STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 1999
v	No. 206357 Recorder's Court
CARY DIXON, Defendant-Appellant.	LC No. 97-001466

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, he was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, intentional discharge of a firearm at a dwelling or occupied structure, and felony-firearm. Defendant was sentenced to five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, to be served concurrently with a two to four year sentence for the intentional discharge conviction. Those sentences were to run consecutively to the mandatory two-year sentence for felony-firearm. Defendant appeals as of right, and we affirm.

Defendant contends that there was insufficient evidence to support his convictions because the prosecutor failed to disprove his theory of self-defense and defense of others beyond a reasonable doubt. We disagree.

"In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The elements of assault with intent to do great bodily harm less than murder are "(1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). "[A] defendant's intent is a question of fact to be inferred from the circumstances by the trier of fact." *People v Tower*, 215 Mich

App 318, 323; 544 NW2d 752 (1996). Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Truong (After Remand),* 218 Mich App 325, 337; 553 NW2d 692 (1996). A defendant may only use the amount of force required to defend himself, and defendant cannot be the initial aggressor. *People v Deason,* 148 Mich App 27, 31; 384 NW2d 72 (1985).

The prosecution met its burden of proving the elements of the offense and disproving defendant's theory of self-defense. There was evidence that the victim was on defendant's property when defendant pulled a shotgun from inside his home, exited his home and shot the victim from close range. This evidence is sufficient to support a finding of an assault with intent to do great bodily harm.

Thomas Coleman testified that he observed the victim get out of his vehicle and proceed to defendant's home. Coleman stated that the victim pulled up his pants after he exited the car. However, Coleman testified that this was not a threatening gesture, but rather, the victim merely needed a belt. Coleman did not observe any weapons in the victim's hands. John Gabrish, an EMS technician, testified that he was en route to render medical care to a pedestrian hit by a car when he heard a gunshot. Gabrish turned and saw a man, later identified as defendant, with a shotgun. Defendant racked the gun and shot a second time, shooting the victim from point-blank range, knocking him off his feet. Gabrish did not see any weapon on the victim at the time of the shooting, and when he returned to the scene to care for the victim, he did not see a gun on the victim's person.

A police officer testified that there was a hole in the screen door of defendant's home, which was consistent with a gun being fired from inside the home. However, four spent shotgun shells were found on the grass in front of defendant's home. The officer testified that once a shotgun is fired, the shell casing remains in the weapon until a new cartridge is loaded, thereby releasing the spent shell casing. While defendant may have fired the first shot from inside his home, there was evidence that defendant exited his home and *pursued* the victim outside. Thus, the evidence was sufficient to disprove defendant's contention that he acted in self-defense. *People v Fortson,* 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant also states that "the prosecution's evidence for discharge of a weapon at an occupied building was also insufficient since the shots fired were in self-defense." MCL 750.234b; MSA 28.431(2) provides in relevant part:

> (1) Except as provided in subsection (3) or (4), an individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both.
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> (4) Subsections (1) and (2) do not apply to an individual who discharges a firearm in self-defense or the defense of another.

With regard to this charge, the evidence showed that a neighbor witnessed the shooting of the victim, and shouted out the victim's name. Defendant then shot once at the neighbor's home. The neighbor fled into his home while defendant fired a second time at the home. Because there was no evidence of harm or a threat of harm from the neighbor, defendant's claim of insufficient evidence must fail. A reasonable jury could conclude that defendant did not have an honest and reasonable belief that an occupant of the neighbor's dwelling posed a threat of imminent harm to defendant or another.

Defendant also contends that the trial court abused its discretion in sentencing defendant and did not individualize the sentences. We disagree. The proportionality of a sentence is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). "A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Because the sentence imposed was in accordance with the guidelines, it is presumed proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Review of the trial court's statement during sentencing reveals that the sentence was, in fact, individualized as the court took into account defendant's background, and the circumstances of the case. A sentence within the guidelines range can violate the principle of proportionality in unusual circumstances. *Milbourn, supra*, 435 Mich 661. However, the circumstances cited by defendant are not unusual circumstances overcoming the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Accordingly, the trial court did not abuse its discretion in fashioning the sentences imposed.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey