

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNELL DION HASBERRY,

Defendant-Appellant.

UNPUBLISHED

March 27, 2008

No. 275685

Wayne Circuit Court

LC No. 06-009459-01

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 13 to 25 years in prison for the assault with intent to commit murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant's convictions arise out of an argument between defendant's brother, Delmarey Mitchell, and a neighbor, Tyrone Walker. After the argument had seemingly abated, defendant joined Mitchell in confronting Walker as he walked down the street. The disagreement was revisited; Mitchell told defendant to shoot Walker and defendant shot Walker in the abdomen.¹ Walker remained in the hospital for two months, has undergone 17 surgeries to address medical complications resulting from the shooting and continues to have health problems.

Defendant first argues on appeal that the trial court erred in denying his motion for directed verdict, because the prosecution failed to present sufficient evidence of defendant's specific intent to commit murder. Walker testified at trial that, as he fled the scene, he heard two more gunshots and defendant shout after him, "Next time, it's going to be your head." Defendant argues that it is not possible to infer intent to kill from this statement because its only rational interpretation is that the shot that hit Walker was not intended to kill him.

We review a trial's court decision on a motion for directed verdict de novo, to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could

¹ Mitchell was previously convicted for his role in the incident.

persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Passage*, 277 Mich App 175, 176-177; 743 NW2d 746 (2007), *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006). All conflicts in the evidence must be resolved in favor of the prosecutor. *Passage*, *supra* at 177. The elements of the crime may be proved by circumstantial evidence and any reasonable inferences arising there from. *Id.*

The elements of assault with intent to commit murder, MCL 750.83, are: “(1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing a murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and citation omitted). Assault with intent to commit murder requires a specific intent to kill. *Id.* at 148. This intent may be proved by inference from any facts in evidence, including the use of a lethal weapon, and a minimum of circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974); see also CJI2d 16.21(2); *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

Defendant’s explanation is not the only rational explanation for his statement. If defendant’s intent was to kill, but due to bad aim or other circumstances, that intent was not fulfilled, it would be rational to make the claim that, next time, Walker may not be so lucky. As it happened, Walker was shot in the abdomen, dangerously close to a number of vital organs. The injury inflicted was and continues to be life threatening. Viewing this evidence, and its possible interpretations, in the light most favorable to the prosecution, a rational jury could find that defendant intended to kill Walker when he shot him in the abdomen. Thus, the prosecutor presented sufficient evidence for a rational jury to conclude that defendant possessed the specific intent to kill when he shot Walker.

Defendant further argues that there was insufficient evidence to identify him as the perpetrator of this crime. Here, again, we review such a claim de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The jury is charged with the responsibility of making credibility determinations and resolving inconsistent evidence and this Court will not interfere with the jury’s exercise of that responsibility. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Defendant argues that Walker’s testimony identifying him as the shooter is not credible. Walker testified that he plainly saw defendant by streetlight aiming and shooting the gun at him. He also testified that he initially identified Mitchell as the shooter because he knew Mitchell and he thought Mitchell could aid the police in finding defendant. Under oath, however, Walker testified multiple times that it was defendant who actually shot him. He identified defendant in the courtroom and in a police photograph. Defendant contends that because of Walker’s history of drug use, his criminal record, and the fact that he changed his story, this testimony should not be credited. Defendant also argues that, against Walker’s unreliable testimony, he has presented his girlfriend and his mother who testified that he was never in the neighborhood in which the shooting occurred on the night in question. There was no physical evidence presented on the question of identity. Thus, the factual determination of whether defendant shot Walker rests on an evaluation of the credibility of the conflicting testimony offered by the witnesses presented by

the prosecution and the defense. It is the jury's exclusive province to evaluate the witnesses' credibility and resolve the inconsistencies between their testimony. *Fletcher, supra* at 561. The jury evidently credited Walker's eyewitness testimony over the testimony of defendant's mother and girlfriend. We will not second-guess the jury's determination of credibility. *Id.* Walker's testimony provided sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant was the individual who shot him.

Defendant's final argument on appeal is that his sentence is disproportionate and, thus, violates the guarantee against cruel and/or unusual punishment set forth in the United States and Michigan Constitutions. US Const, Am VIII; Const 1963, art 1, § 16. The sentencing guidelines provide for a minimum sentence range of 9 to 15 years' imprisonment for defendant's conviction for assault with intent to commit murder. Defendant was sentenced to a minimum of 13 years in prison. Defendant argues that he should have been sentenced at the lower end of his minimum sentence range to account for his personal circumstances, and that the failure to do so created a disproportionate sentence in violation of his constitutional rights. We disagree.

Under the sentencing guidelines act, MCL 769.34, a minimum sentence within the appropriate guidelines range is not reviewable by this court absent a factual or constitutional error. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Conley*, 270 Mich App 301; 316; 715 NW2d 377 (2006). Defendant does not argue that the trial court made any factual error; rather, defendant's claim is limited to the constitutional question of whether his sentence is cruel and/or unusual. *Conley, supra* at 316. When determining whether a punishment is cruel or unusual, we must consider whether the penalty is proportionate to the gravity of the offense and the circumstances of the offender. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), *aff'd* on other grounds 475 Mich 140 (2006); *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996). The Supreme Court has previously recognized that the Legislature subscribed to the principle of proportionality when it promulgated the sentencing guidelines. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). Therefore, a sentence that is within the guidelines range is presumptively proportionate. *Id.*

Defendant argues that his sentence is disproportionate because he is young, has children, and has a relatively clean record. However, these circumstances are not particularly unusual and do not negate the gravity of the offense. See *Daniel, supra* at 54. Nor do these factors in any way negate the presumption that a sentence within the guidelines is proportionate. See *id.* Defendant also contends that, because the evidence used to convict him was not "reliable," his sentence is disproportionate. However, the quality of the evidence presented against defendant, which was sufficient to support his conviction, may not be collaterally attacked by an attempt to mitigate defendant's sentence. Defendant's sentence is proportionate and therefore not cruel or unusual. *Drohan, supra* at 92.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood