

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMORE JAMES HAIRE,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262958

Wayne Circuit Court

LC No. 04-012496-01

Before: White, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with the intent to murder (“AWIM”), MCL 750.83, malicious destruction of a building greater than \$200 but less than \$1,000 (“malicious destruction of property”), MCL 750.380(4)(a), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced to 108 to 216 months’ imprisonment for the AWIM conviction and two years’ imprisonment for the felony-firearm conviction. The felonious assault and misdemeanor malicious destruction of property sentences were suspended. He appeals as of right and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that the evidence presented at trial was insufficient to prove that he intended to kill Pauline Gonzalez (“Gonzalez”) to satisfy a conviction of AWIM. We disagree.

An appeal claiming insufficient evidence is reviewed de novo. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). All evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have determined that the elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

AWIM is a specific intent crime that requires “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

The intent to kill can be reasonably inferred from any facts in the evidence – including circumstantial evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

The evidence shows that defendant assaulted Gonzalez. Defendant attempted to commit a battery, and Gonzalez reasonably apprehended an immediate battery. Defendant drove his van into the apartment building requiring Gonzalez to jump aside to avoid being struck by the van. Defendant also attempted to shoot Gonzalez but was unable to do so because she struggled with him for control of the rifle. Defendant does not argue that an assault did not occur, but rather, only argues that he did not have the intent to kill.

Defendant argues that he did not have the requisite intent to kill because he never injured Gonzalez, never successfully aimed his rifle at Gonzalez, and never discharged his rifle. However, no injury is required to satisfy the elements of AWIM, nor for the inferior crime of assault with the intent to commit great bodily harm less than murder. *Brown, supra*, p 147; *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Rather, only minimal circumstantial evidence is required to prove defendant's intent. *People v McRunels*, 237 Mich App 168, 180; 603 NW2d 95 (1999). The Michigan Supreme Court, in *People v Taylor*, 422 Mich 554, 567-68; 375 NW2d (1985), stated that an intent to kill can be inferred from:

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, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.

Here, the evidence shows that defendant was angry at Gonzalez before the assault for asking him to leave the apartment, attempted to use two deadly instruments during the assault, the van and the rifle, expressed an intent to kill Gonzalez, attempted to gain control of the rifle from Gonzalez using force, and abandoned his assault only after he was threatened himself – all of which lead to the reasonable inference that defendant intended to kill Gonzalez. Although defendant claims that he never successfully aimed his rifle at Gonzalez or discharged his rifle, this was only because Gonzalez struggled with defendant for control of the gun and prevented him from carrying out his intentions.

The only evidence that shows there was not an intent to kill are defendant's own statements that he never intended to harm Gonzalez and did not intentionally drive his vehicle into the apartment building. All determinations of witness credibility, however, should be left to the trier of fact to determine. *Nowack, supra*, pp 399-400. The trial court determined that defendant's testimony was not credible because defendant stated he could not remember the assault, but rather, could only remember the events directly prior to and after the assault. The trial court found that defendant's own assertions of his intent were not credible, and therefore, his intent can be inferred from circumstantial evidence. The evidence is sufficient to maintain a conviction for AWIM.

Defendant next claims that the evidence shows he was intoxicated at the time of the assault so he could not form the requisite intent to kill. Voluntary intoxication is a proper

defense only when the evidence shows that the actor is so intoxicated that he was incapable of forming the requisite intent of the charged crime. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Gomez*, 229 Mich App 329, 333-34; 581 NW2d 289 (1998).

In the current case, defendant asserted that he drank “quite a bit . . . all day” and that he only remembered pulling into the apartment building’s parking lot to look for his girlfriend and the next thing he could remember after that was that he was inside the apartment building. According to witnesses, however, defendant appeared to be conscious of the fact that he was struggling with Gonzalez because he was hitting Gonzalez to gain control of his rifle and yelling at Gonzalez to let go of the rifle. Defendant was also responsive when another apartment resident pointed his gun at defendant and told him to drop the rifle, was able to back his van out of the apartment building and drive down the street, and attempted to elude police on foot. The trial court was free to reject the voluntary intoxication defense based on its conclusion that defendant’s testimony was not credible, he was aware of his environment and actions at the time of the assault, and he had not shown the requisite level of intoxication. The evidence is sufficient to show that defendant had the requisite intent to kill and was not intoxicated to the level necessary to excuse his culpability.

Affirmed.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly