19 if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Interfering with the investigation of a crime, even before criminal charges are filed, constitutes interference, or attempted interference, with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d

348 (2004). Before defendant retreated to his trailer, he was ordered by Veen and Hudson to stop and drop his gun. Instead of obeying the officers' commands, defendant ran away and, as he was running, pointed his gun at Veen and Hudson. By refusing to obey the officers' commands, defendant interfered with the administration of justice. Accordingly, because there is evidence in the record to support the trial court's scoring of ten points for OV 19, the trial court did not abuse its discretion in scoring OV 19. *Cox, supra* at 452. Defendant is not entitled to be resentenced.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens