# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYATTA LAJUAN DANIELS,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 182869

Recorder's Court
LC No. 94-003540

Before: Doctoroff, P.J., and Hood and Paul J. Sullivan,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, malicious destruction of property over $100.00, MCL 750.377a; MSA 28.609(1), and felony firearm, MCL 750.227b; MSA 28.424(2). Pursuant to MCL 769.11; MSA 28,1083, defendant was sentenced to six years, eight months to ten years' imprisonment as an habitual offender, third offense. For the felony firearm conviction, he was sentenced to two years in prison, the prison terms to be served consecutively. Defendant now appeals. We affirm.

The prosecutor's theory of the case was that defendant repeatedly fired a gun at a vehicle carrying the four complainants. At trial, defendant presented three alibi witnesses who testified that defendant was at home at the time of the shooting. On appeal, defendant first argues that reversal is warranted because the trial court did not specifically refer to the alibi defense in its findings of fact. We disagree.

In actions tried without a jury, the trial court is required to make separate findings of fact and conclusions of law on contested matters. MCL 2.517(A)(1); *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). The articulation requirement is satisfied as long as it appears that the trial court was aware of the factual issues and correctly applied the law. *People v Wardlaw*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991). After reviewing the transcript, we conclude that the trial judge was well aware that identification was a key issue in this case. Moreover,

* Circuit judge, sitting on the Court of Appeals by assignment.

the record supports the trial court's finding that defendant committed the offenses for which he was convicted. Accordingly, defendant's argument on this issue is without merit.

Next, defendant contends that the evidence was insufficient to establish that he committed assault with intent to do great bodily harm. We disagree. When reviewing sufficiency challenges, circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). Intent may be inferred from the facts in evidence, *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995); *People v Frost*, 148 Mich App 773, 777; 384 NW2d 790 (1985).

In the instant case, Carlos Rabb testified that he cut off a black Geo Prism as he attempted to turn his vehicle around in a driveway. Several of the complainants identified defendant as the driver of the Prism. Defendant stuck his head out of the sun roof and asked the complainants if they had a problem. After Rabb told defendant that there was no problem, defendant fired six or seven shots in the direction of the Rabb vehicle. The last three shots shattered the back window, barely missing complainant Richard Robson, who was in the back seat of the Rabb vehicle. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that defendant intended to do great bodily harm with regard to Robson. Accordingly, reversal is not warranted on this issue. See *Bell*, *supra* at 277.

Defendant next argues that his conviction of assault with intent to do great bodily harm should be reversed because the trial court's verdicts were inconsistent. This issue is not preserved for appeal because it was not raised in defendant's statement of questions presented. See *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Even if we were to review this issue, we find it to be without merit. Because Robson was the only complainant who testified that he was nearly hit by defendant's bullets, it was rational that the trier of fact found defendant guilty of only one count of assault. Accordingly, the verdicts were not necessarily inconsistent, and reversal is not warranted.

Next, defendant makes several arguments concerning the lineup in which he participated. Defendant did not move to suppress the identification evidence, nor did he object to the introduction of such evidence at trial. Absent manifest injustice, a trial court's decision to admit identification evidence will not be reviewed on appeal unless the defendant objected or moved the trial court to suppress the identification. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

In support of his challenge to the lineup, defendant relies on a document entitled "Attorney Showup and Photo Identification Comments." The form indicates that defendant was the only participant with a mustache and goatee. Although the document is attached as an exhibit to defendant's supplemental brief on appeal, it is not included within the lower court file. Documentary evidence that is attached to a party's appellate brief but not found in the trial court record will not be considered by this court on appeal. *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 648; 482 NW2d 474 (1992). There is no other evidence in the lower court record indicating the composition of

the lineup. Accordingly, manifest injustice would not result from our failure to review this issue. Even if we were to address this issue, we would find it meritless. Generally, physical differences between a defendant and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *People v Kurylczyk*, 443 Mich 289, 313; 505 NW2d 528 (1993) (opinion by Griffen, J.). See also *People v Hughes*, 24 Mich App 223, 225; 180 NW2d 66 (1970) (lineup not unduly suggestive where the defendant was the only participant with both a mustache and a goatee). Accordingly, reversal is not warranted on the basis of this issue.

Next, defendant contends that his trial counsel was ineffective in failing to object to testimony concerning the lineup. To establish a denial of effective assistance of counsel, the defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id*. Because there is nothing in the lower court record to indicate that the lineup was unduly suggestive, defendant has failed to establish that his trial counsel was ineffective.

Finally, defendant argues that his conviction must be reversed because the magistrate failed to properly file a return to circuit court. We disagree. A return to circuit court was filed. The document, dated March 31, 1994, is included within the lower court file. There is no evidence in the record suggesting that the return was not filed in a timely fashion. Accordingly, we find that defendant's argument is without merit.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan