

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MAURICE BLACKMAN,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 257197

Ingham Circuit Court

LC No. 03-001155-FH

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm, MCL 750.84; carrying a concealed weapon, MCL 750.227; and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was also convicted by the trial court of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to prison terms of 83 to 180 months for assault with intent to do great bodily harm, 47 to 90 months for both felon in possession of a firearm and carrying a concealed weapon, and a consecutive term of 2 years for felony-firearm. Defendant appeals as of right. We affirm.

Defendant's uncle visited the apartment where defendant and his girlfriend stayed. During the visit, defendant's girlfriend accused the uncle of stealing her clothes and threatened to slash his tires. The argument spilled out into the apartment building's parking lot, where defendant, in broad daylight, pulled a pistol from his pocket and shot his uncle in the knee. The uncle hobbled away, drove himself to his mother's house, and dressed the wound himself. The uncle later called the police and told an investigator what had happened. The uncle, his mother, defendant's neighbor, and the neighbor's boyfriend testified consistently with these facts at trial.

Defendant first argues that there was insufficient evidence to support his conviction of assault with intent to do great bodily harm. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard of review, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Assault with intent to do great bodily harm consists of “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Viewing the evidence in a light most favorable to the prosecution, a rational factfinder could have found that defendant attempted to violently inflict great bodily harm on the victim by shooting him in the knee. Although defendant argues that the prosecutor only proved that defendant shot his uncle in the knee, the focus of the inquiry is not on the result that occurred. Rather, the critical inquiry is whether defendant intended to cause great bodily harm. There is no requirement that a life-threatening injury must occur. See *People v Montgomery*, 43 Mich App 205, 206-207; 204 NW2d 82 (1972) (shooting a person in the arm unquestionably manifests an intent to do great bodily harm). Shooting another in the knee suffices to indicate an intent to do the other person great bodily harm. Therefore, the prosecution presented sufficient evidence to support defendant’s assault with intent to do great bodily harm conviction.

Defendant next argues his counsel was ineffective for failing to request an instruction on felonious assault. But, as defendant acknowledges, felonious assault is only a cognate lesser offense of assault with intent to do great bodily harm. Contrary to the evident premise of defendant’s argument, a jury is not allowed to consider cognate lesser offenses. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002). Therefore, trial counsel was not ineffective in failing to request a jury instruction on the lesser cognate offense of felonious assault.

Finally, defendant argues that the in-court identification of defendant was tainted due to a previous improper out-of-court identification. “This Court will not reverse a trial court’s decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 462 (2002). Prior to the start of the trial, the court found there was a constitutional infirmity with a previous photograph identification by witness Leonard Brandon because the police improperly conducted a photograph lineup when defendant was available for a corporeal lineup. Once a “pretrial identification has been improperly conducted, an independent basis for any in-court identification must be established.” *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). In *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000), we reiterated the following eight factors compiled in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), that a court should consider when determining if an independent basis for an in-court identification exists:

- (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant’s actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim’s age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant.

Brandon testified that he knew defendant prior to the shooting because his girlfriend and defendant were neighbors. When Brandon looked out the window on the morning of the shooting, he immediately recognized defendant’s face. Brandon testified there was no doubt in

his mind defendant was the man he saw shoot the gun at the victim. Brandon could clearly see out the window as he sat on the bed in his girlfriend's bedroom. From the window, Brandon saw the argument between defendant, the victim, and a female. Brandon watched the argument for approximately ten minutes. It was a bright day outside and there were no trees or buildings obstructing his view of the commotion outside. The shooting occurred on July 23, 2003, and Brandon testified on May 3, 2004, as to his recollection of the events that occurred. Therefore, only about 9½ months had passed between the shooting and the evidentiary hearing. See *Davis*, *supra* at 703-704. These facts indicate that Brandon's in-court identification of defendant was not tainted, and it was not clearly erroneous for the court to find that an independent basis for the identification existed.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly