

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY PAUL BENNETT,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2007

No. 273236

Wayne Circuit Court

LC No. 06-006396-01

Before: Jansen, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assault with intent to do great bodily harm, MCL 750.84, discharge of a weapon at a dwelling or occupied structure, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Upon resentencing, the trial court sentenced defendant to concurrent terms of four to ten years for the assault conviction, eighteen months to four years for the discharging a weapon conviction, and to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first challenges the sufficiency of the evidence to support his convictions. In reviewing the sufficiency of the evidence, we “evaluate 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 Osantowski*, 274 Mich App 593, 613; 736 NW2d 289 (2007). “Assault with intent to commit great bodily harm less than murder requires proof 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). A trier of fact may infer the necessary specific intent from a defendant’s conduct. *Id.* Furthermore, because of the inherent difficulties with directly proving a defendant’s thoughts and unspoken purposes, minimal circumstantial evidence is sufficient to support a finding that a defendant acted with a specific intent in mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Here, the evidence would allow a rational trier of fact to find the elements of assault with intent to do great bodily harm beyond a reasonable doubt. Various witnesses indicated that defendant and the victim engaged in an altercation, and while the victim was pinned to the ground, defendant requested a gun, which was handed to him. The victim testified that he grabbed the barrel of the gun and, while he and defendant were tussling over it, the gun went off, firing a shot above and to the side of the victim’s head. One witness testified that defendant fired

the gun at the victim during the struggle, and another testified that he fired it while merely swinging the pistol at the victim. No matter which version of the episode is adopted, defendant's assault with the pistol raises the legitimate inference that he intended to do the victim great bodily harm.

The evidence was also sufficient to establish that, on another occasion, defendant fired a gun at a dwelling or occupied structure. Anyone who "intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure" is guilty of this crime. MCL 750.234b(1). Here, the structure was undeniably a house, and various witnesses testified that individuals had fled inside during the relevant sequence of events that encompassed defendant's act of firing shots at the building. When the resident of the home emerged, he noticed that the screen door was shattered and the porch light was out. A neighbor testified that she saw defendant and another individual fire at the house, handing a gun back and forth. On appeal, defendant argues that the testimony of the neighbor is inconsistent with the testimony of other witnesses and should be disregarded. However, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Therefore, the prosecutor presented sufficient evidence to support defendant's conviction of discharging a weapon at a dwelling or occupied structure.

Defendant also asserts on appeal that a new trial should have been granted because the jury's verdicts were contrary to the weight of the evidence. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). On appeal, a trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). Although defendant cites inconsistencies in the testimony supporting his assault conviction, the cited inconsistencies do not seriously damage the validity of the verdicts. For example, the witnesses essentially agreed that defendant requested a gun while the victim was pinned to the ground, that a firearm was handed to him, and that the gun then discharged at some point while defendant was swinging it or firing it at the victim. Regarding his conviction for firing a weapon at a dwelling, the question of credibility is for the jury unless the testimony supporting the conviction has been deprived of all probative value or the jury could not believe it. *Id.* at 642-643. The testimony of the witness who identified defendant as a shooter was not so impeached that it was deprived of all probative value nor so infallibly contradicted that it could never be reasonably credited. Therefore, the trial court's denial of defendant's motion for new trial was not an abuse of discretion. *Id.* at 648 n 27.

Defendant next asserts that he was denied the effective assistance of counsel by his attorney's failure to call him as a witness.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's

performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Regarding the factual basis for defendant's claim, the trial court rejected defendant's assertion, embodied in an affidavit, that he wanted to be called as a witness at trial. The trial court found the claim "unpersuasive, and quite frankly, not credible." The court noted that the record did not contain anything that could be construed as an indication by defendant that he wanted to testify, and defendant did not indicate at sentencing that he had been denied an opportunity to testify. We do not find anything in the record that could supply any basis to conclude that the trial court's factual determination in this regard was clearly erroneous. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Furthermore, if defendant had testified in accordance with his post-trial affidavit, there is no reasonable probability that the jury would have chosen to believe his account. The bare statements in the affidavit were conclusory and entirely at variance with the testimony of all the other witnesses. Therefore, defendant has failed to demonstrate any actual prejudice from his trial attorney's strategic recommendation that he refrain from testifying. *Riley, supra*.

Defendant next claims that the trial court erred by denying his motion for directed verdict on a charge of assault with intent to murder, for which he was acquitted. In a related argument, defendant asserts that the prosecutor engaged in misconduct by opposing a directed verdict on the charge of assault with intent to murder, by requesting an instruction on the lesser offense of assault with intent to do great bodily harm, and by then conceding in closing argument that the greater offense had not been proven. Because defendant failed to make a contemporaneous objection to the alleged prosecutorial misconduct and did not request a curative instruction, our review is limited to determining whether the trial court committed plain error that affected substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Whatever the prosecutor's intention in making the comments in question, defendant was not denied a fair trial because the evidence that defendant aimed and shot at the victim was adequate to support the instruction on assault with intent to murder. Moreover, any error did not affect defendant's substantial rights because the lesser charge for which he was convicted was also clearly supported by the evidence.

Finally, defendant challenges his sentences, first asserting that two offense variables were improperly scored. The trial court's scoring of sentencing guidelines is reviewed for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2004). Regarding offense variable one (OV1), MCL 777.31, defendant was given 25 points because "a weapon was discharged at or toward a human being . . . ." The testimony clearly supported this determination. On OV14, MCL 777.44, defendant was given 10 points on the ground that he "was a leader in a multiple offender situation." This scoring is also supported by the record, which indicates that defendant requested a gun while he was holding the victim down and that another individual gave him one.

Defendant also asserts that the trial court's reasons for departing from the sentencing guidelines were neither "objective and verifiable" nor "substantial and compelling." *People v Babcock*, 469 Mich 247, 256-258; 666 NW2d 231 (2003). In reviewing a departure from the guidelines range, the existence of a particular factor is reviewed for clear error, a determination that a factor is objective and verifiable is reviewed de novo, and a determination that the factor constituted substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at 264-265. The trial court articulated objective and verifiable reasons for its

departure, specifically that the victim only avoided serious injury or death by his own actions, and that defendant shot at the house after seeing individuals flee into it. The trial court's identification of these factors as objective and verifiable was not clear error because they were substantially supported by record evidence. Because the factors cited in support of departure are verified in the witnesses' accounts of events, the trial court did not err by considering these factors to be objective and verifiable. *Id.*

Finally, the trial court did not abuse its discretion in finding that these factors constituted substantial and compelling reasons for departure. Defendant argues that the fact that individuals were in the house is an essential element of the crime of shooting at a dwelling or occupied structure, so they were already taken into account in the sentencing guidelines. See *id.* at 258, n 12; MCL 769.34(3)(b). We disagree. "Dwelling" is defined as "a facility habitually used by 1 or more individuals as a place of abode, whether or not an individual is present in the facility," MCL 750.234b(5)(a), so the elements of the crime would also be satisfied by shooting at an unoccupied dwelling. The trial court correctly found that defendant's act of shooting into a house into which people had recently fled was not accounted for in the guidelines. Similarly, the fact that potential injury or death was only averted by the quick actions of the victim is not accounted for in the offense variables. The supplemental details of the events amplify the gravity of the crimes charged, keenly demonstrating defendant's serious lack of concern for human life. Therefore, the trial court did not abuse its discretion by ruling that these considerations warranted deviation from the sentencing guidelines.

Affirmed.

/s/ Kathleen Jansen  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood