

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY MITCHELL,

Defendant-Appellant.

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UNPUBLISHED

January 21, 1997

No. 186052

LC No. 93-011795

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,\* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). Defendant was sentenced to four to ten years in prison on the assault with intent to do great bodily harm conviction, and two years in prison on the felony-firearm conviction, with the former sentence to run consecutively to the latter. We affirm.

Defendant's first issue on appeal is that the trial court erred in allowing the prosecution to present the police statement of defendant's nontestifying codefendant as part of the prosecution's case in chief. We disagree.

The introduction to the jury of an incriminating, unredacted statement made by a nontestifying codefendant violates a defendant's right to confront and question the witness presented against him as provided by US Const, Am VI, and Const 1963, art 1, § 20. *People v Frazier (After Remand)*, 446 Mich 539, 544; 521 NW2d 291 (1994). In a joint trial, when a jury hears a codefendant's statement that expressly names the defendant and describes the defendant's role in the crime, the risk is that the jury will consider the codefendant's statement in assessing the guilt of the defendant despite an instruction telling it not to do so. *Frazier, supra*, at 545.

A nontestifying codefendant's statement will be admissible against a defendant if it is admissible under the Michigan Rules of Evidence and if it does not violate the defendant's constitutional right to

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

confront his accuser. *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Portions of the statement that inculcate the defendant are admissible only if the circumstances under which the statement was made vouch for its reliability. *Spinks, supra*, at 491-492. The Confrontation Clause is not violated where the statement was: (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues or confederates . . . , and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. *Spinks, supra*, at 493.

At the time that the trial court admitted the codefendant's statement, the codefendant had said that she would testify and thus be available for confrontation. The codefendant decided *not* to testify after her statement had been read to the jury. The trial court would have had to anticipate that the codefendant would change her mind about testifying in order to correctly apply a Confrontation Clause analysis to her statement. In any case, any alleged error in admitting the codefendant's statement was harmless beyond a reasonable doubt in light of defendant's equally detailed testimony at trial. *Spinks, supra*, at pp 493-494.

Defendant's second issue on appeal is that the prosecution failed to present sufficient evidence to support his conviction for assault with intent to do great bodily harm. Again, we disagree.

The elements of the crime 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). The requisite intent may be inferred from the act itself, the means employed and the manner employed. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

Complainant and his companions saw defendant display a shotgun. Defendant admitted that he had the shotgun and that he brought it to the front of his truck. Complainant and his companions saw defendant stick the shotgun out the driver's side window. Complainant and one of his companions heard a sound like that of bullets being put into a gun. Complainant and his companions all heard shots as they fled from the area where defendant had stopped his truck. A security guard across the street from the shooting scene heard shotgun blasts and saw a man with a shotgun. After defendant left and returned to the scene, complainant and one of his companions saw defendant in the bed of his truck, aiming the shotgun at complainant. Defendant admitted shooting at complainant. A police investigator found blood and shell casings at the shooting scene. Defendant threw the gun into the Detroit River the day after the shooting. Viewing the evidence in the light most favorable to the prosecution, *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995), we hold that the prosecution provided sufficient evidence to support defendant's conviction.

Affirmed.

/s/ Myron H. Wahls  
/s/ Mark J. Cavanagh  
/s/ John F. Kowalski