

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY DYER, a/k/a  
SHARRIFF MALIK DYER

Defendant-Appellant.

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UNPUBLISHED

September 17, 1996

No. 171606

L.C.No. 93-003192

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEWARD, a/k/a  
MICHAEL THORNE, a/k/a  
MICHAEL CARNELL THORNS,

Defendant-Appellant.

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No. 171938

L.C.No. 93-003084

Before: Marilyn Kelly, P.J., and Gribbs and W. E. Collette,\* JJ.

PER CURIAM.

Defendants Michael Anthony Dyer and Michael Steward were each convicted by a jury of two counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. Defendant Dyer

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\* Circuit judge, sitting on the Court of Appeals by assignment.

was sentenced to concurrent terms of six to ten years. Defendant Steward was sentenced to concurrent terms of five to ten years. We affirm.

There is no merit to defendant Dyer's claim that his convictions were against the great weight of evidence in light of the "strong indications of misidentification". The trial court did not abuse its discretion in denying defendant Dyer's motion for new trial on this basis. Although an identifying witness did not accurately describe defendant Dyer to police, and the witness had a history of criminal behavior and numerous aliases, there was also evidence that the witness positively identified defendant Dyer at a line up. Issues such as this, which involve the credibility of a witness, should generally be left to the factfinder. *People v Smith*, 120 Mich App 429, 439-440; 327 NW2d 499 (1982). Here, the jury evidently believed the witness' testimony, and the trial court did not think the discrepancies in her testimony rendered it completely unbelievable. The verdict was not perverse and the trial court did not abuse its discretion in denying defendant Dyer's motion for new trial.

Defendant Dyer also argues that there was insufficient evidence to prove the element of intent to inflict great bodily harm. We do not agree. The evidence showed that defendant Dyer, after being told by defendant Steward to "go ahead", fired two or three shots into an occupied restaurant. A reasonable trier of fact could infer that defendant intended to harm the people who were in the line of fire. *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979).

Nor did the trial court err in failing to give, sua sponte, a jury instruction on felonious assault after defense counsel stated that he did not want instruction on any lesser included offenses. Defendant Dyer neither requested the instruction nor objected to its omission. The instruction given was supported by the evidence, and we find no error.

There is no merit to defendant Dyer's claim that the trial court abused its discretion in sentencing. Defendant Dyer's minimum sentence was within the guidelines' range and is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant Dyer has not presented any unusual circumstances to rebut that presumption. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). The lower court was aware of defendant Dyer's employment and lack of an extensive criminal record, but those factors do not constitute an unusual circumstance sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant Dyer had a prior criminal history and was on parole at the time of this offense. His sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

The trial court did not err in denying defendant Steward's motion for directed verdict on the charge of assault with intent to commit murder. Defendant Steward argues on appeal that there was insufficient evidence of intent to kill. We note that defendant Steward did not move for a directed verdict on this ground and that the issue is not preserved for appeal. In any case, we find the evidence

was sufficient to sustain the charge. The intent to kill may be inferred from the circumstances surrounding the incident. *People v Moore*, 129 Mich App 354, 356; 341 NW2d 149 (1983). In this case, there was evidence that defendant Steward engaged in an altercation with a restaurant owner and warned the owner that he would be back. Defendant Steward returned later with defendant Dyer, and he gave defendant Dyer the "go ahead" to fire a gun into the occupied restaurant during the dinner hour. The trial court did not abuse its discretion in denying defendant Steward's motion for directed verdict.

Affirmed.

/s/ Marilyn Kelly

/s/ Roman S. Gibbs

/s/ William E. Collette