STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2002
v	No. 235656 Genesee Circuit Court
SHONELL LATORRANCE HARRIS, Defendant-Appellant.	LC No. 00-007126-FH

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b(1), and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced, as an habitual offender third, MCL 769.11, to 35 to 60 years' imprisonment for the assault with intent to murder conviction, 57 months' to 10 years' imprisonment for the felon in possession of firearm conviction, and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises from a drive-by shooting in which the complainant and primary prosecution witness was a police informant, Desmond Savage. Savage had pleaded guilty to unrelated federal charges and agreed to cooperate with law enforcement officers in unrelated cases in exchange for a lesser sentence. The information he provided led to the arrests of three of defendant's acquaintances.

The alleged assault occurred in this case as follows: a white Cadillac, which was owned by an acquaintance of defendant, drove by Savage as he was driving to his sister's house. After the car had passed by, Savage looked over his shoulder and saw the driver of the car remove the hood that was covering his face. Savage was certain the driver was defendant. He never lost eye contact with the white Cadillac after seeing defendant inside. After stopping at his sister's home, Savage left and drove past the white Cadillac. He saw its windows go down, observed one person inside, and heard two or three gunshots. The padding from his seat flew up into the air inside his vehicle.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

After the shooting, Savage drove to the Alcohol, Tobacco, and Firearms office to meet with Special Agent Terry Bowden, with whom Savage had worked as an informant. Savage told Bowden that a person named "Shonell" had shot at him. Bowden then inspected Savage's car and found two bullet holes on the outside of Savage's vehicle, one on the rear passenger side, and one on the tailgate's right side. One of the bullets was found lodged in the far left interior dashboard and the other was recovered from inside the tailgate. Also, there was a tear in the passenger seat consistent with Savage's statement that he saw stuffing fly up from the seat after the shots had been fired. Both bullets appeared to have a trajectory consistent with having been fired into the rear passenger side of the vehicle toward the front driver's seat. Further, each bullet had an upward trajectory that was consistent with having been fired from a sedan or a vehicle that was lower than Savage's vehicle.

The next day, Bowden was able to find a photograph of Shonell Harris, which allowed Bowden to conduct a photographic lineup with Savage. Savage positively identified Shonell Harris as the shooter from the array of photographs. Defendant was arrested, and during his interview that day, he stated that he knew Savage was cooperating with law enforcement and that Savage was probably shot as a result of his cooperation. Defendant believed Savage caused the arrests of two of the people about whom Savage had been an informant. Defendant admitted to being friends with one of them.

Defendant first argues the prosecution failed to present sufficient evidence for a rational factfinder to conclude beyond a reasonable doubt that defendant was the perpetrator of the crimes, or alternatively, that he had the required specific intent to murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); see also *People v Wolfe*, 440 Mich 508, 515 n 6; 489 NW2d 748, amended in part on other grounds 441 Mich 1201 (1992). "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *Id.* at 379-380.

"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). "An assault may be committed without actually touching the person of the one assaulted." *People v Snell*, 118 Mich App 750, 754; 325 NW2d 563 (1982). An actual intent to kill must be found; an intent to place the victim in fear of being murdered is insufficient. *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985); *People v Burnett*, 166 Mich App 741, 756-757; 421 NW2d 278 (1988).

Defendant first argues the evidence was insufficient to support his convictions because it did not establish that defendant was the perpetrator of the crime. We disagree. Savage had known defendant for two to three years before trial, and Savage was one hundred percent certain by personal identification that the driver was defendant. Also, Savage never lost eye contact with the white Cadillac after seeing defendant inside. Savage had initially believed the person who shot him was defendant, and identified defendant from an array of photographs as the driver

of Williams' car. Also, defendant had a motive for attempting to kill Savage. Defendant knew that Savage was cooperating with law enforcement and believed Savage was the cause of Lewis' and Watkins' arrests.

Defendant also challenges Savage's credibility because he was an informant. However, Savage's cooperation with government did not involve the instant case and Savage received no apparent benefit from his testimony in the instant case. See, e.g., *People v Monasterski*, 105 Mich App 645, 657; 307 NW2d 394 (1981) (informant-witness testimony acceptable where immunity deal put before jury and defendant could cross-examine). In addition, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, *supra*, 440 Mich at 514; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002).

With regard to the required intent to commit assault with intent to murder, there also was sufficient evidence for a rational factfinder to conclude beyond a reasonable doubt that defendant possessed the specific intent to commit murder. Savage told Bowden that "Shonell" had shot at him. Bowden then inspected Savage's car and found two bullet holes on the outside of Savage's vehicle, one on the rear passenger side, and the other on the tailgate's right side. The evidence showed that each bullet had been fired at an upward trajectory, which was consistent with having been fired from the Cadillac that Savage had just passed on the street. In addition, the bullets were fired from a place toward the rear right side of Savage's vehicle, and appeared to have been aimed toward the front driver's seat. With the evidence taken in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to kill Savage with a firearm. See *Johnson*, *supra* at 723.

Defendant next argues that he is entitled to a new trial because the trial court violated MCR 6.414(F) by instructing the jury in part before the parties made their closing arguments.[1] Defendant failed to object at trial, so the forfeited issue is reviewed for plain error affecting substantial rights.[2] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under MCR

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[1] According to the trial transcript, after closing arguments, the trial judge gave at least one additional instruction to the jury. See MCR 6.414(F), Staff comment ("Implicit in this provision is the option, if consented to by the parties, of instructing the jury both before and after closing arguments."). We note that staff comment to the Michigan Court Rules is not binding authority. *Id*.

[2] We note that the trial court asked counsel more than once whether they had any objections to the jury instructions and they declined. After the parties noted their intentions to rest their respective cases, the court stated (without objection): "[W]hat I would plan to do is to go immediately into jury instructions after we bring the [j]ury back." When both parties rested in front of the jury, the court began jury instructions before closing arguments.

Because defendant's objection now is to the timing of the instructions, not their substance, and because defendant did not explicitly consent to the court's timing, we decline to find the issue waived for appeal. See *People v Carter*, 462 Mich 206, 214, 215-216; 612 NW2d 144 (2000).

6.414(F), the trial court must instruct the jury after the closing arguments are made. However, the rule also provides for an exception: "with the parties' consent, the court may instruct the jury before the parties make closing arguments." MCR 6.414(F). Here, the trial court instructed the jury in part before closing arguments, but the court did not obtain the consent of the parties on the record. The prosecution suggests that consent was obtained during a bench conference immediately before instruction. However, with no indication on the record, consent cannot be inferred from an off-the-record bench conference.

Thus, the trial court appears to have violated the court rule. However, reversal is not required because defendant has not shown that he was prejudiced by this procedure. See MCR 2.613(A); MCL 769.26; *Carines*, *supra*. Defendant argues that this action by the trial court caused prejudice as the jury began its deliberations once it was instructed and before the conclusion of the case, and that, since the jury assembled the next day to deliberate, it had already reached a conclusion and any instructions forgotten or not understood would have been neglected. However, the trial court specifically explained to the jurors that deliberations were not to begin until after the attorneys had made their closing arguments. To that end, the jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, juries commonly spend more than one day deliberating on a case and prejudice cannot be inferred from this.[3] In the absence of any objection, which would have allowed the trial court to avoid or correct the error, defendant has not shown any prejudice by the trial court's instruction of the jury before closing arguments without the recorded consent of counsel. Therefore, defendant is not entitled to a new trial. See *Carines*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

[3] Further, we note that the jury was instructed that closing arguments are not evidence to be considered in deliberations. See CJI2d 2.5; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).