

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE MANUEL MURPHY,

Defendant-Appellant.

UNPUBLISHED

April 15, 2008

No. 277104

Wayne Circuit Court

LC No. 06-013886-01

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his convictions on three counts of assault with intent to do great bodily harm against Thomas Gaines, Anthony Green, and Denise Grant, MCL 750.84, felon in possession a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's first argument on appeal is that the prosecution failed to present legally sufficient evidence that he was the perpetrator to support his assault with intent to do great bodily harm less than murder convictions. We disagree. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Therefore, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The prosecutor must establish beyond a reasonable doubt that the defendant was the perpetrator of every charged offense. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "Identity may be shown by either direct testimony or circumstantial evidence." *Id.* Defendant argued twice with Green outside the C-Note Lounge, where Green was collecting entrance fees. Defendant was irate because he wanted to use the restroom, but Green would not permit defendant to enter without paying the fee. Following defendant's second argument with Green, Gaines, Grant, and Green saw defendant pull a gun from his left side. Although Grant and Green only heard the subsequent shots, Gaines testified that he saw defendant shoot. Defendant's shots missed Green, who ran inside the lounge, but hit Gaines and Grant. Before leaving in an ambulance, Grant told Officer James McDonald that defendant shot her. Although defendant claimed that Duwan Perry, who did not testify at trial, was the shooter, we conclude

that, in viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for a trier of fact to infer beyond a reasonable doubt that defendant was the shooter.

Defendant also claims that there was insufficient evidence to prove the requisite intent for assault with intent to do great bodily harm less than murder against Green. We disagree.

“The elements of assault with intent to do great bodily harm less than murder are: ‘(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.’” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). “This Court has defined the intent to do great bodily harm as ‘an intent to do serious injury of an aggravated nature.’” *Id.*, citing *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Defendant demonstrated intent to do serious injury of an aggravated nature against Green. See *Brown, supra*. He argued with Green regarding the entrance fee on his first visit to the bar. At that time, defendant was unarmed. When defendant left the bar, he was angry. Fifteen minutes later, defendant returned, armed with a gun. Defendant argued with Green again, threatened him, stating, “. . . I just show you you ain’t tough,” and pointed the gun at him. Defendant fired multiple shots in Green’s direction as Green ran away. After a brief lull in the shooting, defendant fired more shots toward the bar, where Green had retreated. Consequently, we conclude that there was sufficient evidence for a trier of fact to infer beyond a reasonable doubt that defendant intended to do great bodily harm against Green.

Next, defendant contends that even if this Court finds that he had the requisite intent for assault with intent to do great bodily harm against Green, the requisite intent was not satisfied for the convictions regarding Gaines and Grant. Under the doctrine of transferred intent, “[i]t is only necessary that the state of mind exist, not that it be directed at a particular person.” *People v Lawton*, 196 Mich App 341, 351; 492 NW2d 810 (1992), citing *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). In this case, defendant possessed the requisite intent to assault Green with the object of doing great bodily harm less than murder. Moreover, Gaines and Grant were present in the immediate area outside the lounge when defendant fired multiple shots at Green. Gaines and Grant suffered gunshot wounds from these errant shots. Therefore, under the doctrine of transferred intent, a reasonable trier of fact could find defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm against Gaines and Grant.

Defendant also argues that the prosecutor committed misconduct in his cross-examination of defendant when he questioned defendant about his criminal history and use of aliases. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

“MRE 609 provides, in pertinent part:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

- (1) the crime contained an element of dishonesty or false statement, or
- (2) the crime contained an element of theft, and
 - (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
 - (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.” [*Parcha, supra* at 241.]

MRE 609(b) explains how to determine the probative value and prejudicial effect of a past conviction:

“Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction’s similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.” [*People v Meshell*, 265 Mich App 616, 635; 696 NW2d 754 (2005), citing MRE 609(b).]

In this case, the prosecutor asked defendant:

Q. Ever been convicted of a crime involving theft or dishonesty, lying or stealing?

A. Yes.

No other evidence regarding the nature of these convictions was presented. However, according to defendant’s PSIR, defendant has been convicted of two counts of forgery, home invasion, and larceny in a building. Defendant did not object to this question on the record, so the trial court did not perform the MRE 609(a)(2)(B) balancing test.

Nevertheless, this Court may perform its own analysis to determine whether a plain error has occurred. These convictions occurred between six and nine years before the trial, so their probative value was somewhat reduced by their age. See *People v Allen*, 429 Mich 558, 612; 420 NW2d 499 (1988) (eight-year-old conviction “was of relatively late vintage”). Because theft crimes are “moderately probative of veracity,” defendant’s past convictions had probative value. *Id.* at 610-611. Furthermore, assault with intent to do great bodily harm and defendant’s various weapons charges bore little similarity to his forgery, home invasion, and larceny convictions. Finally, there was no indication that the question affected defendant’s decisional process because defendant testified at trial. Therefore, the probative value of the prosecutor’s question regarding defendant’s criminal history was not outweighed by its prejudicial effect.

During cross-examination, the prosecutor also asked defendant if he had used six aliases in the past. Generally, prosecutors may not introduce evidence of a defendant's use of an alias unless it is relevant to impeach the defendant's credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). In this case, defendant testified that Perry was the shooter. Therefore, defendant's credibility was at issue and his aliases were relevant for impeachment. Consequently, we conclude that the prosecutor's questions regarding defendant's aliases and criminal history did not deny defendant a fair and impartial trial.

Defendant's final argument on appeal is that the trial court improperly scored ten points for OV 13 based on defendant's contemporaneous assault convictions where it had already considered these convictions as subsequent or concurrent convictions under PRV 7. At sentencing, defendant's trial counsel and the prosecutor agreed on a score of ten points for OV 13. Because trial counsel affirmatively approved the scoring of the sentencing guidelines, any error was waived. See *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007).

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh