STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ROBBINS,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 230140
Wayne Circuit Court
LC No. 00-003237

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of thirty-four months to ten years for the assault conviction and to a mandatory consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict with regard to the assault with intent to do great bodily harm less than murder and felony-firearm charges[1] because no direct evidence was presented that defendant possessed a gun or shot a gun. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of assault with intent to do great bodily harm less than murder are (1) an assault, coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204, on remand 218 Mich App 645 (1996). The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App

[1] In his brief, defendant asserts that the evidence was not sufficient to convict him of the charged offenses. However, defendant was not convicted of the offenses for which he was charged but rather of lesser offenses.

499, 505; 597 NW2d 864 (1999). A defendant may attack the sufficiency of the evidence in regard to felony-firearm with respect to two elements: possession and time. *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), overruled on other grounds *People v Burgenmeyer*, 461 Mich 431 (2000).

Possession may be actual or constructive and may be proved by circumstantial evidence. *Williams, supra* at 609. Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

Here, evidence was presented that the victim noticed defendant sitting in defendant's car and saw another person in the passenger seat. The victim noticed that the window of defendant's car was down. The victim then heard gunshots and heard glass breaking and metal hitting metal. Several bullets hit the victim's car, one bullet hit the victim in the arm, and a bullet fragment hit the victim in the nose. The victim testified that, because of the position of the cars, the passenger of defendant's car would not have been able to shoot the victim or his car. While the victim was being treated in the hospital, defendant left messages on the victim's machine where he told the victim, "I got you." We find that a reasonable finder of fact could have found that this circumstantial evidence proved beyond a reasonable doubt that it was defendant who possessed the gun and fired the shots. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant also argues that the trial court abused its discretion in denying his motion for a new trial on the basis of newly discovered evidence. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001).

A defendant seeking a new trial on the basis of newly discovered evidence must first demonstrate that the evidence itself, not merely its materiality, is newly discovered. *People v Cress*, ___ Mich App ___; ___ NW2d ___ (Docket No. 225855, issued 2/26/02), slip op p 9.

Defendant argues that the transcription of the phone messages defendant left on the victim's answering machine is newly discovered evidence that conflicts with the victim's testimony with regard to the time at which he saw defendant in the car. We disagree. Evidence is newly discovered if neither the defendant nor his lawyer was aware of it at the time of the trial. *People v LoPresto*, 9 Mich App 318, 324-325; 156 NW2d 586 (1967). Defendant does not contend that he was unaware of the phone messages that he left on the victim's answering machine. With reasonable diligence, defendant could have had the phone messages transcribed and used at the trial. Hence, we conclude that the evidence was not newly discovered and that the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald