

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK DEJAUN YINGLING,

Defendant-Appellant.

UNPUBLISHED

November 22, 2002

No. 236869

Oakland Circuit Court

LC No. 00-175490-FC

Before: Jansen, P.J., and Holbrook, Jr. and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with intent to murder, MCL 750.83; felonious assault, MCL 750.82; and four counts of felony firearm, MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 15 to 40 years' imprisonment for each assault with intent to murder conviction and 4 to 10 years' imprisonment for the felonious assault conviction. These sentences were to be served consecutive to two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

The instant appeal arises out of a shooting that occurred in a residential neighborhood during the late afternoon of October 22, 2000. Linda Smith testified that she was at the home of her boyfriend, Shawn Rickmon, with two other friends on the day in question. Mr. Rickmon's house was located across the street from where Ms. Smith lived with her mother, Terry Hawley, and her stepfather, Walter Hawley. According to Ms. Smith, defendant came over to Mr. Rickmon's house with three other people to discuss an allegedly racist letter that had been circulated in the neighborhood. Ms. Smith testified that she left the house to talk with them and that when the discussion became heated she decided to go and get her mother. As Ms. Smith attempted to leave, she claimed that defendant pulled out a long silver gun and pressed the barrel against her left cheek. At trial, Ms. Smith testified that she knew defendant from the neighborhood and even considered him a friend.¹

According to Mr. Rickmon, he was standing behind the storm door of his house when he witnessed defendant pointing a gun at Ms. Smith. Mr. Rickmon testified that he shouted at

¹ We note that several witnesses also testified that they knew defendant from the neighborhood.

defendant to “get the gun out of my girlfriend’s face” and that defendant responded by pointing the gun at him and firing. At trial, Mr. Rickmon claimed that he could feel the bullet brush past him and that it shattered the upper glass pane of the storm door. Mr. Rickmon quickly shut the inner door to his house but reopened it to let Ms. Smith inside. When he reopened the door, Mr. Rickmon stated that he could see defendant walking away while shooting across the street at Terry Hawley. Mr. Rickmon claimed that he could see Terry Hawley in the doorway but that he did not see Walter Hawley.

The Hawleys were working in their kitchen shortly before the shooting. Terry Hawley testified that her nephew informed her of a commotion outside and that she opened her door and observed defendant holding a gun to her daughter’s face. Terry Hawley stated that she started screaming and that she saw defendant shoot at Mr. Rickmon. She further claimed that she was standing partly outside of the door and that her husband was directly behind her. Terry Hawley testified that she knew he was behind her because she could feel his weight as he leaned against her to look outside. After defendant fired at Mr. Rickmon, Terry Hawley claimed that defendant turned around and fired three rounds at her. Terry Hawley stated that she could hear the bullets “pinging” as they struck the house on both sides of the door where she was standing.

Walter Hawley testified that when he followed his wife to the door, he saw defendant holding a gun to Ms. Smith’s face and then fire it at Mr. Rickmon. Walter Hawley claimed that he had an unobstructed view of defendant because he was taller than his wife. After defendant fired the weapon at Mr. Rickmon, Walter Hawley stated that the defendant began shooting at his home from about twenty-five feet away.

Aaron Harris was going to a friend’s house when he heard a gunshot. When Mr. Harris turned around, he saw that a window on the upper part of a door had been shattered. Shortly thereafter, Mr. Harris claimed that he saw a man with a gun fire three more shots into a house across the street. Mr. Harris stated that he only saw Terry Hawley standing in the doorway of that house. He further testified that he saw the shooter remove his jacket, go up to another house, and then walk down to the service drive where the police picked him up. Another witness, David Ross, also observed defendant take off a jacket and hand it, along with a pistol, through the window of a house.

Police Officer Brian Strick was dispatched to the area of the shooting and observed defendant running toward the freeway. When Officer Strick arrested defendant, he found a magazine in his back pocket containing two rounds of .22 caliber bullets. Officer Strick further testified that he observed three bullet holes in the Hawley home and one bullet hole in Mr. Rickman’s house. The police also found .22 caliber shell casings in the street where the shootings occurred. After defendant was placed under arrest, Sergeant Arthur testified that defendant admitted that he was involved in the incident and that he fired a weapon.

On appeal, defendant does not contest his convictions for assault with intent to murder Mr. Rickmon or Terry Hawley. Rather, defendant claims that the trial court erroneously instructed the jury on the doctrine of transferred intent with respect to Walter Hawley.²

² The trial court instructed the jury that if it found that defendant intended to assault Terry Hawley with the intent to kill her, but by mistake or accident assaulted Walter Hawley instead, (continued...)

Specifically, defendant argues that because he was convicted of assault with intent to murder Terry Hawley, his intent could not be transferred to support a conviction for the same assault with respect to Walter Hawley. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). “The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court.” *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

The transferred intent doctrine is explained in *People v Lovett*, 90 Mich App 169, 171; 283 NW2d 357 (1979), as follows:

“In the unintended-victim (or bad-aim) situation—where A aims at B but misses, hitting C—it is the view of the criminal law that A is just as guilty as if his aim had been accurate. Thus where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. And if A aims at B with a first-degree-murder state of mind, he commits first degree murder as to C, by the majority view. So too, where A aims at B with intent to injure B but, missing B, hits and injures C, A is guilty of battery of C.” [Citation omitted.]

Under *Lovett*, the Court determined that if two individuals are assaulted from a single act then the defendant may be charged with two separate offenses. *Id.* at 174.

This principle was reaffirmed in *People v Lawton*, 196 Mich App 341; 492 NW2d 810 (1992). The defendant’s convictions in *Lawton*, which included three counts of assault with the intent to commit murder, were upheld despite his argument that he only intended to kill one person. *Id.* at 350-351. In that case, the defendant was attempting to shoot a man and in the process struck the man’s daughter, who was hiding in a closet with her mother. *Id.* at 344-345. The Court in *Lawton* determined that the defendant’s intent to kill could be transferred to the daughter and mother, despite his ignorance of their presence. *Id.* at 351. According to *Lawton*, defendant’s lack of awareness did not make his crime any “less heinous.” *Id.*

We disagree with defendant’s contention that *Lovett* and *Lawton* are not controlling in that they failed to follow *People v Ochotski*, 115 Mich 601; 73 NW 889 (1898). In *Ochotski*, *supra* at 603-604, the defendant assaulted two different people with several blows during a fight. The defendant was ultimately acquitted of one assault, but because two separate transactions were involved the Supreme Court concluded that he could still be tried for the assault of the

(...continued)

then the crime would be the same as if Terry Hawley had been actually assaulted.

other victim. *Id.* at 610. To demonstrate the difference between a single transaction and a single volition, the Supreme Court cited the following example:

“If one, by a single volition, should discharge into a congregation of people a firearm loaded with peas for shot, and each 50 different persons should be hit by a pea, it would be startling to affirm that he could be punished for assault and battery 50 times.” [*Id.*, quoting 1 Bish New Cr Law, § 1061.]

Because *Ochotski* involved multiple assaults, this quote was not essential to the outcome of the case and was merely obiter dicta. See *People v Borchard-Ruhland*, 460 Mich 278, 286, n 4; 597 NW2d 1 (1999). “[O]biter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis.” *Id.* We further note that MCR 7.215(I)(1) requires this Court to follow the rule of law as presented in *Lawton*.

The present case is factually similar to *Lawton, supra*, because both cases involve defendants who fired several shots in the direction of multiple victims. Additionally, defendant does not contest the jury’s finding that he intended to kill Terry Hawley. Thus, under the doctrine of transferred intent the fact that defendant may not have intended to kill Walter Hawley, or even knew that he was present, is irrelevant. *Id.* at 351. Therefore, we find that the trial court did not abuse its discretion in instructing the jury on transferred intent.

Nevertheless, even absent the instruction on transferred intent there was sufficient evidence to support defendant’s conviction with respect to Walter Hawley. Viewing the evidence in the light most favorable to the prosecution, we find that a reasonable jury could conclude that defendant committed an assault on Walter Hawley with the intent to kill. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *Lawton, supra* at 350. There was testimony that Walter Hawley was standing directly behind his wife in the doorway, that he was taller than his wife, and that he could clearly see defendant. Moreover, Walter Hawley claimed that defendant was only about twenty-five feet away when he began shooting. From this testimony, a jury could reasonably conclude that defendant saw Walter Hawley. The evidence also shows that defendant fired three rounds in the area of the doorway. Firing multiple rounds could support a conclusion that defendant intended to kill both of the Hawleys. See *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975).

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper