

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEJUAN P. GIBBONS,

Defendant-Appellant.

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UNPUBLISHED  
November 2, 1999

No. 207681  
Recorder's Court  
LC No. 97-501243

Before: Whitbeck, P.J., and Gribbs and White, JJ.

PER CURIAM.

I. Introduction

Following a bench trial, the trial court convicted defendant Dejuan P. Gibbons of three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced Gibbons to concurrent prison terms of four to fifteen years on the assault convictions and the mandatory two-year, consecutive term for felony-firearm. Gibbons appeals by right, and we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

II. Statement Of Facts And Procedural History

The charges in this case stem from a shooting late on the afternoon of November 16, 1996. According to the eyewitnesses testifying for the prosecution, gunshots were initially fired at Michael Johnson as he stood outside his home; the shots came from down the street. At some point, Lawrence Harris drove to Johnson's home to pick up Johnson's uncle, Marvin Johnson. The shooting continued at that time, with Michael Johnson firing back with a gun he retrieved from his home. Michael and Marvin Johnson entered Harris' car and, as Harris backed his car up to leave, a Ford Bronco truck approached Harris' car from a field. The Bronco struck the side of Harris' car from the back, and the driver of the Bronco, identified as Gibbons, fired several shots from an AK-47 machine gun into Harris' car. An unidentified passenger in the Bronco may have fired an AK-47 into Harris' car as well.

Only Marvin Johnson was actually hit by the gunfire, receiving one bullet wound in the back of his neck and another across his back. Charles Johnson witnessed the incident from the front porch of the Johnson home; a fragment of concrete that gunfire directed at the house knocked loose struck him.

There was inconsistent testimony regarding the position of Marvin and Michael Johnson in Harris' vehicle. Lawrence Harris and Marvin Johnson testified that Marvin Johnson was seated in the front passenger seat while Michael Johnson was seated in back behind the driver, Harris. However, Charles Johnson testified that Michael Johnson was in the front passenger seat and Marvin Johnson was in back. Charles Johnson also testified that the Bronco struck the rear passenger's side of Harris' car, but all the other witnesses indicated that the Bronco struck the rear, driver's side of the car.

Lawrence Harris testified that there was damage to "the back, the windows, the side windows, [and] the doors" of his car. Photographs of the bullet holes and other damage were admitted into evidence. Detective Douglas Potts described the bullet damage as follows:

The rear window was broken out. There was what appeared to be bullet holes in the passenger's seat and passenger headrest that had appeared to travel from the left rear vehicle towards the right front of the vehicle, the path of the bullet. You could see where it appeared to be a bullet hole in the left-rear passenger window, and it's like the opera window, if you know what I mean. There's a window and then a slight window behind it. There was a bullet hole there that appeared to travel through the seat and headrest from left rear to right front.

According to Lawrence Harris, several of the shots also went through the back of the driver's seat, and Marvin Johnson was wounded as he covered Harris while Harris ducked down in the driver's seat.

The primary issue in this case was identification. The trial court found that Gibbons assaulted all three occupants of the Harris vehicle by firing an AK-47 into the vehicle at point-blank range from behind, and that Gibbons specifically intended to kill all three assault victims. However, the trial court acquitted Gibbons on a fourth assault charge based on the injury to Charles Johnson on the porch of the Johnson home.

### III. Sufficiency of the Evidence

#### A. Gibbons' Argument

Gibbons contends that there is insufficient evidence to support more than one assault conviction because the evidence shows no more than a single volitional act directed at Michael Johnson only. Gibbons argues that there was "no evidence of a specific intent to kill anyone other than Michael Johnson," and that there was "also no evidence presented that bullets were directed at each of the passengers rather than solely at Michael Johnson."

Gibbons relies upon the following passage from Bishop's treatise on Criminal Law quoted in *People v Ochotski*, 115 Mich 601, 610; 73 NW 889 (1898):

If one, by a single volition, should discharge into a congregation of people a firearm loaded with peas for shot, and each of 50 different persons should be hit by a pea, it would be startling to affirm that he could be punished for assault and battery 50 times.

In this regard, Gibbons argues, somewhat inconsistently with his argument that the bullets were fired solely at Michael Johnson, that there is no evidence "that Mr. Gibbons engaged in more than a single volition aimed at the three occupants of the car."<sup>1</sup> Gibbons contends that two of his three assault convictions should be set aside, and that the case should be remanded for resentencing in light of the reduced number of assault convictions.<sup>2</sup>

### B. Standard Of Review

To properly convict a defendant, the prosecutor must present sufficient evidence to prove each element of the offense beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 518; 489 NW2d 748 (1992). When reviewing the sufficiency of the evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

### C. The Evidence

We find that the evidence here supported the trial court's determination that Gibbons specifically intended to kill each of the three assault victims, not just Michael Johnson. As noted by the trial court, the evidence indicates that Gibbons fired into Harris' vehicle from close "point blank" range. Presumably, Gibbons was close enough to know that the car was occupied by persons in both the front and back seats. The bullet damage evidence indicates that Gibbons did not concentrate his gunfire at the back seat area where Michael Johnson was supposedly located. Rather, the evidence indicates that Gibbons sprayed bullets throughout the interior of the vehicle, with bullets traveling through the left side of the rear seat area as well as striking both the driver's and passenger's sides of the front seat area.

In our view, *Ochotski, supra*, does not provide support for Gibbons' argument that no more than a single volition was involved. In *Ochotski*, the defendant allegedly assaulted his next door neighbors with a club. *Id.* at 603-606. The defendant was initially acquitted of assaulting one neighbor, but then he was tried and convicted of assaulting the neighbor's wife. *Id.* at 604-606. The Michigan Supreme Court rejected the argument that the first acquittal was binding *res judicata* regarding the assault of the wife, noting that while the confrontation between the defendant and his two neighbors was part of a single transaction, it did not involve a single volition. *Id.* at 610. In this regard, the Supreme Court included the passage from Bishop's treatise quoted above, yet concluded that the passage had no application because the case involved different blows injuring different victims rather than a single blow injuring both victims at once. *Id.*

In dicta, this Court has cited *Ochotski* for the proposition that “an assault on several persons at the same time and place can support as many assault convictions as there were victims,” *People v Adams*, 128 Mich App 25, 29; 339 NW2d 687 (1983), and for the proposition that there can be only one assault conviction when there is but a single act or intent, *People v Cronk*, 9 Mich App 606, 612 n 5; 157 NW2d 802 (1968). Additionally, this Court has held that the discussion of the rule in Bishop’s treatise in *Ochotski* is itself non-binding dicta because the *Ochotski* Court found that rule inapplicable, *People v Lovett*, 90 Mich App 169, 174; 283 NW2d 357 (1979).

Even if the *Ochotski* discussion of the single volition rule were binding, it does not appear to be applicable here. *Ochotski* indicates that a single volition exists only if the assailant attempts to injure multiple victims with a single blow or a single gunshot. Here, Gibbons fired multiple gunshots at multiple victims positioned in different areas of Harris’ car. Again, the gunshots themselves were not isolated to one area or one path but were spread across the left and right seating areas. Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to prove beyond a reasonable doubt that more than one volition was involved, i.e., that Gibbons intended to kill the driver of the vehicle and both the front and rear seat passengers with separate gunshots.

Affirmed.

/s/ William C. Whitbeck

/s/ Roman S. Gibbs

/s/ Helene N. White

<sup>1</sup> Apparently, Gibbons is trying to argue, inconsistently, that all the gunshots were intended to hit Michael Johnson alone and that all of the gunshots were intended to hit all three occupants of the Harris vehicle together.

<sup>2</sup> Gibbons correctly notes that there was no argument or findings below concerning whether more than a single volitional act was involved. However, because Gibbons’ argument is based upon the sufficiency of the evidence, the issue is preserved for review despite Gibbons’ failure to raise the issue in the trial court. See *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). Additionally, with regard to Gibbons’ claim that there was only a specific intent to kill Michael Johnson, his argument is contrary to the findings of the trial court, which included a determination that Gibbons specifically intended to kill each of the three occupants of the Harris vehicle, i.e., Lawrence Harris, Marvin Johnson and Michael Johnson. Moreover, nothing in the trial court’s findings suggests that the court relied on the doctrine of transferred intent in this regard.