

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE FOMBY,

Defendant-Appellant.

UNPUBLISHED

March 18, 2004

No. 244908

Wayne Circuit Court

LC No. 01-011949

Before: Zahra, P.J., and Saad and Schuette, JJ.

MEMORANDUM.

Defendant appeals as of right his convictions of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court granted the prosecution's oral motion in limine to exclude evidence regarding a previous physical confrontation between complainant and defendant's sister on the ground that such evidence was inadmissible because defendant was not present during the incident. Complainant testified that defendant shot him several times when he went to the door of defendant's sister's residence to complain about noise. Defendant denied he shot complainant. The jury found defendant guilty as charged.

Generally, all relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002).

We affirm defendant's convictions. A preserved nonconstitutional error is presumed to be harmless. The defendant bears the burden of showing that the error resulted in a miscarriage of justice. The error justifies reversal if it is more probable than not that it affected the outcome of the case. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999). The evidence showed that defendant and complainant were alone on the porch when shots were fired. Complainant alleged that defendant shot him, but defendant denied shooting complainant and

asserted that he ran from the scene because he thought complainant was firing shots at him. Evidence of the prior incident, which involved complainant and defendant's sister but not defendant, would have been irrelevant in that it would not have aided the jury in resolving the issue of whether defendant shot complainant. MRE 401. Complainant admitted that prior to the shooting he had gone to defendant's sister's residence on several occasions to complain about noise, but that his visits had not produced satisfactory results. The jury was aware that complainant had previous confrontations with persons in defendant's sister's residence, but nevertheless exercised its prerogative to accept complainant's testimony regarding the shooting incident and to reject that given by defendant. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has not shown that it is more probable than not that had the evidence regarding the confrontation between complainant and his sister been admitted it would have affected the outcome of the case. *Lukity, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette