

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS E. COUSIN,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2002

No. 225219

Wayne Circuit Court

Criminal Division

LC No. 99-005196

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant was convicted by a jury of two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of six-and-one-half to ten years' imprisonment for each assault conviction, and a consecutive two-year term for the felony-firearm conviction. He now appeals as of right. We affirm.

Defendant argues that the evidence was insufficient to support his convictions. We review this issue de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), and view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We must show deference to the jury's verdict, drawing "all reasonable inferences" and making all "credibility choices in support" of that verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecutor presented sufficient evidence to support defendant's convictions of assault with intent to do great bodily harm. The elements of that offense are "(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." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Here, the prosecutor presented evidence that defendant approached a group of three men, called to them to come closer, then pulled out a gun and fired twice at them. Defendant argues that there was no evidence that he intended to shoot the victims. However, one of the victims testified that defendant pointed the gun at them and shot. Moreover, defendant called to the victims to come closer, supporting an inference that he did so in order to increase his chances of striking them. That defendant's gunshots missed the victims is inconsequential. See e.g., *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). There was sufficient

evidence that defendant assaulted the victims with a gun and that he intended to do them great bodily harm by shooting at them. Additionally, this evidence was sufficient to support defendant's felony-firearm conviction.

Defendant also argues that he was denied a fair trial because the trial court admitted hearsay testimony without a cautionary instruction. We review this issue for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999). The evidence showed that as the victims fled from the shots fired by defendant, a second, unidentified assailant began firing upon them from an alternate position, killing one of the victims and wounding the other. The prosecutor charged defendant, as an aider and abettor of the unidentified assailant, with one count of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of assault with intent to commit murder, MCL 750.83. Over objection by defense counsel, one of the victims was permitted to testify during trial that while in prison he had met the unidentified assailant, who told the victim that he knew defendant and that defendant was supposed to aid the assailant in shooting the victims. We agree with defendant that, as testimony concerning an out of court statement offered to prove the truth of the matter asserted, the victim's testimony in this regard was hearsay. See MCR 801(c). We conclude, however, that any error in the admission of this testimony was harmless.

Where, as here, the declarant is unavailable for cross-examination, the admission of hearsay against a criminal defendant is a constitutional error, violating the defendant's right to confrontation. See *People v Tanner*, 222 Mich App 626, 631-632; 564 NW2d 197 (1997). Thus, reversal is required unless the beneficiary of the error can show that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). To make this showing, there must be no reasonable possibility that the error contributed to the conviction. *Id.* at 406.

As noted above, defendant was charged as an aider and abettor of the unidentified assailant with first-degree murder involving one victim, and assault with intent to commit murder involving the others. The jury acquitted defendant of all charges involving the first victim, instead convicting him only of two counts of assault with intent to do great bodily harm less than murder with regard to the latter two victims, based on the two gunshots that he alone fired. Because the jury rejected the prosecutor's theory that defendant acted in concert with the unidentified assailant in killing the first victim, the admission of hearsay that supported the prosecutor's theory was harmless beyond a reasonable doubt.

We affirm.

/s/ Henry William Saad  
/s/ Richard A. Bandstra  
/s/ William C. Whitbeck