

No. 1-14-1447

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 10460
)	
KEVIN DAVIS,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of attempted first degree murder and attempted armed robbery.

¶ 2 Following a bench trial, defendant Kevin Davis was convicted of attempted first degree murder and attempted armed robbery and was sentenced to concurrent terms of 31 and 29 years in prison, respectively. On appeal, defendant contends that the evidence was insufficient to prove him guilty of attempted first degree murder where there was no evidence he had the specific intent to kill the victim. Defendant also contends that the evidence was insufficient to prove him

guilty of attempted armed robbery where there was no evidence that he intended to rob the victim.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the May 28, 2011, shooting of Pawel Kowalczyk. At trial, Kowalczyk testified through a Polish interpreter that on the day in question, he was working construction at 6204 South Maplewood Avenue. About 11:20 a.m., he was in the alley by the garage, jumping on top of garbage in a dumpster to push it down when a man, identified in court as defendant, approached him from behind. Defendant, who sounded nervous, said "don't move man" several times. Kowalczyk turned and saw defendant about three feet away, pointing a small black gun at him. Defendant was wearing a black hoodie over his head, but Kowalczyk could see defendant's face, as there was nothing covering it. Kowalczyk got down off the dumpster and ran toward the garage door. When he was about 19 feet away, he heard a "big sound," felt a sharp pain in his left leg, and fell to the ground.

¶ 5 Kowalczyk testified that he was taken to the hospital in an ambulance. When asked about his injuries, Kowalczyk said, "The bullet cut through the, it almost touched the artery, and then it's in my lower left leg, and the blood was just coming out of my stomach." Kowalczyk testified that he had two surgeries on his intestines, that a bullet was still lodged inside his body, and that he continued to experience pain in his leg because a nerve had been damaged by the shooting. Kowalczyk further testified that on June 11, 2011, Chicago police detective Patricia Walsh came to his home and showed him a photo array. Kowalczyk identified defendant in the array. Four days later, Kowalczyk went to the police station and identified defendant in a lineup.

¶ 6 On cross-examination, Kowalczyk testified that defendant said "don't move" three or four times, but never asked him for money, his phone, or anything else. Kowalczyk explained, "No, they just -- they didn't want anything from me. They just pointed the gun at me and I jumped off and I wanted to run." On re-direct, when Kowalczyk was asked whether he made any motions toward his pockets after defendant pointed the gun at him and told him not to move, he answered, "No, no. I was just scared, and I don't know if I fell off or slid off the dumpster. I was just running to the garage."

¶ 7 Chicago police detective Patricia Walsh testified that on the day of the shooting she went to the hospital to talk with Kowalczyk. Detective Walsh related that because defendant was in surgery, she was unable to talk to him. The next morning, she and another officer, who acted as an interpreter, talked with Kowalczyk at the hospital. Kowalczyk gave a description of defendant and told the officers about the shooting. The following questions were asked and answered:

"Q. Now, during that conversation, did Mr. Kowalczyk tell you that he believed that he was being robbed when the defendant pulled from the sleeve of his hooded sweatshirt a black revolver?"

[DEFENSE COUNSEL]: Objection, hearsay.

[ASSISTANT STATE'S ATTORNEY]: Mr. Kowalczyk testified that he did not remember telling the detective those statements, and they are admissible but not as substantive.

THE COURT: Course of conduct?

[ASSISTANT STATE'S ATTORNEY]: No, just to -- it's impeachment.

THE COURT: You want to impeach your witness?

[ASSISTANT STATE'S ATTORNEY]: Yes --

THE COURT: Overruled.

Q. [Assistant State's Attorney:] Do you remember the question?

A. Could you repeat the question, sir?

Q. I can. During your interview with Mr. Kowalczyk on the 29th of May, 2011, did he tell you he believed he was being robbed when the defendant pulled from the sleeve of his hooded sweatshirt a black revolver?

A. That's correct.

Q. Did he also tell you that during the robbery attempt, Kowalczyk motioned to his pockets indicating that he had no money?

[DEFENSE COUNSEL]: Objection, hearsay.

THE COURT: Is this for impeachment purposes?

[ASSISTANT STATE'S ATTORNEY]: Correct.

THE COURT: Overruled.

Q. [Assistant State's Attorney:] Did he make that statement to you?

A. He did."

¶ 8 Detective Walsh testified that based on the physical description provided by Kowalczyk, she assembled a photo array of suspects. In the array, she included photos of individuals living in the area where the shooting occurred and who had previous arrests for crimes such as robbery or gun-related offenses. On June 11, 2011, Detective Walsh went to Kowalczyk's home and showed him the photo array. Kowalczyk identified defendant's photo. Detective Walsh testified that she

subsequently located defendant and arrested him. Thereafter, on June 15, 2011, she had Kowalczyk view a physical lineup. Again, Kowalczyk identified defendant.

¶ 9 The trial court allowed the State to present other-crimes evidence, in the form of testimony from Sergio Ramirez, for the purpose of showing intent.

¶ 10 Ramirez testified that about 12:40 p.m. on June 7, 2011, he, Anthony Delgado, and Heriberto Mojica were on a scaffold at 6052 South Talman Avenue, working on a house's siding. Two men approached them through the alley. One of the men, identified in court as defendant, pointed a gun at Delgado. Defendant tried to fire the gun; Ramirez did not see him pull the trigger, but he heard the hammer clicking. Defendant then said, "[G]ive us your wallet or I'm going to kill you." Ramirez testified that he and Mojica threw down their wallets, but Delgado only opened his wallet and tried to get money out of it. When Delgado did not immediately give up his wallet, defendant's companion told defendant to shoot Delgado "because he wouldn't give them the wallet." Defendant and the other man reached down to grab the wallets and money. Initially, defendant and the other man had their shirts over their faces, but when defendant reached toward the ground, he let go of his shirt and Ramirez was able to see his face. After defendant and the other man picked up the wallets and money, they ran. Ramirez followed them toward the front of the house as he called the police. While defendant was fleeing, Ramirez was able to see his face. Finally, Ramirez testified that on June 15, 2011, he went to the police station to view a lineup. He identified defendant as the man who was holding the gun.

¶ 11 Defendant presented no witnesses and did not testify.

¶ 12 Following argument, the trial court found defendant guilty of attempted first degree murder and attempted armed robbery. Subsequently, the court sentenced defendant to concurrent

terms of 31 years in prison for attempted first degree murder and 29 years in prison for attempted armed robbery.

¶ 13 Defendant's first contention on appeal is that the evidence was insufficient to prove him guilty of attempted first degree murder where there was no evidence he had the specific intent to kill Kowalczyk.

¶ 14 When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Reversal is justified where the evidence is so unsatisfactory as to justify a reasonable doubt of the defendant's guilt or where proof of an element of the crime is wholly lacking. *People v. Robinson*, 2013 IL App (2d) 120087, ¶ 11. To prove attempted murder, the State must establish beyond a reasonable doubt that the defendant (1) performed an act constituting a substantial step toward the commission of murder, and (2) possessed the criminal intent to kill the victim. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39.

¶ 15 Here, defendant challenges the element of intent. Because proof of a defendant's intent to kill is rarely based on direct evidence, such intent may be implied from the character of the act. *People v. Glazier*, 2015 IL App (5th) 120401, ¶ 15. Intent to kill may be established by proof of surrounding circumstances, including the use of a deadly weapon. *Petermon*, 2014 IL App (1st) 113536, ¶ 39. Specifically, such intent may be proven where the defendant fired a gun at or towards another person with malice or with a total disregard for human life; the very act of firing

a gun at a person supports the conclusion that the shooter acted with an intent to kill. *Id.* (citing *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001)).

¶ 16 Defendant argues that several circumstances argue against a finding of specific intent to kill. First, he only fired a single shot in Kowalczyk's direction. Second, defendant notes that instead of firing at Kowalczyk from a distance of 3 feet, which he could have done while Kowalczyk was in the dumpster, he fired at Kowalczyk from a distance of 19 feet. Third, he argues that he only hit Kowalczyk in the "lower back near the left leg," as opposed to the head, neck, or upper back area. Fourth, he argues that although he did shoot Kowalczyk, he made no attempt to complete the offense of murder despite having the opportunity to do so while Kowalczyk lay on the ground. Finally, he asserts that there was no evidence to show that he had any motive or reason to want Kowalczyk dead. Defendant maintains that the mere act of firing a gun at the victim and causing him great bodily harm does not establish an intent to kill. Rather, he suggests that the circumstances of the instant case indicate only an attempt to intimidate, or a "show of force to a perceived challenge."

¶ 17 We reject defendant's arguments. First, evidence of a defendant's firing a gun a single time is sufficient to support the inference of intent to kill. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 41. Second, in our view, the fact that defendant shot Kowalczyk from 19 feet instead of 3 feet does not speak as much to defendant's intent as to Kowalczyk's speed as he attempted to flee. Additionally, defendant has cited no authority for his argument that shooting a handgun from a distance makes it less probable that the shooter intended to kill and more probable that he was firing the gun as a show of force or as a means of intimidation. Third, poor marksmanship is not a defense to attempted murder. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 27. Fourth,

once the elements of attempted murder are complete, abandonment of the criminal purpose is no defense. *People v. Myers*, 85 Ill. 2d 281, 290 (1981); see also *People v. Parker*, 311 Ill. App. 3d 80, 90 (1999) (abandonment is not a defense to criminal attempt). Finally, motive is not an element of the crime of attempted first degree murder, and therefore, does not need to be proven. See 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010).

¶ 18 Here, defendant aimed a gun at Kowalczyk, told him not to move, shot him in the back, and fled the scene. Viewed in the light most favorable to the prosecution, we find the evidence sufficient to prove defendant guilty of attempted first degree murder beyond a reasonable doubt. Defendant's contention fails.

¶ 19 Defendant's second contention on appeal is that is that the evidence was insufficient to prove him guilty of attempted armed robbery where there was no evidence he intended to rob Kowalczyk. Defendant emphasizes that when Kowalczyk testified at trial, he made it clear that defendant did not ask for his money, his phone, or anything else, specifically stating, "No, they just -- they didn't want anything from me. They just pointed the gun at me and I jumped off and I wanted to run." Defendant acknowledges that Detective Walsh testified Kowalczyk told her he "believed he was being robbed" and that he had "motioned to his pockets indicating that he had no money," but asserts that this evidence may not be considered as proof of intent, as it was not admitted substantively, but only as impeachment. Defendant asserts that there was no evidence he ever reached for Kowalczyk's pockets or made any move or verbal threat to take anything from Kowalczyk either while Kowalczyk was inside the dumpster or while Kowalczyk was lying on the ground after being shot. Finally, defendant argues that the other-crimes evidence introduced at trial was so dissimilar to the instant offense that it does not hold enough weight to

establish intent to rob. Specifically, defendant notes that in the instant crime, there was one perpetrator and one victim, the gunman did not try to conceal his face, and the gunman did not make any demands other than to say "don't move," while in the other-crimes case, there were two perpetrators and three victims, the perpetrators attempted to cover their faces, and the gunman demanded the victims' wallets.

¶ 20 To prove attempted armed robbery as charged in the instant case, the State was required to establish that defendant, with the intent to commit armed robbery, performed any act constituting a substantial step toward taking property from the person or presence of another by the use of force or by threatening the imminent use of force, and that during the commission of the offense, he personally discharged a firearm that proximately caused great bodily harm. 720 ILCS 5/8-4(a), 18-2(a)(4) (West 2010). Here, defendant challenges the element of intent. Intent is a question for the trier of fact and may be inferred from the character of the defendant's actions and the circumstances surrounding the commission of the offense. *People v. Foster*, 168 Ill. 2d 465, 484 (1995). In addition, evidence of other crimes is admissible to show intent. *People v. Wilson*, 214 Ill. 2d 127, 135-36 (2005).

¶ 21 We conclude that the circumstances of defendant's attack on Kowalczyk, combined with the other-crimes evidence, indicated that defendant intended to commit armed robbery. Defendant approached Kowalczyk at a site where Kowalczyk was working construction, pointed a gun at him, told him not to move, and shot him. That defendant did not successfully rob Kowalczyk does not require a finding that he had no intent to do so. See *People v. Kuhn*, 291 Ill. 154, 158 (1919) (finding that the fact that the victim "defended himself and prevented the robbery has no tendency to disprove the alleged intent"); *People v Turner*, 108 Ill. App. 2d 132,

137-38 (1969) (finding intent to rob where the defendant told a taxi cab driver "This is it" prior to his stated destination, the defendant pulled a gun, and the driver got out of the cab and ran from the scene). Moreover, the other-crimes evidence admitted at trial revealed a similar fact pattern to the instant case: a mere 10 days later and only about three blocks from Kowalczyk's work site, defendant approached a group of men working construction, pointed a gun at them, demanded their wallets, and attempted to shoot them. While the details of the crimes do not track exactly, in our view, they were similar enough to allow an inference of intent to commit armed robbery. We find that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to establish that defendant intended to rob Kowalczyk. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 22 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 23 Affirmed.