STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2006
v TONY FRANKINA, JR., Defendant-Appellant.	No. 260642 Macomb Circuit Court LC No. 2003-001139-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TONY FRANKINA, JR., Defendant-Appellant.	No. 260643 Macomb Circuit Court LC No. 2003-001068-FC

Before: Whitbeck, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, unlawfully driving away an automobile (UDAA), MCL 750.413, and fourth-degree fleeing or eluding a police officer, MCL 750.479a(2), in LC No. 2003-001068-FC, and of a separate count of armed robbery in LC No. 2003-001139-FC. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 450 months to 80 years for each of the armed robbery convictions, 76 months to 80 years for the UDAA conviction, and 46 months to 15 years for the fleeing or eluding conviction. He appeals as of right. We affirm.

Defendant's convictions arise from a crime spree that began on February 5, 2003, and ended the next morning. According to a convenience store clerk, a man wearing a ski mask robbed the store, which was located on 23 Mile Road in Ray Township, at approximately 10:30 p.m. Later, around midnight, defendant's former girlfriend, Sandra O'Rourke, saw defendant drive up to the gas station where she worked; he was driving a green Monte Carlo. At approximately 4:30 a.m., a man wearing a ski mask robbed a 7-Eleven store located on 21 Mile Road, and fled in a green Monte Carlo. A police officer who was responding to the 7-Eleven

robbery observed a green Monte Carlo and began pursuing it. The driver turned into a subdivision, crashed the vehicle into a tree, and fled on foot. A black hood and a quantity of loose one and five dollar bills were found inside the vehicle. Shortly after 7:00 a.m., a Saturn automobile was stolen from its owner's garage on 21 Mile Road. At approximately 7:20 a.m., a man resembling defendant's appearance was observed parking the Saturn on a nearby residential street and walking away. Shortly afterward, a police officer observed defendant on foot and arrested him.

I Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his convictions of UDAA and fleeing or eluding a police officer. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

Defendant argues that the evidence was insufficient to prove his identity as the perpetrator of the charged UDAA offense. We disagree. Joyce Lepage testified that her husband went outside to start her car, a 1998 Saturn, at 7:00 a.m. on February 6, 2003. When she left the house a few minutes later, her car was gone. She stated that the car was equipped with an alarm operated by the "key fob." Lynn Riehle testified that a Saturn car turned onto her street with the alarm sounding at approximately 7:20 a.m.. The driver, a man with dark brown curly hair, and dressed in black jeans and a white shirt, parked the vehicle in front of her house. He seemed to be panicking as he parked the car and then ran away. Riehle stated that defendant's hair color matched the hair of the man who ran from the car. Utica Police Officer Thomas Bowman testified that he was searching the area for the armed robbery suspect and encountered defendant on foot at approximately 7:30 a.m.

Viewed in a light most favorable to the prosecution, evidence that defendant was driving the Monte Carlo when it crashed placed defendant in the area of Lepage's home when the opportunity to steal the Saturn arose, and supported an inference that defendant stole the Saturn, because he was in need of a car after crashing and abandoning the Monte Carlo. The jury could also reasonably infer from the evidence that defendant abandoned the Saturn on Riehle's street 10 or 15 minutes later, after the alarm had been activated and would not go off. Riehle's description of the driver matched defendant's appearance, and Officer Bowman placed defendant within walking distance of the parked Saturn. Thus, the evidence, and reasonable inferences drawn there from, was sufficient to establish defendant's identity as the person who stole the Saturn. This case is distinguishable from *People v Talley*, 67 Mich App 239; 240 NW2d 496 (1976), on which defendant relies. In *Talley*, the evidence merely established that the defendant removed items from a stolen vehicle after it had been driven away. In the instant case, there was sufficient evidence linking defendant to the theft of the Saturn.

Defendant also argues that the prosecution failed to establish all of the elements of fleeing or eluding. MCL 750.479a(1) provides:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the

> lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

To prove that a suspect is guilty of fleeing or eluding, the prosecution must show each of the following:

> (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant was driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, [and] (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things. [*People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999); see also CJI2d 13.6d.]

Shelby Township Police Officer David Jacquemain testified that he responded to the dispatch for the armed robbery of the 7-Eleven store. He saw a car coming from the direction of the store and made a U-turn to pursue it. As soon as he got behind the car, the driver turned off the headlights and abruptly turned into a subdivision. Officer Jacquemain activated his lights and siren and increased his speed to follow the car, but lost sight of the vehicle when it turned into the subdivision. He then received a radio dispatch regarding a car that had crashed into a tree in the subdivision. He found the car with the engine running, the driver's side door open, and the headlights off.

Defendant argues that there was insufficient evidence that the officer ordered him to stop, and that he refused to obey that order. He asserts that the officer did not signal the driver to stop until after the driver turned into the subdivision, at which point the driver was no longer in the officer's line of vision and could not have seen the signal. However, Officer Jacquemain testified that he activated his lights and siren as soon as the driver turned off his lights and turned into the subdivision. A reasonable trier of fact could infer that the driver was able to hear the siren, even if he did not see the lights, yet failed to stop, contrary to MCL 750.479a(1). Further, in light of the evidence of the driver's evasive conduct, a reasonable trier of fact could infer that the driver was aware that the siren was directed at him.

Accordingly, the evidence was sufficient to support defendant's convictions of UDAA and fleeing or eluding.

II Sentencing

Defendant argues that resentencing is required because the trial court erred in scoring 15 points for offense variable ("OV") 19 (interference with the administration of justice).

Defendant preserved this issue by objecting to the scoring of OV 19 at sentencing. MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). We review a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *Id.*

MCL 777.49 provides, in pertinent part:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere, or that results in the interference with the administration of justice or the rendering of emergency services. . . . . 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice. . . . . 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force. . . . . 0 points

At sentencing, the prosecutor argued that a score of 15 points for OV 19 was proper because defendant had threatened witnesses. The prosecutor maintained that defendant threatened to harm Sandra O'Rourke during recorded telephone calls to his mother from his jail cell before his preliminary examination. Transcripts of the recordings were read into evidence at defendant's trial. Defendant told his mother that the only evidence linking him to the convenience store robberies was O'Rourke's statement that he was in possession of the green Monte Carlo on the night of the crime spree. Defendant believed that the prosecutor could not convict him without O'Rourke's testimony, because she was "the only person that can put me in that car." Defendant's mother told defendant that O'Rourke was "too afraid to do anything, because she's afraid what you'll do to her." Defendant replied, "You're damn straight," and asked his mother to call O'Rourke and "tell her to change her story." He urged his mother to tell O'Rourke to visit him at the jail. The prosecutor also stated that defendant had threatened Officer David Kennedy, the officer in charge, during the trial. The trial court agreed that the evidence justified a score of 15 points for OV 19.

We conclude that there is evidence in the record to support the trial court's scoring decision. Here, officer Kennedy testified that defendant "threatened" him during a post-arrest interview. Although officer Kennedy did not specify the exact nature of the threat, the word

threat is commonly defined as "a declaration of an intention to inflict punishment, injury, etc., as in retaliation for, or conditionally upon, some action or course." Random House Webster's College Dictionary (1997). Here, we can only presume that officer Kennedy meant that defendant had declared his intention to cause him harm. Since officer Kennedy was in the process of investigating a crime spree, defendant attempted to interfere with the administration of justice. Further, given that defendant had asked his mother to call O'Rourke, who defendant knew was deathly afraid of him, and "tell her to change her story," there is no reason to doubt officer Kennedy's testimony that defendant threatened him. Accordingly, we cannot conclude that trial court improperly exercised its discretion in scoring defendant 15 points under OV 19.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio