

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 28, 2013

v

KEVIN LEE SMITH,

No. 309950
Macomb Circuit Court
LC No. 2011-003687-FC

Defendant-Appellant.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to murder (AWIM), MCL 750.83, assault with intent to do great bodily harm less than murder (AGBH), MCL 750.84, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to 18 to 30 years for the AWIM conviction, 6 to 10 years for the AGBH conviction, three to five years for the felon in possession of a firearm conviction, all consecutive to a two-year term of imprisonment for each felony-firearm conviction. We affirm.

Defendant concedes sufficient evidence supported his conviction of being a felon in possession of a firearm but argues that the prosecution failed to present sufficient evidence beyond a reasonable doubt to support his other convictions. We disagree.

On appeal, a challenge to the sufficiency of the evidence is reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court reviews the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 196.

ASSAULT WITH INTENT TO MURDER

Defendant first contends the prosecution failed to present sufficient evidence from which a rational trier of fact could conclude that defendant intended to kill Angel Rankin, the mother of his three year old daughter, Leanna. Specifically, defendant does not dispute that he fired six shots at Rankin's living room, but argues that the evidence is insufficient to establish an actual intent to kill. We disagree.

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.”” *Ericksen*, 288 Mich App at 195-196 (citation omitted). The intent to inflict great bodily harm or acting in willful and wanton disregard of the recklessness of one’s conduct is not sufficient to support a conviction for assault with intent to commit murder. *People v Fyda*, 288 Mich App 446, 454; 793 NW2d 712 (2010). Like all other elements, the intent to kill may be proved with circumstantial evidence. *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). ““An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty in proving an actor’s state of mind, minimal circumstantial evidence is sufficient.”” *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003)(citation omitted).

Based on the testimony offered at trial, a rational trier of fact could conclude beyond a reasonable doubt that defendant actually intended to kill Rankin. Defendant and Rankin were engaged in a paternity battle during the summer of 2011, at which point Rankin insisted that defendant take a DNA test, which was completed in July 2011. The DNA test was required for Rankin to receive child support from defendant. Rankin received Facebook messages from defendant in which defendant threatened Rankin and told her that he wanted a DNA test. Rankin also received Facebook messages from defendant’s girlfriend, Latasha Hudson, in which Hudson told Rankin to “grow up” and that defendant wanted joint custody if the DNA test confirmed that he was Leanna’s father. While defendant and Rankin were at the facility to administer the DNA test, defendant confronted Rankin about her feelings regarding Hudson. On August 19, 2011, Rankin and defendant received the results of the DNA test, which confirmed that defendant was Leanna’s father. Rankin and defendant were to appear in court following the results to determine defendant’s child support payments.

The next day, on August 20, 2011, defendant and Hudson went to Rankin’s house. They drove by Rankin’s house several times, at which time they saw two vehicles in the driveway. Defendant parked the car one block from Rankin’s house and exited the car, at which time Hudson moved into the driver’s seat. Defendant stood on the sidewalk, approximately 30 feet away from Rankin’s house, and fired six shots into Rankin’s living room. Defendant fired the six shots, the total capacity of his Colt Anaconda 44 Magnum revolver.

Detective Shannon Makowski of the Roseville Police Department described Rankin’s living room as having a couch along the east wall, a smaller couch along the north wall, a television and entertainment center on the south wall, and a large picture window that faced Lechner Street on the west wall. Rankin’s boyfriend, Rashard Rice, testified that a person would be able to see through the blinds of the living room, even when the blinds were closed. In addition, Rice said, “If the TV is on, the light faces towards the back wall. And if someone walks past, you can see the shadow in the blinds. They were cream blinds. If somebody walk [sic] past them, you can see the shadow from the light of the TV.” Rice based this on previous experiences, specifically, that when he arrived at Rankin’s home and the television was on in the living room, he could see Rankin’s shadow as she walked through the living room and to the front door.

Defendant testified that he intended only to scare Rankin. Despite defendant’s contention that he intended to fire his revolver at the television, there were no bullet holes in the television. Defendant admitted that he could see the light that emanated from the television, that it was a fair

assumption that people were in the living room, and that he knew it was a possibility that Rankin's children would be home with Rankin when he fired his gun. Defendant did not fire his gun at Rankin's garage or the empty cars on her driveway because it would not have sufficiently scared Rankin. The bullets were retrieved from the wood frame in the couch and a wood beam in the laundry room, at locations approximately waist high from the floor. There were bullet holes in the interior door that were slightly lower and a couple of feet away from the waist-high television, which was in front of the couch where Rankin and her one year old son, Phillip Mulligan, took cover after defendant fired the first two shots. From this evidence, a rational fact finder could infer that defendant could see the shadows of Rankin and Mulligan, fired six shots from a powerful revolver at or toward them, that defendant was angry about his paternity battle with Rankin, and that defendant actually intended to kill Rankin. Therefore, viewing the facts in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant actually intended to kill Rankin.

ASSAULT WITH INTENT TO DO GREAT BODILY HARM

Defendant argues there is insufficient evidence that he intended to cause Mulligan great bodily harm less than murder. We disagree.

The elements of AGBH are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 148; 703 NW2d 230 (2005). AGBH is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). As noted above, circumstantial evidence and reasonable inferences arising from it may be used to prove the elements of a crime. *Gonzalez*, 256 Mich App at 226. "[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

For many of the same reasons discussed above, we conclude there is sufficient evidence from which a rational fact finder could infer that defendant intended to do great bodily harm less than murder to Mulligan. Defendant stood on the sidewalk at a distance of approximately 30 feet front Rankin's living room. The shots were fired at a 90 degree angle. Mulligan was hospitalized for three days at St. John Hospital, and then transferred to Children's Hospital in Detroit. Mulligan had surgery to remove a bullet fragment from his eyelid and pieces of glass from his forehead. He also had a bullet fragment in the top of his head.

Defendant conceded that it was a fair assumption that there were people in the living room, given that he could see the light from the television. Rice testified that when the television in the living room was on, an individual that stood outside could see shadows in the living room. Defendant knew it was a possibility that Rankin's children would be home with Rankin when he fired his gun. So, again, it is fair to conclude that defendant saw two shadows in the living room and fired six shots at Rankin and Mulligan. Viewing the evidence in the light most favorable to the prosecution, we agree there is sufficient evidence for a rational trier of fact to conclude that defendant intended to do great bodily harm less than murder to Mulligan.

FELONY-FIREARM

Defendant argues there is insufficient evidence to support his felony-firearm convictions based on the assumption that there is insufficient evidence to support the assault with intent to murder and AGBH convictions. We disagree.

To establish the elements of felony-firearm, the prosecution must prove that the defendant carried or had in his or her possession a firearm when committing or attempting to commit a felony. MCL 750.227b(1); *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). Possession of the firearm can be actual or constructive, joint or exclusive. *Id.* at 83.

Based on the testimony already summarized, we conclude there is sufficient evidence to support defendant's AWIM and AGBH convictions, which in turn support his felony-firearm convictions.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens