

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 17, 2016

v

MARCUS ANTOINE SMITH,
Defendant-Appellant.

No. 326009
Kent Circuit Court
LC No. 14-002314-FH

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of assault with intent to murder (“AWIM”), MCL 750.83; three counts of assault with intent to do great bodily harm less than murder (“AGBH”), MCL 750.84(1)(a); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent sentences of 50 to 75 years’ imprisonment for AWIM and 160 to 240 months’ imprisonment for each count of AGBH, served consecutively to two years’ imprisonment for felony-firearm. For the reasons provided below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

This case arises from an incident in which defendant shot a gun multiple times into a club. Defendant argues that there was insufficient evidence for the jury to find him guilty of AWIM. We disagree. An appeal based on the sufficiency of the evidence is reviewed *de novo*. *People v Henderson*, 306 Mich App 1, 8; 854 NW2d 234 (2014). When considering the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 8-9.

“The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). When a defendant is convicted of AWIM, “it is only the fortunate fact of the victim’s survival . . . that renders the defendant guilty of AWIM as opposed to murder.” *Henderson*, 306 Mich App at 7. “Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of [AWIM].” *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). “Intent to kill

may be inferred from all the facts in evidence, including the use of a deadly weapon.” *Henderson*, 306 Mich App at 11.

On appeal, defendant only challenges the sufficiency of the evidence with respect to the *mens rea* element. Testimony at trial demonstrated that defendant fired a gun into the doorway of the club six or seven times, striking four different people. Earlier, defendant had a conflict with someone in the club named “Ron” and was escorted out of the club by Eric Jones after someone in defendant’s group was seen with a gun. While outside, Jones attempted to diffuse the situation and talked to defendant and others in his group. Jones then turned to go back into the club when Ron attempted to exit. Jones spoke to Ron and then physically pushed him back into the club. Defendant then fired multiple shots toward the club’s doorway from 10 to 12 feet away. Jones and three others were hit by bullets.

We hold that the evidence is sufficient to have allowed the jury to conclude that defendant possessed the requisite intent to kill. Jones testified that defendant had a conflict with Ron, and that one of the people in the club with defendant had a gun, so Jones escorted them out of the club. Jones then told defendant not to return to the club that evening. This testimony provides a basis on which the jury could conclude that defendant had a motive to assault either Jones or Ron.¹ Although motive is not an element of AWIM, evidence of motive is relevant in determining whether defendant acted with the intent to kill, especially when a case relies on circumstantial evidence. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). Moreover, defendant’s use of a deadly weapon can allow the jury to infer that defendant acted with the intent to kill. See *Henderson*, 306 Mich App at 11.

II. SENTENCING

Defendant argues that his sentence of 160 to 240 months’ imprisonment for each count of AGBH represented an unreasonable departure from the sentencing guidelines. However, this argument has no merit.

Under the sentencing guidelines, a trial court must calculate a sentence range for each consecutive sentence, MCL 771.14(e)(i), but for concurrent sentences, the trial court is only required to calculate a minimum sentence range for the crime that has the *highest* crime class, MCL 771.14(e)(ii); *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). In *People v Lopez*, 305 Mich App 686, 691-692; 854 NW2d 205 (2014), this Court explained why a minimum sentence range under the sentencing guidelines is not scored for a concurrent conviction of a lower-crime-class offense:

The rationale for this legislative scheme is fairly clear because, except in possibly an extreme and tortured case, the guidelines range for the conviction with the

¹ The jury was properly instructed on the doctrine of transferred intent, where it could find defendant guilty of AWIM if he intended to kill Jones, or if he intended to kill someone else and that intent transferred to his assault on Jones. See *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

highest crime classification will be greater than the guidelines range for any other offense. Given that the sentences are to be served concurrently, the guidelines range for the highest-crime-class offense would subsume the guidelines range for lower-crime-class offenses, and there would be no tangible reason or benefit in establishing guidelines ranges for the lower-crime-class offenses.

The *Lopez* Court then concluded that “because the sentences for defendant’s lower-crime-class offenses were to be served concurrently with the highest-class-felony sentence,” the guidelines for the lower-crime-class offenses “did not need to be scored and there was no departure.” *Id.* at 692.

Here, defendant claims that his sentences for the lesser-class convictions of AGBH constituted an unreasonable upward departure from the sentencing guidelines range for those offenses. See MCL 777.65 (sentencing table for class D offenses). However, as already discussed, the trial court was only required to calculate the guidelines range for the *highest* crime class of defendant’s concurrent convictions, which it did when it calculated the guidelines for the AWIM conviction. See MCL 777.62 (sentencing table for class A offenses). As in *Lopez*, “the trial court was not required to independently score the guidelines for and sentence the defendant on each of his concurrent convictions” because “the court properly scored and sentenced the defendant on the conviction with the highest crime classification.” *Lopez*, 305 Mich App at 690. Because there was no guidelines range regarding defendant’s AGBH convictions, there is no departure for this Court to consider, and defendant’s claim necessarily fails.

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey