STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2009
v	No. 280704 Wayne Circuit Court
TRACY LEVAR HUBBARD, Defendant-Appellant.	LC No. 07-007516-01

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Because there was sufficient evidence to convict defendant of the charged offenses and defendant was not denied his right to present a defense or to compulsory process, we affirm.

Defendant's convictions arise from a shooting that occurred during the early morning hours of March 17, 2007, at the Detroit-area home of Timothy Moses. Moses testified that sometime between 2:00 a.m. and 4:00 a.m., he was awakened when defendant stepped onto his front porch, activating an installed motion detector. After Moses opened the door, defendant asked whether his former girlfriend Lakea Demps, who lived with Moses at the time, was present at the house. Because of the odd hour and defendant's "disturbed" look, Moses responded by stating to the effect that Demps was present and began to close the door. Moses testified that as he closed the door, defendant reached into his pants and retrieved a gun, prompting Moses to slam the door closed and begin running toward his bedroom. Moses heard gunshots being fired at the door while he ran. Evidence at trial established that approximately six shots were fired into the outside of the door with four shots penetrating into the interior of the house. Lashawna Anthony, who was sleeping on Moses' living room couch that morning, was hit in the arm and injured by one of the bullets that entered the house.

Defendant first contends there was insufficient evidence to show that he acted with intent to kill Moses when he fired his gun into Moses' door. A challenge to the sufficiency of the evidence is reviewed de novo by this Court. *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). In reviewing the sufficiency of the evidence, we construe the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have concluded that the prosecution proved the essential elements of the crime beyond a

reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

MCL 750.83 provides "any person who shall assault another with intent to commit the crime of murder" is guilty of a felony. Thus 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 Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The "intent" element of assault with intent to murder can be proven from any of the facts in evidence and "because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The Michigan Supreme Court has held that when determining whether a defendant acted with a specific intent to kill, a jury should consider "'the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, … and all other circumstances calculated to throw light upon the intention with which the assault was made.'" *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).

In the instant case, evidence was presented that showed defendant went to Moses' doorstep in the early morning hours looking for his former girlfriend with a loaded semi-automatic weapon while appearing to be "disturbed." Testimony showed that defendant then retrieved his gun from his pants immediately as Moses began to close the door, and he began firing at the door after it was slammed shut. Defendant, then, committed an assault by firing a gun into the door six times when he knew that Moses had just been on the other side of that door. Defendant contends that the "best read" of the evidence shows that he merely intended to frighten Moses, however, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Reviewing the evidence in the light most favorable to the prosecution, we find a rational trier of fact could have concluded beyond a reasonable doubt that defendant committed an assault with intent to murder according to MCL 750.83.

Secondly, defendant contends that he was denied his right to present a defense and to the compulsory process when one of his witnesses failed to appear and the court and prosecution did not assist him in locating the witness. We review de novo a defendant's claim he was denied his right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The Sixth Amendment of the Federal Constitution guarantees criminal defendants the right to compulsory process to obtain witnesses in their defense. US Const, Am VI. The Michigan Constitution guarantees the same right. Const 1963, art I, § 20. "The right to offer the testimony of a witness, and to compel their attendance, if necessary, is in plain terms the right to present a defense." *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). While defendant does have a right to compulsory process, this right is not absolute. *People v McFall*, 224 Mich App 403, 408; 569 NW2d 828 (1997). Defendant's right requires a "showing that the witness' testimony would be both material and favorable to the defense." *Id*.

Here, during the first day of trial, after the prosecution rested its case, defense counsel notified the judge for the first time that one of defendant's alibi witnesses failed to appear. Defendant requested assistance from the court in locating the witness for the second day of trial. In response, the trial court issued a bench warrant and requested that the prosecutor assist in locating the witness, but indicated the court would continue the trial into a second day. Clearly, the trial court took as much action as time would permit to secure the witness. Defendant has not shown what further actions the trial court could have taken to secure the absent witness. Moreover, defendant did not show at trial and does not demonstrate on appeal how the witness was material to his case or what favorable testimony would have been presented. *McFall, supra* at 408. While it is true that defendant's other alibi witness, Vonnell Newsome, was impeached during trial, defendant has not shown that the additional witness testimony would not have been cumulative of what was presented by Newsome. See *People v Pullins*, 145 Mich App 414, 418; 378 NW2d 502 (1985). Furthermore, the prosecution and law enforcement officer attempted to locate the absent witness overnight but were unable to do so, and defendant did not request a continuance when the judge resumed proceedings on the following day. A trial court generally does not abuse its discretion in failing to grant a continuance where there is no request. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995). Therefore, we find that defendant was not denied his constitutional rights to compulsory process and to present a defense.

Defendant's argument that the prosecutor violated MCL 767.40a by failing to render adequate assistance in locating the absent witness is similarly without merit. MCL 767.40a requires a prosecutor to "provide to the defendant…upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request shall be made in writing by defendant or defense counsel not less than ten days before the trial of the case or at such other time the court directs." Defendant failed to request assistance in writing ten days before the trial, and the assistance provided upon direction of the trial court was reasonable under the circumstances. Moreover, although the exact date is not specified, the prosecution indicated that it had sent someone to the witness's home prior to trial.

Finally, defendant's failure to cite any supporting authority for his claim that he was denied his equal protection rights under the law, US Const, AM XIV § 1; Const 1963, art 1, § 2, constitutes abandonment of the issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto