

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK DEON SHIRLEY,

Defendant-Appellant.

UNPUBLISHED

June 27, 1997

No. 194259

Recorder's Court

LC No. 95-008237

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his February 9, 1996, waiver trial conviction of assault with intent to murder, MCL 750.83; MSA 28.278, unlawfully driving away an automobile, MCL 750.413; MSA 28.645, and possession of a firearm during commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender to concurrent ten to eighteen year sentences for the assault and unlawful driving away convictions and to a consecutive two year sentence for the felony firearm conviction. We affirm.

Defendant argues that the trial court erred in failing to grant him a new trial on the grounds that the trial court's verdict was against the great weight of the evidence. Defendant bases his assertion on the trial court's apparent inability to determine the precise manner in which defendant's discharge of the gun caused the complainant's particular injuries. At defendant's motion for new trial, the trial court indicated that, despite the fact that it did not make a specific finding at trial regarding "how the injuries occurred in terms of how many shots were fired," it nonetheless had no hesitation in concluding that defendant had pulled the trigger with the intent to kill complainant and that it did not accept defendant's version of the events.

MCR 2.611(A)(1)(e) states that a new trial may be granted if a verdict is against the great weight of the evidence. Determining whether a verdict is against the great weight of the evidence requires review of the entire body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). The test is whether the verdict is against the "overwhelming weight" of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). Where the challenge is

based upon the existence of conflicting evidence in the record, questions concerning the credibility

of witnesses presenting such evidence must be left for the factfinder. *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943); *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968).

In the instant case, the trial judge was faced with conflicting testimony from the complainant and defendant regarding the exact circumstances of the shooting. Although defendant suggests that the “great weight of the evidence” supported his, rather than complainant’s, recollection of the events, our review fails to reach the same conclusion. The only evidence regarding the shooting, beyond the testimony of the principals, was the stipulated testimony of Dr. Patel who opined that complainant’s wounds were consistent with two gunshots, rather than a single one. This evidence conflicted with defendant’s assertion that the gun which produced complainant’s wounds was fired once accidentally during a struggle. Dr. Patel’s testimony, however, was consistent with the complainant’s testimony that defendant shot her while standing over her and pointing the gun downward. Accordingly, we conclude that the trial court’s verdict was not against the great weight of the evidence and that the court properly denied defendant’s motion for a new trial.

Affirmed.

/s/ Stephen J. Markman

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O’Connell