

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES BIRTHWRI ARMSTRONG III,

Defendant-Appellant.

UNPUBLISHED

March 11, 2010

No. 289883

Wayne Circuit Court

LC No. 08-010736-01

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

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 12 to 20 years for the assault conviction and 4 to 7-1/2 years for the CCW and felon in possession convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from a February 29, 2008, confrontation with Jerrell Boyles, the father of two children by Amanda Keller, with whom defendant was living at Keller's grandmother's house. According to testimony at trial, the two men argued and verbally threatened each other, following which defendant pulled out a gun and fired shots in the direction of Boyles. Boyles stated that he could hear the bullets pass by his ear as he ran, and he also heard bullets hit off of something in front of him. Witnesses described hearing between six and eight shots.

On appeal, defendant argues that there was insufficient evidence of his intent to kill to support his assault with intent to commit murder conviction, and insufficient evidence that he possessed or concealed a firearm to support his CCW conviction. We disagree.

In evaluating a challenge to the sufficiency of the evidence in a bench trial, "this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. Findings of fact by the trial court may not be set aside unless they are clearly erroneous." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The elements of assault with intent to commit murder are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (citation and internal quotation marks omitted). Here, defendant challenges only the intent to kill element.

Viewed in a light most favorable to the prosecution, the testimony that defendant threatened to “pop [Boyles] out” and fired six or more gunshots in his direction, which Boyles could hear pass by his ear and hit off of something in front of him, was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that defendant shot at Boyles with an intent to kill.

Defendant also argues that there was insufficient evidence to support his CCW conviction. MCL 750.227(2) provides:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law . . .

Defendant’s assertion that witnesses testified that they never saw a gun is not supported by the record. On the contrary, Boyles testified that he saw defendant pull out a gun, and a neighbor testified he saw a gun and a muzzle flash. To the extent defendant also argues that there was insufficient evidence of concealment that argument is also without merit. Concealment under MCL 750.227(2) “occurs when the pistol is not discernible by the ordinary observation of persons casually observing the person carrying it.” *People v Kincade*, 61 Mich App 498, 504; 233 NW2d 54 (1975). Boyles testified that defendant reached under his coat and pulled out a gun. This testimony is sufficient evidence of concealment to support defendant’s conviction.

On appeal, defendant also discusses the dwelling house exception to the prohibition on carrying a concealed weapon without a license. Defendant did not rely on or mention this exception at trial, and the trial court did not address it. Pursuant to MCL 776.20, defendant had the burden of establishing the exception. See also *People v Pasha*, 466 Mich 378, 382-383; 645 NW2d 275 (2002) (“to qualify for the dwelling house exception, the defendant must present evidence that the location where the concealed pistol was carried was defendant’s dwelling house”). The purpose of the dwelling house and other exceptions in the statute is “to allow persons to defend those areas in which they have a possessory interest. This is the clear import of the phrase ‘possessed by him’ which modifies the three areas set forth in the statute.” *People v Clark*, 21 Mich App 712, 716; 176 NW2d 427 (1970).

Whether Keller’s grandmother’s house where defendant was living with Keller would qualify as his “dwelling house” is questionable. Regardless, the evidence showed that defendant possessed the concealed weapon in an area not covered by the exception. Any right to carry an unlicensed concealed weapon does not extend to the street, *People v Ingram*, 99 Mich App 410, 417; 297 NW2d 684 (1980), rev’d in part on other grounds, 412 Mich 200 (1981), or to the public easement adjoining the land, *People v Marrow*, 210 Mich App 455, 464; 534 NW2d 153 (1995), aff’d 453 Mich 903 (1996), overruled in part on other grounds in *Pasha*, *supra*. Boyles

testified that defendant walked into the middle of the street before shooting. A neighbor testified that the man who he first saw arguing and who later fired shots was on the sidewalk. Keller testified that defendant was at the end of the driveway, which was beyond the sidewalk. Because the testimony indicates that defendant carried the concealed weapon in an area that would not qualify for the dwelling house exception, the exception is not available.

Affirmed.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood