

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
August 21, 2012

v

STEVEN RAY SCOGGINS,  
  
Defendant-Appellant.

No. 304738  
Macomb Circuit Court  
LC No. 2010-005235-FC

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Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on two counts each of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b(1), and felonious assault, MCL 750.82. We affirm.

Criminal charges were filed against defendant after he shot at both his wife of 36 years and the police officer responding to the emergency. Prior to shooting at his wife, defendant had repeatedly threatened to “blow [her] brains out” with a gun he had in his pocket, apparently because she would not give him the key to a safe which held more guns. Defendant also told her that if he saw police, he would kill her. Despite defendant’s threats and without his knowledge, his wife did call 911 and defendant’s threats were recorded. When the police officer arrived, defendant’s wife attempted to run away but defendant gave chase and fired a shot at her back. Defendant then turned the gun on the responding police officer, and shot at him. The officer returned fire, striking defendant and ending this criminal episode. Although charged with two counts of assault with intent to commit murder, the jury convicted defendant of the lesser included offense of assault with intent to do great bodily harm less than murder. Defendant now appeals.

First, defendant argues he was denied his constitutional right to present a defense because the trial court granted the prosecution’s motion in limine and excluded the testimony of a psychologist who had examined him. We disagree.

Whether defendant was denied his right to present a defense is a constitutional question that this Court reviews de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Defendant’s claim also presents evidentiary issues. Evidentiary decisions, including the decision to admit or exclude expert testimony, are reviewed for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The trial court properly concluded that the proposed testimony constituted an improper diminished capacity defense which is not recognized as a viable defense in Michigan; thus, the trial court did not abuse its discretion when it excluded the proposed testimony. See *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001). We reject defendant's claim that the psychologist would not testify to defendant's diminished capacity. The theory of diminished capacity is that it allows a defendant, "even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *Id.* at 232. Here, the psychologist provided a letter detailing his findings relating to defendant. This letter was replete with indications that defendant was somehow incapable of forming the intent to kill either his wife or the police officer. The psychologist described a depressed, angry man, who, because of a lifetime of impotent rage and dependence on his wife, was mentally incapable of following through on his desire to kill his wife. The psychologist also opined that, given defendant's depressed state of mind, it was not unreasonable to expect that he would consider "suicide by cop." In short, the psychologist intended to testify to mental abnormalities (short of insanity) that he claimed were proof defendant lacked the requisite intent to kill either his wife or the police officer. This proposed testimony was, in substance, a diminished capacity defense which was properly excluded under *Carpenter*. *Id.* at 237.

Defendant argues that *Carpenter*, insofar as it eliminated diminished capacity as a viable defense, was mere dicta. However, we have previously rejected claims that the *Carpenter* decision was dicta. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005); *People v Abraham*, 256 Mich App 265, 271 n 2; 662 NW2d 836 (2003). The *Carpenter* decision is controlling Supreme Court precedent and the trial court did not err in relying upon *Carpenter* in making its decision.

Defendant next argues that even if not dicta, the decision in *Carpenter* amounts to the unconstitutional deprivation of his right to present a defense. We disagree. Our Supreme Court has concluded that there is no constitutional right to present a diminished capacity defense. *Carpenter*, 464 Mich at 240-241. "[A] state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence a state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent." *Id.* at 241 (citation omitted). Accordingly, defendant had no constitutional right to present a diminished capacity defense and there was no constitutional error in the exclusion of the psychologist's testimony.

Moreover, defendant was not denied the opportunity to present a defense. The trial court's decision only barred defendant from offering a psychologist's testimony on defendant's mental state at the time of the offense. See *Tierney*, 266 Mich App at 713-714. Defendant did in fact testify extensively regarding his intent during the event. He testified that he was upset over the impending separation and his wife's refusal to give him the key to the safe. While he admitted saying he was going to kill his wife, his sons, and his grandchildren, he denied any actual intent to complete such acts. Defendant admitted to shooting at his wife, but testified that he intentionally missed because he only intended to scare her. He also claimed that he wanted the police to kill him. He denied firing at the police officer and claimed his gun went off when he was shot. In addition to defendant's testimony, defense counsel argued defendant's theory of the case to the jury and maintained defendant did not intend to kill or harm anyone. As in *Tierney*, "the trial court's ruling did not deny defendant his constitutional right to present a

defense; rather, it merely denied defendant the right to present evidence of diminished capacity.” *Id.* at 714.

Next, defendant argues that the evidence was insufficient to support his convictions for assault with intent to do great bodily harm less than murder because the prosecutor failed to establish that he possessed the requisite intent. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient evidence, the “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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Determinations as to the weight of the evidence and the credibility of witnesses remain within the province of the trier of fact. *Id.* at 514-515 (citation omitted). “Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). “[A]ll reasonable inferences must be drawn in favor of the prosecution.” *Wolfe*, 440 Mich at 533.

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) (citation omitted). Assault with intent to do great bodily harm less than murder is a specific intent crime. *Id.* Intent can be inferred from the surrounding facts and circumstances, including defendant’s conduct, the weapon used, and threats made by defendant. *People v Lugo*, 214 Mich App 699, 709-711; 542 NW2d 921 (1995); *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992).

In this case, the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that defendant had the specific intent to do great bodily harm to his wife and the police officer. The evidence showed that defendant was enraged with his wife and he repeatedly threatened to “blow [her] brains out.” He specifically threatened to kill her if he saw police, and he threw a bullet at her, promising that the “next one was going to come out at [her] a lot faster.” Defendant’s threats were not merely idle statements made during an argument. Defendant in fact had a gun in his pocket. Moreover, he chased his wife and fired at her as she attempted to flee in a zigzagging pattern across their lawn. Several witnesses saw defendant take aim and fire at his wife, as well as the police officer. The police officer testified that defendant “pivoted in my direction, raised his gun, pointed it directly at me and fired a round at me.” In addition to hearing the testimony of three eye witnesses, the jury watched a video of the shootings taken with the camera in the responding police car. Additionally, in the hospital, defendant admitted to a detective that he was trying to shoot his wife’s back and that he shot at the police officer. In summary, there was sufficient evidence from which a jury could reasonably conclude that defendant had the specific intent to cause his wife and the responding officer great bodily harm. See *Lugo*, 214 Mich App at 709-711; *Harrington*, 194 Mich App at 429-430.

Defendant's attempts to dispute the evidence of his intent by offering what he considers proof of his lack of intent are unpersuasive. Specifically, defendant claims that, because he was a marksman, if he had wished to inflict great bodily harm he would have done so. However, the jury heard evidence that defendant was a marksman and it was the jury's prerogative to determine what weight to give this evidence. *Wolfe*, 440 Mich at 514-515. Such determinations will not be disturbed by this Court on appeal. *Id.* Defendant also points out that neither his wife nor the responding officer was injured. However, actual physical injury is not a required element of assault with intent to do great bodily harm. *Harrington*, 194 Mich App at 430. The fact that defendant missed his intended targets does not mean he did not intend to cause great bodily harm. *Id.* Defendant also suggests that there was no proof he fired at the responding officer. As discussed above, there was ample testimony and video evidence to support the conclusion that defendant took aim and fired at the police officer. Issues of credibility are for the jury. *Wolfe*, 440 Mich at 514-515.

Finally, defendant argues that he is entitled to resentencing because the trial court's reason for imposing the departure sentence was its "personal opinion" that defendant was "guilty of a higher charge for which he had been acquitted." We disagree.

The statutory sentencing guidelines require a judge to impose a sentence within the guidelines range absent a "substantial and compelling reason" to deviate from the guidelines. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Offense or offender characteristics already accounted for by the sentencing guidelines range do not constitute a substantial and compelling reason for departure unless the characteristic has been given "inadequate or disproportionate weight." MCL 769.34(3)(b). To impose a departure sentence, a trial court must find the existence of an objective and verifiable factor which provides a substantial and compelling reason for departure. *Babcock*, 469 Mich at 257-258. On appeal, the Court reviews the existence of such a factor for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Whether such a factor is objective and verifiable is a question the Court reviews de novo. *Id.* Whether such a factor constitutes substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010). Finally, the amount by which a trial court departs is also reviewed for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Here, the statutory minimum recommended sentencing guidelines range for defendant's assault with intent to do great bodily harm less than murder convictions was 19 to 38 months. Before imposing its sentence the trial court stated:

With respect to your case, sir, frankly I was surprised at the verdict the jury came back with assault with intent to do great bodily harm less than murder. It was clear from the testimony at trial as well as my viewing of the video that you made a concerted effort to end the lives of not only your wife but [the responding police officer] who was simply doing his job and responding to your wife's cries for help.

But for the grace of God, you would be facing two murder charges instead of the two assault charges that you did.

The court noted that defendant's "extreme conduct in shooting a weapon directly at your wife and then at a responding officer mandates this upward departure." Further, the court indicated that OV-5 (psychological injury to victim's family member) was not given adequate weight considering the psychological impact the event had on defendant's children and grandchildren, and that OV-19 (interference with the administration of justice) was not given enough weight because defendant took direct aim and fired a bullet at the responding police officer. Accordingly, the trial court issued a departure sentence of 62 months to 10 years.

Defendant argues on appeal that "it was error for the judge to sentence [defendant] based on his personal opinion that [defendant] was guilty of the charge of assault with intent to commit murder, for which the jury acquitted him." However, it is well-established that the sentencing court may consider, as an aggravating factor, that a defendant's actions reflected a more serious crime where that determination is supported by a preponderance of the evidence. *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992); *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). This is true even with regard to conduct for which a defendant was charged but acquitted. *United States v Watts*, 519 US 148, 157; 117 S Ct 633; 136 L Ed 2d 554 (1997).

Here, the sentencing court clearly held that, in light of all of the record evidence, the elements of assault with intent to commit murder were established, at least, by a preponderance of the evidence. In other words, the evidence established that, after repeated threats to kill her, defendant aimed and then fired a gunshot directly at the back of his wife as she was attempting to flee from him. Defendant also took direct aim and fired at the responding police officer. Thus, defendant's actual intent to kill can be inferred, at minimum, from his acts, his disposition, his use of a deadly weapon, his declarations prior to the shooting, and other circumstances. See *People v Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985) (citation omitted). Accordingly, the trial court did not err when it considered defendant's conduct related to the crime of assault with intent to commit murder.

Defendant's reliance on the case of *People v Grimmert*, 388 Mich 590; 202 NW2d 278 (1972) in support of his argument is misplaced. In that case, the sentencing court considered the fact that the defendant was charged with another crime that was pending at the time of sentencing, even though the defendant had not stood trial on that pending charge. The *Grimmert* Court held that the sentencing court could not, in effect, adjudge the defendant guilty of a crime for which a trial had not even been conducted. *Id.* at 608. The facts of the case before us are clearly distinguishable.

And we reject defendant's claim that the sentence imposed was disproportionate to the seriousness of the circumstances surrounding the offense and offender. See *People v Smith*, 482 Mich 292, 305, 309; 754 NW2d 284 (2008). Defendant appears to argue that his lack of criminal history should have been accorded more weight than was accorded his serious criminal conduct on the day of the shootings. We cannot agree. As the sentencing court held, but for happenstance, defendant would have been facing a sentence of life in prison for murder, possibly two since he shot at both his wife and a police officer. And the evidence was sufficient for the jury to have convicted defendant as charged with two counts of assault with intent to commit murder, which also could have resulted in a sentence of life imprisonment. See *id.* at 304. The

sentencing court adequately justified the departure sentence as more proportionate to the offense and the offender and did not abuse its discretion with regard to the extent of departure.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Mark J. Cavanagh