STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

FRANK DELANO GIBSON,

Defendant-Appellant.

UNPUBLISHED
February 11, 1997

No. 182700
LC No. 94-1926-FC

Before: Wahls, P.J., and Young and J.H. Fisher,* JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to commit murder (AWIM), MCL 750.83; MSA 28.278, possession of a short-barrel shotgun, MCL 750.224b; MSA 28.421(2), and two counts of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to terms of thirty-five to sixty years' imprisonment for both assault convictions, thirty to sixty months' imprisonment for the possession conviction, and two-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions stem from defendant's attack on Shirley Sweet and an infant that Sweet was baby-sitting. Defendant discharged a short-barrel shotgun at these victims at close range, causing Sweet to lose three fingers and half her teeth. She is also expected to lose her right eye. The infant sustained a wound to the back of her head. At trial, defendant testified that he was intoxicated at the time in question and had no memory of the shooting.

I

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

Defendant argues that the trial court abused its discretion when it allowed into evidence a telephone message recording made by defendant on Sweet's answering machine, photographs of the victims' injuries, and photographs of the victims' bed sheets and clothing. We disagree.

Defendant has abandoned his argument regarding the photographs and the physical evidence by failing to cite any case law or other authority that supports his position. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Similarly, defendant has abandoned the issue as to the recorded telephone message by failing to refer this Court to any authority supporting his position other than a single reference to MRE 403. *Id.* In any case, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *People v Hack*, 219 Mich App 299, 308; ___ NW2d ___ (1996). In addition, photographs otherwise admissible are not rendered inadmissible because they vividly depict gruesome details of a shocking crime, even though they are likely to arouse the jury's passion or prejudice. *People v Hoffman,* 205 Mich App 1, 18; 518 NW2d 817 (1994); see *People v Coddington,* 188 Mich App 584, 599; 470 NW2d 478 (1991). Accordingly, the trial court did not abuse its discretion in admitting this evidence.

II

Defendant argues that the trial court erred with respect to the transferred intent instruction. We disagree.

First, the issue of whether defendant possessed the specific mens rea required was a factual question to be decided by the jury. Second, the trial court did not instruct the jury that intent *had been* transferred. Instead, the court instructed the jury that only "*if* the defendant intended to assault one person but by mistake or accident assaulted another person, the crime is the same as if the person had actually been assaulted." Finally, defendant claims that he could not be convicted of two counts of assault because he only fired one shot from his gun. Assuming arguendo that defendant fired only one shot, there was testimony that the one shot contained approximately 350 bird shot pellets. In any case, the salient fact is that both victims were injured. The criminality of defendant's act toward the unintended victim is the same as that toward the intended victim. *People v Lovett,* 90 Mich App 169, 174-175; 283 NW2d 357 (1979). Accordingly, the trial court properly instructed the jury as to the doctrine of transferred intent.

III

Defendant contends that there was insufficient evidence to show that defendant possessed either the specific intent required for AWIM or that the short-barrel shotgun had the capacity to kill. We disagree.

There was sufficient evidence of intent to convict defendant of AWIM as to Sweet. Sweet testified that defendant stated, "you know what I got to do," and "get ready" while pointing a shotgun at her at close range. In arguing defendant's motion for directed verdict, defense counsel specifically conceded that there was sufficient evidence as to the count charging assault with intent to murder Sweet.

In addition, because there was sufficient evidence to convict defendant of AWIM as to the intended victim, there was also sufficient evidence to convict defendant of the same charge as to the unintended victim. *Lovett*, *supra*, pp 174-175. Importantly, the *Lovett* Court adopted the rationale of a California case in which the court held that a defendant who was found guilty of manslaughter of his pregnant wife could also be found guilty of manslaughter of the fetus. *Id.* (citing *People v Carlson*, 37 Cal App 3d 249; 112 Cal Rptr 321 (1974)). In any case, Sweet testified that defendant confronted her at her home with a gun. She tried to set the baby down twice, but defendant would not allow that. Sweet was holding the infant when defendant fired the gun.

As to defendant's intoxication defense, a number of witnesses testified that defendant did not look, smell, sound, or act intoxicated. Consideration of the effect, if any, of defendant's alleged intoxication is a matter that rests exclusively with the jury. *People v Berryhill,* 8 Mich App 497; 154 NW2d 593 (1967).

Finally, direct testimony on the issue of whether the short-barrel shotgun was capable of killing the victims was unnecessary. In *People v McIntosh,* 6 Mich App 62; 148 NW2d 220 (1967), the defendant argued that, from the distance he fired his sixteen-gauge shotgun, he could not have possibly killed anyone. In rejecting this argument, this Court noted:

> The jury was apprised of the type of weapon used, the distance from which it was fired, and the nature of the injury inflicted. Under these circumstances it would be a question of fact as to whether the defendant had the present ability to commit the crime charged. Jurors are the sole judges of the facts and neither the trial court nor this Court can interfere with their exercise of that right. [*Id.,* 72.]

Likewise, the jury here heard testimony as to the type of weapon defendant used, the distance from which he used it, and the damage he caused with it. There was testimony that the ammunition defendant used was capable of penetrating human flesh and bone. There was testimony that "human flesh or tissue . . . was strewn pretty much on three of the four walls there and part of the ceiling," and that the adult victim's hand was partially shot off. The trial court specifically instructed the jurors that they should use their common sense and general knowledge in weighing the evidence. As a matter of common sense and general knowledge, the jurors could have concluded that a discharge capable of blowing off fingers was capable of producing death if it had more squarely impacted the neck of Sweet or any part of the infant. Whether defendant had the capacity to kill was a question for the jury. *McIntosh*, *supra*, p 72.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to convict defendant of both counts of AWIM. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

IV

Finally, defendant argues that the trial court abused its discretion in sentencing defendant outside the guidelines. We disagree.

First, any error as to the scoring of OV 5 was harmless since recalculation would not change the guidelines range. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

As to the sentence itself, a departure from the guidelines is appropriate when the guidelines range is disproportionate to the seriousness of the crime or the prior record of the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). The sentencing court must articulate the reasons for the departure on the record. *People v Fleming,* 428 Mich 408, 428; 410 NW2d 266 (1987). The sentencing court should consider what unique facts are involved that are not adequately reflected in the guidelines and the extent of the departure those facts warrant. *People v Harris,* 190 Mich App 652, 658-659; 476 NW2d 767 (1991).

The guidelines recommended a minimum sentencing range for the AWIM convictions of ten to twenty-five years. The trial court deviated upward from the guidelines, imposing a sentence of thirty-five to sixty years. The trial court reasoned that the guidelines did not adequately account for the aggravating circumstances of defendant's crime, specifically that the crime occurred in the victim's home; that defendant announced to the victim his intention to shoot her, thereby heightening her fear; that her injuries are permanent and debilitating; and that defendant specifically intended to kill a 2-1/2 month old infant. Under these facts, the trial court could reasonably conclude that OV 2 did not adequately take into account the aggravating circumstances. The record bears out that any mitigating factors were grossly overshadowed by the aggravating circumstances not accounted for in the guidelines. Defendant's argument that the sentence is disproportionate because he had no prior felony convictions is unpersuasive. See *People v Granderson,* 212 Mich App 673, 681; 538 NW2d 471 (1995).

After reviewing the record, we believe that defendant's sentence is proportionate to the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher