

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN C. WILKERSON,

Defendant-Appellant.

UNPUBLISHED

February 4, 2000

No. 209539

Recorder's Court

LC No. 96-500581

Before: Bandstra, C.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to serve two prison terms of forty to eighty years each for the assault convictions, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions stem from a shooting that occurred during the evening of December 28, 1995. Earlier that evening, while out walking with friends, Victor Trevino and Angela Abbot encountered defendant and several other individuals in an alleyway. An apparent gang-related confrontation ensued,¹ during which Trevino pulled a gun from out of his coat. No shots were fired at this time, and the two groups departed. Trevino and Abbot then returned with their friends to a nearby duplex, where they entered a back bedroom. Inside the room were Trevino, Abbot, and five others, including a three year old. Presently, two individuals were spotted running through the alleyway behind the residence. The room lights were then extinguished and the window shades closed. A few moments later, gunfire came through the wall and into the room. Abbot was struck in the neck, sustaining crippling injuries. Defendant's conviction for two counts of assault with intent to commit murder involved the assaults on Trevino and Abbot.

Defendant first argues that the trial court erred in denying his motion for a directed verdict. We disagree. When ruling on a motion for a directed verdict of acquittal, the trial court "must consider the evidence presented by the prosecution up to the time the motion was made, view that evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that

the essential elements of the crime were proven beyond a reasonable doubt.” *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (citations omitted). This Court reviews the denial of a motion for a directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

Defendant asserts that the trial court should have granted his motion for a directed verdict because the testimony of James Shearer was not credible. This claim is without merit. It is well established in Michigan that a trial court must not determine the credibility of witnesses when ruling on a motion for directed verdict. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). We also reject defendant’s claim that reversal is warranted because the trial court’s denial of the directed verdict motion was based, in part, on the mistaken belief that defendant was wearing a green Miami University jacket at the time of the shooting. While the trial court did make a factual error in asserting that defendant was wearing the jacket, the remaining evidence was still sufficient to enable a rational trier of fact to find defendant guilty of the charged crimes beyond a reasonable doubt. *Hampton, supra* at 368.

Next, defendant argues that there was insufficient evidence of his intent to kill to convict him of two counts of assault with intent to commit murder. We disagree. “When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt.” *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999). “The intent to kill may be proven by inference from any facts in evidence.” *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). To prove intent to kill, it is only necessary that the state of mind exists and not that it is directed at any particular victim. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient to prove intent. See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Viewing the evidence in a light most favorable to the prosecution, we conclude that the trial court did not err in finding sufficient evidence of an intent to kill. Evidence was presented of a gang related confrontation before the shooting incident. After this confrontation, defendant armed himself, expressed hostility toward Trevino, and returned to the scene. Approximately five shots were fired into the back bedroom of a house in which seven people, including Trevino, were congregated. A light had been on in the room just moments before the shooting, and the room faced the alley from which the shots were fired. From these facts, the factfinder could reasonably infer that defendant had the intent to kill Trevino. That intent also transferred to Abbot. *People v Plummer*, 229 Mich App 293, 306-307; 581 NW2d 753 (1998).

Finally, defendant argues that his sentences are disproportionate. We disagree. This Court reviews a defendant’s sentence for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). “A sentence constitutes an abuse of discretion if it violates the principle of proportionality.” *Id.*

The sentencing guidelines recommended a minimum sentence of ten to twenty-five years' imprisonment for the assault convictions. The court departed from this recommendation, sentencing defendant to two concurrent minimum terms of forty years. At sentencing, the court indicated its reasons for departing from the guidelines:

For the record, I would indicate that with regards to the sentence, I do believe that the sentencing guidelines do not adequately reflect the fact that the victim in this particular case, 16 year old Angela Abbot, in fact spent the better part of a year literally fighting for her life in a hospital, in a rehab center and in recovery, and she is now in a wheelchair and will remain so for the rest of her life; that this was a shooting done by a young man who has been presented numerous opportunities in the juvenile system to turn himself around and clearly has chosen a life style and course of conduct that is outside of control; that this was a violence that imperiled not only the lives of Angela Abbot and Mr. Trevino, but also I think lives inside the house so that five others were placed in peril; and that I do believe that society needs to be protected, and that the defendant needs to be punished.

A court may depart from the guidelines when it determines that the recommended range inadequately reflects the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). However, departures from the guidelines should alert appellate courts to the possibility of a violation of the principle of proportionality. *Id.* at 659-660. "The crucial test is not whether the sentence departs from, or adheres to, the recommended range under the guidelines, but whether it reflects the seriousness of the matter." *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998).

After reviewing the record, we conclude that "the trial court properly considered the nature of the crime in a way not fully addressed in the guidelines." *Castillo, supra* at 449. For example, we believe that the lifelong impact of the crime on Abbot is not adequately weighed in the guidelines and, therefore, was a permissible consideration in departing from the guidelines. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Additionally, the court correctly considered the following circumstances, which also speak to the severity of the crime and the danger defendant presents to the public: the danger defendant's actions posed to the five other individuals in the room, including the three year old; defendant's involvement in gangs; and the fact that the offense was gang related. See *Rice, supra* at 445. We conclude, therefore, that the sentences imposed do not constitute an abuse of discretion. *Milbourn, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

¹ Trevino testified that defendant was a member of a gang known as the Disciples of Chaos. Trevino indicated that he had been a member of the Cash Flow Posse, a rival gang.