

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY REGAN BOSTER,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 230942

Wayne Circuit Court

LC No. 99-006605

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, two counts of discharging a firearm at a dwelling or occupied structure, MCL 750.234b, possession of a firearm during the commission of a felony, MCL 750.227b, carrying a dangerous weapon in a motor vehicle, MCL 750.227, and transporting a loaded firearm other than a pistol in a motor vehicle, MCL 750.227c. The trial court sentenced defendant to six to eighteen months' imprisonment for the conviction of assault with intent to murder, six months to four years for each conviction of discharging a firearm at a dwelling or occupied structure, two years for the felony-firearm conviction, six months to five years for the conviction of carrying a dangerous weapon in a motor vehicle, and six months to two years for the conviction of transporting a loaded firearm in a motor vehicle. Defendant appeals as of right. We affirm in part, reverse in part, and remand.

On June 24, 1999, defendant and Zachary Woodby were drinking beer at defendant's home. They decided to take some firearms owned by Woodby to the woods to fire some rounds. They went to Woodby's home where they obtained and loaded the firearms. At about 2:25 a.m. on June 25, 1999, defendant and Woodby were near the intersection of Sheldon Road and Palmer Road in Woodby's neighborhood. Defendant was carrying a shotgun and Woodby had an SKS rifle. Defendant fired a shot into the air or into the ground.¹ Woodby fired at and struck a passing car. Residents in the area were awakened by the sound of gunfire and witnessed two individuals walking three feet apart, one behind the other. After Woodby had fired several shots, he and defendant got into a car and drove away.

¹ The evidence was conflicting whether defendant fired the gun into the air or into the ground.

Canton Police Officer Timothy Wright was dispatched to the area where shots were fired. He came upon a blue Pontiac Grand Am and followed the car. A high speed chase ensued, which ended when Woodby, the driver, attempted to turn right and collided with another vehicle. Woodby was wearing bandoliers with shotgun shells and had three knives on his person. Defendant appeared to be intoxicated. Officer Wright asked defendant “whether anyone else was involved in this incident,” to which defendant replied, “No, man. It was just us.” The police seized two rifles and a shotgun, and ammunition for each, from the car.

A police investigation later determined that some of the bullets penetrated two homes in the neighborhood, and a daycare center at the Sheldon and Palmer intersection. Police estimated that nineteen shots were fired from Woodby’s rifle found in the Grand Am. The police found no evidence that any structure or automobile had been hit by gunfire from the shotgun.

Detective Steven Miller interviewed defendant after he was taken into custody. Defendant wrote an apology to the victims, in which he stated, “I didn’t shot [sic] at you. I shot in the air, but that doesn’t dismiss anything.” According to Miller’s report, defendant told him that he and Woodby took the weapons from Woodby’s house “with the intention of going to the woods to shoot some rounds off.” Defendant stated that after he saw Woodby fire the SKS rifle at a passing car, defendant “freaked out, turned, and started running through the yards back the other way away from where the shooting was going on.”

At the close of the prosecution’s case, defendant moved for a directed verdict. Defendant argued that he could not be convicted as an aider and abettor of either assault with intent to murder or discharging a firearm at a dwelling or occupied structure because there was no evidence that he intended, or had knowledge of an intent by Woodby, to kill or to shoot at a dwelling or occupied structure. The trial court denied the motion.

On appeal, defendant challenges the sufficiency of the evidence supporting his convictions of assault with intent to murder and discharge of a firearm at a dwelling or occupied structure. Defendant argues that the trial court erred in denying his motion for a directed verdict on these charges, and also that his convictions are not supported by sufficient evidence. Our review of defendant’s claims requires us to view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found that the elements of the crimes were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The prosecution proceeded on an aiding and abetting theory with regard to the charges of assault with intent to murder and discharge of a firearm at a dwelling or occupied structure. “The elements necessary to support a finding that a defendant aided and abetted the commission of a crime are: (1) the charged crime was either committed by the defendant or some other person, (2) the defendant gave encouragement or performed acts that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid and encouragement.” *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995).

We conclude that the trial court erred in denying defendant’s motion for a directed verdict on the charge of assault with intent to murder. The elements of assault with intent to

murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The record is void of any evidence that defendant knew that Woodby actually intended to kill when he fired the rifle. The evidence adduced in the prosecution's case in chief established only that defendant believed that Woodby's intention was to shoot in the woods and that they were going to the woods. Even assuming the evidence permits the inference that Woodby intended to kill when he fired the shots, there is no evidence that defendant knew of that intent. To the contrary, the only evidence of defendant's reaction to Woodby's shooting was that he ran in the other direction. We find no evidence from which the jury could reasonably infer knowledge by defendant that Woodby had an actual intent to kill. *Id.* at 674. Accordingly, we reverse defendant's conviction of assault with intent to murder.²

With respect to defendant's convictions of discharging a firearm "at a facility that he [] knows or has reason to believe is a dwelling or an occupied structure," MCL 750.234b(1), we conclude that the prosecution presented sufficient evidence to defeat defendant's motion for a directed verdict and support the convictions. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The evidence showed that while defendant and Woodby were drinking together, they decided to go to the woods to fire Woodby's guns, and they took firearms from Woodby's home for that purpose. Officer Wright testified that there are no woods in the area of the Palmer and Sheldon intersection. Even if defendant originally believed that he and Woodby were going to the woods, the evidence showed that defendant accompanied Woodby to a residential neighborhood. Defendant carried a shotgun, which he fired into the air or into the ground. Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to prove that defendant aided and abetted Woodby's discharges of a firearm at a dwelling or occupied structure.

Our reversal of the assault with intent to murder conviction and affirmance of the discharge of a firearm at a dwelling convictions require us to reverse defendant's felony-firearm conviction. The trial court instructed the jury that it could find defendant guilty of felony firearm on the basis of either predicate felony, assault with intent to murder or discharging a firearm at a dwelling or occupied structure. Because only one of the alternative theories is supported by sufficient evidence, and we are unable to ascertain on which underlying felony the felony-firearm conviction is based, reversal is required. *People v Acosta*, 153 Mich App 504, 510, 513; 396 NW2d 463 (1986); *People v Olsson*, 56 Mich App 500, 504-505; 224 NW2d 691 (1974). See *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). The prosecution, in its discretion, may retry defendant on that charge alone, predicated on the felony of discharging a firearm at a dwelling or occupied structure.

Defendant also raises an issue of prosecutorial misconduct based on the prosecutor's unsupported argument that defendant entered into a murder-suicide pact with his alleged

² We note that the evidence may have supported a conviction of a lesser offense. However, because neither party requested that the jury be instructed on lesser offenses, we do not remand for entry of conviction on a lesser offense.

accomplice, and was motivated to do so by knowledge of the shootings at Columbine High School in Littleton, Colorado. We do not consider this issue because defendant affirmatively waived it in proceedings before the trial court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

We affirm defendant's convictions of discharge of a firearm at a dwelling or occupied structure. We reverse defendant's convictions of assault with intent to murder and felony-firearm and remand for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra