

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY SHAW,

Defendant-Appellant.

UNPUBLISHED

June 15, 2001

No. 222908

Muskegon Circuit Court

LC No. 98-042848-FC

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was charged with four counts of assault with intent to commit to murder, MCL 750.83; MSA 28.278, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and three counts of felony firearm, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to three concurrent terms of nine to fifteen years' imprisonment for the assault convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict of the assault with intent to commit murder charges. We disagree. We review the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

In *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), this Court stated:

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. The intent to kill may be proved by inference from any facts in evidence. Because of the

difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. [Citations omitted.]

For this issue, defendant concedes that the evidence was sufficient for the jury to find that he was the shooter. He argues only that there was inadequate evidence to support a finding that he intended to kill. Viewing the evidence in a light most favorable to the prosecution, we disagree.

The evidence demonstrated that defendant was agitated or upset after speaking with his attorney about a drunk driving case. Defendant was seen standing on a highway overpass and pointing a gun down to the highway several hours before the shootings at issue. A witness testified that, at the time, defendant appeared very angry. Hours later, defendant shot at numerous vehicles as they traveled north on Getty Street. Defendant was charged with shooting at four vehicles. The testimony indicated that, in three of the four incidents, the bullets were aimed toward the heads of the drivers. The bullets went through the windshields or driver's side windows, almost hitting the drivers.

From the evidence, an inference can be drawn that defendant intended to kill. It appears that the shots were consciously aimed at the head level of each driver. Defendant's lack of success, i.e., the fact that he missed his moving targets in the dark during a windstorm, does not negate the inference that can be drawn from the relatively consistent location of the shots fired with respect to three of the four vehicles. The circumstantial evidence supported the charges of assault with intent to commit murder. The trial court properly refused to grant a directed verdict.

II

Defendant next argues that the evidence was insufficient to support his convictions for assault with intent to do great bodily harm less than murder. We disagree. When reviewing the sufficiency of the evidence in a criminal case we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find 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). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *Id.* At 452. Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 452.

Defendant requests that we draw inferences favorable to him from the evidence when determining this issue. This we may not do. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the evidence was sufficient to support that defendant intended to do great bodily harm.

Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. Assault with intent to commit great bodily harm is a specific intent crime. [*People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (citations omitted).]

As noted in the discussion of Issue I, there was strong evidence of defendant's intent to kill. The same evidence is sufficient to support the conclusion that defendant had, at the very least, an intent to cause great bodily harm to the victims.

III

Defendant next argues that the trial court improperly responded to a jury request for "a transcript" after deliberations began. This issue is waived because defense counsel affirmatively approved the trial court's handling of the situation. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). Because the issue is waived, we will not consider any substantive claims raised by defendant about the trial court's response to the jury's request for a transcript.

IV

Defendant next argues that, at the *Walker*¹ hearing, the trial court improperly admitted a report from the Center for Forensic Psychiatry. We disagree. Where a defendant has a psychiatric history that might raise a reasonable question about his ability to make a knowing and intelligent waiver of his *Miranda* rights, admission of evidence about the defendant's psychiatric state is relevant and admissible at the *Walker* hearing. *People v Howard*, 226 Mich App 528, 538-542; 575 NW2d 16 (1997), citing *People v Garwood*, 205 Mich App 553; 517 NW2d 843 (1994). In *Garwood*, the defendant had a psychiatric history that included institutionalization. He sought to introduce testimony from a psychologist to show that he had not knowingly and understandingly waived his rights. The trial court ruled that the evidence was irrelevant and inadmissible for purposes of the *Walker* hearing. *Id.* at 555. This Court disagreed and remanded, finding that evidence of the defendant's mental capacity was an issue when determining whether there was a knowing and intelligent waiver. *Id.* at 555-559.

Here, defendant raised the issue of his psychiatric history and condition when he attempted to suppress his statements to the police. The report contained information about defendant's past psychiatric history and mental capacities. As such, it was relevant to the issues to be determined by the trial court at the *Walker* hearing and the trial court properly admitted it.²

V

Finally, defendant argues that the trial court abused its discretion when it refused to allow him to present evidence that the Chronicle newspaper had published information and a picture about him before a witness identified him in a lineup. We disagree. The evidence of the newspaper publications was irrelevant and inadmissible. The witness at issue testified that she

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

² Defendant's reliance on MCL 768.20a(5); MSA 28.1043(1)(5) is misplaced. The statute only forbids the use of statements made by a defendant to personnel at the center for forensic psychiatry "in court at trial of the case on any issues other than his mental illness or insanity at the time of the alleged offense." The report at issue was not used at trial in this case.

saw defendant from a very close distance and would never forget his face. She testified that she did not read any newspaper articles or see defendant's picture in the paper before identifying him at the time of a lineup ten days after the incident. The witness was on vacation for several days during the time period. While she admitted that she talked about the incident with several other people, there was no testimony or evidence that any of those people read any articles or saw defendant's picture and then imparted information to the witness about defendant. The trial court identified the lack of any logical link between the witness and the articles. It ruled that the evidence was inadmissible unless a link could be established. The ruling was not an abuse of discretion.

All relevant evidence is admissible. MRE 402. Relevant evidence is defined as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [MRE 401.]

"Relevant evidence has two characteristics: it is 'material' and has 'probative force.'" *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). "To be 'material,' the evidence must be logically relevant to an issue of fact at consequence at trial." *Id.* Further, "[a]ny tendency to prove such a fact in issue constitutes sufficient probative value for purposes of relevancy." *Id.* at 497-498.

In this case, the evidence was neither material nor probative, given the link that was missing. The witness' credibility was an issue of consequence. However, the newspaper article was not logically relevant to her credibility where there was no testimony or evidence to support even a tenuous inference that she received information from the newspaper articles. In other words, the mere existence of the newspaper articles had no tendency to prove that the witness was not credible where there was no link between her and the newspaper articles.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder