STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2009
v	No. 283761 Ottawa Circuit Court
CORWIN RINNES THOMPSON, Defendant-Appellant.	LC No. 06-030898-FC

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Corwin Rinnes Thompson appeals as of right his jury trial convictions for assault with intent to commit murder,[1] and possession of a firearm during the commission of a felony.[2] The trial court sentenced Thompson to 135 to 240 months' imprisonment for the assault with intent to murder conviction and two years' imprisonment for the felony-firearm conviction, to be served consecutively. We affirm.

I. Basic Facts And Procedural History

Aaron Vazquez testified that on the afternoon of August 21, 2006, he was standing outside of his house on the front steps, talking with Anthony Guzman. Vazquez was standing next to the front porch window. Vazquez stated that he saw Thompson pass by in the passenger seat of a car. Vazquez testified that he "had no problem" with Thompson and that Thompson did not have a "beef" with Vazquez, either. According to Vazquez, Thompson then passed by a second time, near the curb in front of the house, and Thompson and Guzman then exchanged heated words. Vazquez indicated that Thompson then pulled out a gun and aimed it towards Vazquez and Guzman.

Vazquez testified that the gun "was a silver handgun" and that neither he nor Guzman pulled any weapons out first. Vazquez indicated that Guzman was standing approximately four feet to his left, and 15 to 16 feet from Thompson. Vazquez testified that he did not know whether Thompson intended to point the gun at him or at Guzman: "He just pulled it out, aimed

[1] MCL 750.83.

[2] MCL 750.227b.

it, I was just froze [sic], I was shocked. I didn't know what to do." Vazquez also testified, "I don't know if he was trying to scare [Guzman] or what he was thinking at the time, but what I saw, that he pulled out the gun, aimed it towards us and then that is when he clicked it."

Vazquez testified that "as far as I remember it was only once or two times" that Thompson "clicked" the gun, although he testified at the preliminary examination that there were two clicks. Vazquez did not recall telling the police that he thought it was funny that the gun did not discharge. Vazquez indicated that Thompson pulled the gun back into the vehicle, possibly to reload the weapon, and then again aimed it at him and Guzman. According to Vazquez, Thompson "pull[ed] the trigger and that's when the gun [went] off." Vazquez testified that Thompson did not aim the gun at the ground or shoot at the ground, but was pointing "directly" it at him and Guzman when he pulled the trigger. Vazquez did not recall testifying at the preliminary examination that he did not know where the bullet went at the time or that he thought Thompson shot at the ground.

According to Vazquez, Thompson drove off after he discharged the gun, and Vazquez ran away. Vazquez explained that he was scared and felt that the "best thing I could do was to leave the scene." Vazquez did not call the police because he did not want to become involved in an investigation. When Vazquez later returned to the house, he saw a hole in the front porch window. From where Vazquez had been standing at the time the gun was discharged, the hole was "maybe twelve inches above my head." Vazquez testified that the hole was not there before the shooting.

Vazquez's neighbors heard the gunshot and came out to inspect the scene. Robin McCarry-Petty, who lived across the street from Vazquez, testified that she heard a "boom" outside at approximately 2:00 p.m. or 2:15 p.m. She was not sure whether it was a firearm or a firecracker. Before Petty heard the noise, she saw Guzman and Vazquez outside on the front steps of Vazquez's house. After the boom, Petty looked outside and saw a brown Blazer or Bronco pull away; she did not see where Guzman and Vazquez were at that time, and she did not see who was in the Blazer. According to Petty, when she subsequently went to Vazquez's house, she saw a hole in the porch window that was not previously there.

In addition, Brittany Teska, who lived two houses down from Vazquez, testified that she heard "a sound that sounded like a gun" on the day of the incident. Teska ran to the front door and "saw someone put his hand back in the car and they just looked at the house and they took off." Teska testified that the vehicle she saw was a "tannish" or "brownish" SUV or "Blazerish, looking car"; she indicated that there "was a driver and then there was a passenger that was the shooter[,]" sitting in the front seat. Teska testified that the car was not parked: "they were just driving by and then they shot the house and then they stopped and then they drove off." Teska said that she saw the Blazer when it was "kind of still in front of [Vazquez's] house but not like directly in front of the house." Teska testified that she "saw the full face of the shooter and he looked Hispanic." However, she "only saw part of the driver," but she "assume[ed] he was Hispanic too because he had the same skin color but I didn't see his face." Teska testified that she believed they were Hispanic because of their skin color, but she did not hear them speak with an accent. She was "just 99.9 percent sure that the person looked Hispanic." Teska also observed a hole in the front window of Vazquez's house and said that "it looked like someone threw a baseball in it, but it wasn't like shattered completely." Teska had never visited Vazquez's house before, and she was not sure if the house had been previously vandalized or shot at; she lived in the area for four years and did not know of any prior shootings.

Guzman, who was called as a defense witness, testified only that he "was there [at Vazquez's house] at the beginning of the day and I was not there when the incident happened."

Officer Kenneth DeKleine testified that when he arrived at the house, neither Guzman, Vazquez, Thompson, nor the Blazer were there. Officer DeKleine observed that the window on the front porch of Vazquez's house had a "round hole in it, approximately three inches in diameter[,]" and there was broken glass on the porch "directly below where the hole was"; Officer DeKleine identified photographs of the hole at trial. Officer DeKleine testified that the hole in the window was consistent with a bullet hole because the hole "looked like a high velocity items [sic] that went through, more than a rock or a stone." Officer DeKleine admitted, however, that the hole could be from a baseball or softball, although he did not see one nearby. Officer DeKleine attempted to trace the path the bullet traveled, but he was unable to locate a spent bullet.

Nearly one month after the incident, on September 19, 2006, the police returned to Vazquez's house to search for the bullet. Sergeant Jeff Velthous testified that he assisted in removing a "spent round from a gun that was located inside an enclosed porch at that address." According to Sergeant Velthous, the enclosed front porch had a suspended ceiling, and there was a hole in one of the ceiling tiles. Sergeant Velthous stated that he climbed a ladder, removed a ceiling tile, and recovered a spent bullet lying on top of another ceiling tile, about two feet from the bullet hole in the ceiling. Sergeant Velthous explained that the ceiling tile with the hole was behind the window with the hole in it, "above it approximately three to four feet away from the window." Officer James Ludema testified that, based on the Michigan State Police Laboratory analysis of the spent bullet, it was "consistent, based on the estimated diameter, to be most consistent with a 9 mm, 38, 357 caliber [sic] fired bullet or a lead core from a metal jacketed fired bullet."

On December 1, 2006, Thompson called Vazquez from jail unexpectedly. (We note that Thompson was charged with witness tampering as a result of the telephone call, and the cases were consolidated for trial. At the plea hearing, Thompson pleaded guilty to interfering with a witness in a criminal case. The trial court sentenced Thompson to 365 days in jail for the witness tampering charge, to be served concurrently with his felony-firearm sentence.) Officer Ludema testified that equipment in the jail recorded the conversation, and the recording was played for the jury. Neither Thompson nor Vazquez knew that the telephone call was recorded. During the conversation, Thompson indicated that he knew of Teska's statement that the shooter and driver looked Hispanic, and Thompson urged and "begg[ed]" Vazquez to tell the police that the "Mexicans" were the shooters, not Thompson. Thompson also stated: " Come on man, it wasn't even nothin [sic] to do with you man, it wasn't even nothin [sic] to do with you at all, you know what I'm sayin [sic]? It was like that other mother fucker ya [sic] know . . . . Shot at . . . ." Thompson further stated:

> Will you please do that for me man? You don't gotta [sic] worry about me comin [sic] at you and none of that shit. If you get me to do anything for you . . . I swear I'm a man of my word. I help you . . . I'll front you some shit. You know what I'm saying, I'll get you some cash, whatever, just please come do that for me.

Vazquez testified at trial that it was not "the Mexicans" who shot at him, it was Thompson. Vazquez claimed that he never told anyone that "the Mexicans" shot at his house.

Vazquez stated that "[Thompson] did it, he pulled the trigger." Vazquez confirmed that Thompson also offered him money and said he would "front [him] something."

Thompson testified that he was arrested in Illinois in connection with the shooting and brought back to Ottawa County on November 30, and arraigned on December 1. Thompson admitted that after the arraignment, when he was informed that the victim was Vazquez, he then made arrangements to contact him. Thompson said that he did not know Vazquez, but knew of him. Thompson explained that before his arrest, his brother called him when he was in Illinois in October and informed him that there was a warrant for his arrest for an attempted murder charge. Thompson testified that he was surprised and did not know what the charge related to, but his brother informed him that it was about Guzman. Thompson indicated that before he called Vazquez, he heard that "a witness said that the Mexicans did it." Thompson testified that he told Vazquez that his "beef" was not with him and that he did not shoot at anyone or at anyone's house. Thompson admitted that during his conversation with Vazquez, he never stated that he shot at the ground: "I didn't say anything about no shooting. I didn't mention any gun or—no shooting. I just told him—I asked him could he come to the police station and say that it wasn't me."

Thompson testified that he did not "drive by" Vazquez's house on the day of the incident; he was driving to his friend's house. Thompson said that he saw Guzman and Vazquez standing on the steps outside Vazquez's house, and conceded that "it was not the Mexicans" or "Treses," which he explained is a gang. Thompson admitted that he was the passenger in the vehicle with the gun. He admitted that he had a conversation with Guzman and that he saw "something black" in Guzman's back pocket. Thompson then testified, "[s]o I pulled out the gun" and admitted that he did not have a license to carry a gun. Thompson also admitted that Guzman and Vazquez made no attempt to assault him or scare him. Thompson explained that he pulled out the gun "[j]ust to scare them, because [Guzman], he tried to get—tough guy, because he is a Latin King and he liked to terrorize Holland and beat up on people so I pulled out the gun, aimed it at the ground, shot it twice and it didn't go off. I didn't see what was wrong with the gun. I didn't know what was wrong with it. It was fully loaded. I pulled it back out. I shot at the ground, dirt flew up and the bullet—."

Thompson testified that he "clicked" the gun, but he "didn't know what was wrong with it, that's why I check[ed] it," and then shot it again. He indicated the gun was fully loaded but said that he was aiming at a garbage can on the side of Vazquez's house. Thompson explained that, "I was pointing towards the garbage can, but I wasn't pointing it towards anyone. It was like slightly towards the ground. I was in a truck, and I was sitting up high." He indicated that when he "clicked" the gun, he was still aiming at the ground by the garbage cans, and when he fired the gun, he was aiming it at the same place. He testified that Vazquez and Guzman laughed at him when the gun first clicked. He testified that after discharging the gun, he "[p]ulled off, and I just went to my baby's mother house [sic]." Thompson refused to divulge the name of the driver of the vehicle. He agreed that if the bullet had hit Vazquez in the head, it likely could have killed him. Thompson further testified that he was familiar with guns, that he was "a pretty good shot," and if he wanted to shoot someone, he believed that he could.

Thompson also sent letters to Officer Ludema and the prosecutor. In one of those letters, Thompson wrote: "Anthony Guzman told Jacob Garza I shot at the ground. Also Matt Young told me their [Vazquez's] house was shot up in '04." In Thompson's letter to the prosecutor, he offered to plead to carrying a concealed weapon in exchange for dropping the assault charge.

However, Guzman testified that he did not remember telling Garza that Thompson shot at the ground. In addition, Officer Ludema reviewed police records from up to 1-1/2 years before the incident, but there was no record of a prior shooting at Vazquez's house or surrounding houses.

Thompson moved for a directed verdict based on insufficient evidence. The trial court denied the motion and instructed the jury regarding assault with intent to murder, assault with intent to do great bodily harm, simple assault, and felony-firearm. The jury found Thompson guilty of assault with intent to murder and felony-firearm.

II. Insufficient Evidence

A. Standard Of Review

Thompson argues on appeal that there was insufficient evidence to support the trial court's flight instruction and that his right to a fair trial was thereby prejudiced. Although Thompson preserved his challenge to the flight instruction on grounds that it was unsupported by the evidence, he did not raise his constitutional challenge at that time. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."[3] We therefore review the constitutional dimension of his claim for plain error that affected his substantial rights.[4] We review for an abuse of discretion the trial court's determination that the flight instruction was applicable to the facts of this case.[5] The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes.[6] We review the instructions as a whole to evaluate whether they sufficiently protected the defendant's rights and fairly presented the issues to the jury.[7]

B. Legal Standards

"Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them."[8] The trial court may provide a particular instruction where the evidence presented at trial supports giving that instruction.[9] "It is well established in Michigan law that evidence of flight is admissible."[10] Flight evidence may indicate consciousness of guilt, even though it is not sufficient, standing alone, to sustain a defendant's conviction.[11] Evidence of flight can include that the defendant

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[3] *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

[4] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

[5] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[6] *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

[7] *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

[8] *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

[9] *People v Lonnie Renee Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

[10] *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

[11] *Id.*

fled the scene of the crime, ran from the police, resisted arrest or tried to escape custody, or left the state or jurisdiction.[12]

In *People v Hall*,[13] there was insufficient evidence to warrant a flight instruction where there was "no indication in the record that [the] defendant feared apprehension at the time she left the scene" and she "merely walked away[.]" Thus, "mere departure from the scene is insufficient to give rise to 'flight' in the legal sense[.]"[14] On the other hand, sufficient evidence to support a flight instruction has been found where the evidence indicated that the defendant obtained a gun, went into the bedroom with the victim, there was a loud noise, and the defendant ran out of the house to his car and drove away.[15] "Evidence of hasty departure had indeed been placed before the jury[.]"[16]

C. Applying The Standards

Preliminarily, we note that, based on the evidence presented, the prosecutor's arguments, and the trial court's ruling, the flight instruction pertained to evidence that Thompson fled the scene of the crime immediately after the shooting. The flight instruction and was not given because he was in Illinois when he was arrested in connection with this case. With respect to the instruction itself, we conclude that the trial court did not abuse its discretion in determining that it was appropriate.[17] The record reflects that Thompson drove by Vazquez's house twice; the second time, he stopped, engaged in a heated argument with Guzman, pulled out a gun, twice tried unsuccessfully to fire the gun at them, and on the third try the gun discharged. Thompson then "took off," "pulled off" or "pulled away" after he fired the gun. The record reflects that Thompson knew his behavior was illegal and admitted that he nonetheless fired the gun. Thus, there was evidence that Thompson fled the scene of the crime, knowing that he had just broken the law.[18] Thompson did not merely calmly depart the scene, like in *Hall*,[19] but "took off." The trial court instructed the jury that there was "some evidence that [Thompson] ran away after the alleged crime," and not that Thompson ran from police. This instruction was warranted by evidence of Thompson's hasty departure after discharging the gun at the two individuals.[20]

Based on this evidence, we cannot say that the trial court's decision to instruct the jury on flight fell outside the range of reasonable and principled outcomes.[21] Further, the trial court

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[12] *Id.*

[13] *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

[14] *Id.*

[15] *People v Jones*, 1 Mich App 633, 639-640; 137 NW2d 748 (1965).

[16] *Id.* at 640.

[17] See *Gillis*, *supra* at 113.

[18] See *Coleman*, *supra* at 4.

[19] *Hall*, *supra* at 691.

[20] See *Jones*, *supra* at 640.

[21] See *Young*, *supra* at 448.

instructed the jury according to the model flight instruction,[22] which provides that flight evidence is insufficient to warrant conviction alone and an individual may flee for innocent reasons. These instructions were sufficient to protect Thompson's rights.[23] In addition, we note that, in light of the other evidence presented at trial, any error in giving the flight instruction did not amount to plain error that affected Thompson's substantial rights.[24] We find Thompson's citation of federal law in support of his argument unavailing. "Although lower federal court decisions may be persuasive, they are not binding on state courts."[25] The Sixth Circuit Court of Appeals has noted that, "[w]hile the Supreme Court has expressed some concern regarding flight instructions, this court has held that 'flight is generally admissible as evidence of guilt, and that juries are given the power to determine "how much weight should be given to such evidence."'"[26]

III. Thompson's Standard 4 Brief

A. Standard Of Review

Thompson argues that the trial court erred in scoring ten points for offense variable (OV) 9 for two victims being "placed in danger of physical injury or death[.]"[27] Because Thompson's sentence was within the appropriate guidelines range, we must affirm unless there was an error in scoring the guidelines or the trial court relied on erroneous information in making its sentencing determination.[28] The trial court has discretion to determine the number of points to be scored, although this determination must be supported by adequate evidence on the record.[29]

Thompson also claims that the trial court erroneously denied his motion for a directed verdict and that there was insufficient evidence of his intent to kill to sustain his conviction of assault with intent to murder. We review a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[30] It is the jury's function alone, when considering the evidence, to determine what weight and credibility to give the evidence.[31]

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[22] CJI 2d 4.4.

[23] See *Holt*, *supra* at 116.

[24] See *Carines*, *supra* at 774; *Kennebrew*, *supra* at 608.

[25] *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[26] *United States v Swain*, 227 Fed Appx 494, 497 (CA 6, 2007) (citations omitted).

[27] MCL 777.39(1)(c).

[28] MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

[29] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[30] *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[31] *Id*.

B. OV 9

We hold that the trial court properly scored ten points for OV 9. MCL 777.39(1)(c) provides that ten points are scored if "[t]here were 2 to 9 victims placed in danger of physical injury." Although Thompson contends that Guzman was not present, and Guzman testified that he was not present at the time of the shooting, the trial court determined that "ample evidence" demonstrated that Guzman was in fact there when Thompson shot the gun and that Guzman's trial testimony was not credible. Adequate record evidence supported this decision.[32] Vazquez testified that Guzman was standing approximately four feet from him at the time Thompson fired the gun, and other witnesses corroborated that Guzman was present at the time of the shooting.

C. Directed Verdict/Insufficient Evidence

In order to prove that a defendant is guilty of assault with intent to murder,[33] the prosecutor must show that the defendant committed "(1) an assault,[34] (2) with an actual intent to kill, (3) which, if successful, would make the killing murder."[35] "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient."[36]

Thompson argues that Guzman was not present during the shooting. Although Guzman testified that he was not present when the shooting occurred, we must view the evidence in the light most favorable to the prosecution, and the record reflects that three other witnesses testified that Guzman was present during the shooting, and that Guzman was generally uncooperative throughout the investigation.[37] We defer to the jury's determination regarding what weight and credibility to give the evidence and the witnesses presented at trial.[38]

Thompson also asserts that the evidence does not support that he had the intent to murder. Under the doctrine of transferred intent, Thompson's intent to murder Guzman may be transferred to Vazquez.[39] The intent to murder may be established by circumstantial evidence

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[32] See *Hornsby*, *supra* at 468.

[33] MCL 750.83 provides:

> Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

[34] "A simple criminal assault has been defined as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979).

[35] *People v Warren* (*After Remand*), 200 Mich App 586, 588; 504 NW2d 907 (1993).

[36] *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

[37] See *Wolfe*, *supra* at 514-516.

[38] See *id.*

[39] See *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

and "by inference from any facts in evidence."[40] The jury may further infer intent to kill based on the use of a dangerous weapon.[41] In *People v Hollis*,[42] there was sufficient evidence to convict the defendant of assault with intent to murder where that defendant aimed the gun at the victim, followed him and then aimed it again, claiming he only took the gun out to scare the victim. "A person takes out a handgun and knows there's a chance of great bodily harm. He aims at somebody and knows there's a good possibility of killing that individual and when he fires at an individual, he has to know the consequences that there's a great possibility that that person may be killed."[43]

Examining the evidence in the light most favorable to the prosecution, there was sufficient evidence to enable a rational trier of fact to conclude, beyond a reasonable doubt, that Thompson possessed the intent to murder in the present case.[44] The record reflects that the second time Thompson drove by Vazquez's house, he engaged in a heated argument with Guzman, pulled out the gun, and aimed it at Vazquez and Guzman while approximately 15 to 16 feet from them and that Vazquez and Guzman were within four feet of each other. Thompson "clicked" the gun twice, but when it did not discharge, he inspected the gun. He then re-aimed the gun at Guzman and Vazquez, discharged the gun, and drove off. The bullet passed within one foot above where Vazquez was standing, making a hole through the window of Vazquez's front porch and coming to rest inside the suspended ceiling on the porch.

The record also reflect that Thompson subsequently called Vazquez, asking him to tell police that "it was the Mexicans," indicating to Vazquez that "[y]ou don't gotta worry about me fucking with you" if he told police this, offering Vazquez money, and stating that "it wasn't even nothin' to do with you at all . . . . It was like that other mother fucker ya know . . . . Shot at . . . ." Thompson admitted at trial that he drove by Vazquez's house, aimed the loaded gun, and fired it, although he claimed he aimed at the ground or a garbage can. Thompson further admitted that the bullet could have killed Vazquez if it had hit him in the head and that Thompson believed he was a "pretty good shot."

We conclude that the jury could infer Thompson's intent to kill based on the fact that he pointed a loaded gun at Guzman and Vazquez and fired it from a short distance of approximately 15 feet, causing the bullet to pass within one foot of Vazquez's head.[45] Additionally, the jury could infer Thompson's intent to murder based on his "beef" with and heated argument with Guzman.[46] Thompson's intent is further demonstrated by the fact that he took time to inspect the

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[40] *Warren*, *supra* at 588.

[41] *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993) (stating that the jury properly instructed to infer intent to kill from use of a dangerous weapon, in that case, a vehicle); CJI2d 17.8.

[42] *People v Hollis*, 140 Mich App 589, 592-593; 366 NW2d 29 (1985).

[43] *Id.*

[44] See *Wolfe*, *supra* at 514-516.

[45] See *Hollis*, *supra* at 592-593.

[46] See *Lawton*, *supra* at 350-351.

gun when it did not properly fire, and then intentionally fired it at Vazquez and Guzman again.[47] The jury heard Thompson's testimony that he only showed the gun "to scare them," that he shot at the ground or a garbage can, and that the hole in the window occurred on a prior occasion and we defer to the jury's determination that this testimony was not credible.[48] Further, Thompson's contention that Guzman and Vazquez had "ample time to flee" does not negate the evidence of his intent. Thompson alternatively offers that the evidence could have established convictions for several other crimes. However, Thompson was never charged with any of the crimes he offers as alternatives on appeal.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[47] See *Hollis, supra* at 592-593.

[48] See *Wolfe, supra* at 514-516.