

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS M. SMITH, JR.

Defendant-Appellant.

UNPUBLISHED

May 27, 2010

No. 289294

Wayne Circuit Court

LC No. 08-001020

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, intentional discharge of a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent terms of 18 months' to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, 18 months' to four years' imprisonment for the felonious assault and discharge of firearm at a dwelling convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant initially disputes that sufficient evidence supported the specific intent element necessary to sustain his assault with intent to commit great bodily harm conviction. When reviewing the sufficiency of the evidence in a criminal case, we must determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id.* at 400 (internal quotation omitted).]

"Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

“The elements of . . . assault with intent to do great bodily harm less than murder are (1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder.” *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). A defendant’s intent to do great bodily harm may be inferred from all the facts and circumstances surrounding the offense, *id.* at 709-710, including his acts, the means employed to commit the assault, and the manner of the assault. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

Michael Litnianski testified at trial that in the early morning hours of December 10, 2007, the sounds of a conversation awoke him from slumber in his ground floor apartment at 53 East Willis Street in Detroit. Litnianski recounted that he went outside to discern the source of the noise, saw a man speaking on a cell phone, and turned to head back inside after the man continued his cell phone conversation. According to Litnianski, the man on the phone then inquired of him, “What[?]”; Litnianski replied, “It’s 3:00 in the morning, and you just woke me up”; and the man responded, “Shut the hell up. . . . [G]o back into [your] apartment. I’m in front of my place.” Litnianski recalled that the man threw down his cell phone and approached Litnianski, that Litnianski went back inside the building and toward his apartment, and that the man “stuck his head in the door” and told Litnianski “he had several firearms, and that he’d be back.” Litnianski estimated that about five minutes later he heard 10 or 11 gunshots from two different weapons, several of which entered Litnianski’s apartment, shattering glass in the windows and puncturing blinds, and two of which lodged in Litnianski’s front door. The police recovered 11 spent shell casings near the front of 53 East Willis. Defendant testified that Litnianski approached him in a menacing fashion early on December 10, 2007 while holding a revolver. Defendant retreated to his apartment in the same building, and, armed with a handgun and shotgun, went to retrieve his cell phone. Defendant averred that he “heard some movement from behind,” which prompted him to fire his guns repeatedly “toward the ground” out of fear for his life and to “scare the person and get away,” not to “injure anybody else.”

From the record evidence establishing that defendant fired more than 10 gunshots from two different weapons, many that traveled into the very apartment at which defendant had argued with Litnianski five minutes earlier, the jury rationally could have found beyond a reasonable doubt that defendant intended to cause Litnianski great bodily harm. *Lugo*, 214 Mich App at 709-710; see also *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (finding intent to commit great bodily harm on the basis of the defendant’s assault with a pistol). To the extent that the jury credited Litnianski’s account of the assault where it conflicted with defendant’s, we will not second guess the jury’s credibility determinations. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (“This Court will not interfere with the trier of fact’s role in determining the weight of the evidence or the credibility of witnesses.”).

Defendant next suggests that his trial counsel rendered ineffective assistance by neglecting to move for a directed verdict at the close of the prosecutor’s proofs, and before defendant in his own testimony “filled the evidentiary gap in the prosecution’s case by testifying that he fired at the ground outside Litnianski’s apartment.” Defendant’s argument ignores that the prosecutor presented ample evidence of defendant’s guilt of the assault with intent to do great bodily harm count.

In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made

and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).]

In the prosecutor's case in chief, he presented (1) Litnianski's testimony about defendant's assault, (2) testimony and evidence that (a) the police found in an apartment rented by defendant at 53 East Willis open gun cases and ammunition matching the .40-caliber shell casings found outside Litnianski's apartment, (b) shortly after the shooting the police recovered from defendant's friend's residence a shotgun and a .40-caliber handgun, and (c) a forensic examiner positively linked defendant's .40-caliber pistol to fired .40-caliber ammunition and casings recovered in and around Litnianski's apartment, and (3) testimony by defendant's friend describing a visit by defendant to his apartment around 3:00 a.m. on December 10, 2007, during which defendant, who appeared "shaken up" and distraught, showed the friend a shotgun and a handgun and admitted to having "shot at a door." Because the evidence introduced by the prosecutor, viewed in the light most favorable to the prosecution, sufficiently proved beyond a reasonable doubt defendant's guilt of assault with the intent to commit great bodily harm, defense counsel was not ineffective for failing to file a groundless motion for a directed verdict. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).¹

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

¹ Having concluded that the record supports defendant's assault with intent to do great bodily harm conviction, we need not address defendant's additional appellate sentencing claim, which defendant erroneously premises on our anticipated reversal of the assault with intent to do great bodily harm count.