STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENELL WHITWORTH,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 196412
Recorder's Court
LC No. 95-013971

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions for assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fourteen to twenty-five years in prison for the assault with intent to commit murder conviction, and two years in prison for the felony-firearm conviction, with the former sentence to be served consecutively to the latter. We affirm.

Defendant raises seven issues on appeal. First, defendant contends that his convictions were against the great weight of the evidence because the testimony of the prosecution's two primary witnesses was inherently incredible. We disagree. The witnesses' testimony was plausible when compared to the body of evidence presented at trial. *People v Miller (After Remand)*, 211 Mich App 30, 48; 535 NW2d 518 (1995).

The witnesses testified that, at first, they described only one shooter to police because they believed that the police department was only seeking one suspect in connection with the victim's death. The witnesses also identified defendant both at a pretrial lineup and at trial as a man who shot at the victim. Moreover, their testimony about where defendant stood as he shot at the victim was consistent with the path of a bullet through the victim's body and with shells found in the middle of the street. The witnesses testified that defendant stood in the middle of Plymouth Road shooting at the upper part of the victim's body. The victim lay about eight feet away, "catty corner" from where defendant stood. Forensic evidence showed that a bullet passed through the victim's head, entering near the top and back

on the right side and exiting through the left side of the victim's face. Further, even though two other witnesses were unwilling to identify defendant at trial as one of the men who shot at the victim, they identified him at the lineup as one of the shooters. Giving regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it, MCR 2.613(C), we conclude that defendant's convictions found reasonable support in the evidence presented at trial. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Next, defendant argues that the prosecution failed to present sufficient evidence to establish his specific intent to kill, a necessary element of assault with intent to commit murder. We disagree.

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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be proven by inference from any facts in evidence, including the defendant's firing of a gun at close range to the victim. *People v Buckner*, 144 Mich App 691, 697; 375 NW 2d 794 (1985). Here, on November 19, 1995, defendant became involved in a brawl in a Detroit bar between his friends and the victim's friends. As defendant and his friends left the bar, one of the victim's friends heard defendant say, "Let's go get the shit, come on, go get the shit." The friend testified that this statement was a request by defendant to his friends to go get their guns. Four of the prosecution witnesses testified that they saw two men shooting at the victim. The two primary witnesses testified that they saw defendant standing in the middle of Plymouth Road shooting at the victim, who lay on the ground where he had fallen after being shot by the first man. Defendant stood about eight feet away. Considering all of the evidence in a light most favorable to the prosecution, we conclude that this evidence sufficiently established defendant's intent to kill the victim. *Davis, supra* at 53; *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995); *Buckner, supra* at 697.

Defendant's third issue is that the trial court made insufficient findings of fact to support his conviction for assault with intent to commit murder. We disagree. The trial court recognized that the identification of defendant as the second shooter of the victim was an important issue in the case. The court also recognized that not all of the descriptions of the second shooter provided to police described defendant, and that each of the four lineup identifications, standing alone, did not positively identify defendant as the second shooter. But the trial court also noted that all four witnesses at the lineup recognized defendant as associated with the first shooter. The trial court correctly found that the cumulative effect of all four identifications, with the rest of the trial testimony placing defendant at the crime scene, established that defendant was the second shooter.

The trial court also found that defendant had an intent to kill the victim independent from the intent possessed by the first shooter. The court based its finding of defendant's intent on the testimony that defendant shot at the victim at fairly close range after he had fallen from the first shooter's attack and that the victim had been shot through the head, apparently as he lay on the ground. This Court treats the trial court's assessment of the witnesses' credibility with great

deference. We will not resolve that assessment anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The trial court was aware of the factual issues in defendant's case and correctly applied the law. *People v Porter*, 169 Mich App 190, 194; 425 NW2d 514 (1988).

Defendant's fourth argument is that he received ineffective assistance of counsel at trial. Because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Defendant first claims that his trial attorney failed to provide effective assistance by failing to contact and present a witness whose testimony could have exonerated defendant. This claim is without merit, as defendant cannot establish on the existing trial record that the witness' testimony would have made a difference in the outcome of the trial. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant claims that the missing witness would have testified that he left the bar with defendant on November 19, 1995, that he did not see defendant with a weapon, and that he did not see defendant shoot anybody. This must be set against the testimony of one of the trial witnesses who saw defendant leave the bar alone on November 19, 1995, and the testimony of the two primary witnesses who saw defendant standing in the middle of Plymouth Road shooting at the victim. One of these two witnesses had heard defendant ask his friends to "go get the shit" before the victim was shot, a request the witness interpreted as meaning, "Go get your guns." We conclude that the failure of defendant's trial attorney to present the missing witness did not deprive defendant of a substantial defense.

Defendant next claims that his trial attorney erred by not objecting when the prosecution mentioned, during closing argument, that "there has been no motivation given why the two witnesses who do identify this defendant would testify falsely." The attorney's decision not to immediately object to this remark, which defendant claims constituted an impermissible shifting of the burden of proof, appears to have been sound trial strategy to allow counsel to suggest to the trial court through his own closing argument that the witnesses were lying. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Defendant's trial attorney strongly attacked the credibility of the prosecution's primary witnesses during his closing argument. We cannot therefore say that counsel's behavior was an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant's third claim of ineffective assistance is that his trial attorney should have moved to dismiss the charges against defendant and to suppress the lineup identifications because defendant was arrested without probable cause or a signed warrant. We disagree. The trial record clearly shows that probable cause existed to arrest defendant. Police officers learned on November 20, 1995, the day after the victim was shot, that defendant was one of two men shooting at the victim. This information

would lead a reasonably cautious person to believe that a crime was committed and that defendant committed it. *People v Champion,* 452 Mich 92, 115; 549 NW2d 849 (1996). Further, the two primary witnesses were able to identify defendant as one of the shooters independently of the post-arrest lineup. *People v Kachar,* 400 Mich 78, 95-96; 252 NW2d 807 (1977). The witnesses testified that they knew defendant before November 19, 1995, and that they were in a position from which they could clearly see defendant shooting at the victim. We conclude that defendant has not shown that his trial attorney deprived him of a substantial defense or committed any errors so serious that they prejudiced his right to a fair trial. *Daniel, supra* at 58.

Defendant's fifth argument is that the prosecutor impermissibly shifted the burden of proof to defendant when he commented during closing argument that no reason had been given as to why the prosecution's two primary witnesses would offer false testimony. However, defendant failed to object to the comment he now claims was improper. Therefore, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). Our review of the prosecutor's comment in context leads us to find no miscarriage of justice. *Id.* The prosecutor's remark was not directed at the burden of proving whether the witnesses were credible, but at defense counsel's repeated attempts to impeach them during trial. *People v Guenther,* 188 Mich App 174, 180; 469 NW2d 59 (1991); *People v Rosales,* 160 Mich App 304, 309; 408 NW2d 140 (1987).

Defendant argues that his fourteen to twenty-five year sentence for his assault with intent to commit murder conviction violates the principle of proportionality because it punished defendant for prior crimes and for his "lifestyle." Defendant's fourteen-year minimum sentence was within the range recommended by the sentencing guidelines, and therefore is presumptively proportionate. *People v Price,* 214 Mich App 538, 548; 543 NW2d 49 (1996). Defendant did not present any unusual circumstances to challenge this presumption of proportionality. *People v Milbourn,* 435 Mich 630, 661; 461 NW2d 1 (1990). Further, the circumstances surrounding the offense and the offender support the proportionality of defendant's sentence. *Milbourn, supra* at 635-636. In addition to the circumstances surrounding the shooting discussed above, defendant had two prior felony convictions for drug possession and delivery, a prior misdemeanor larceny conviction, and a pending charge for drug possession. We conclude that the trial court did not abuse its discretion in sentencing defendant to fourteen to twenty-five years in prison for his assault with intent to commit murder conviction. *People v Houston,* 448 Mich 312, 319; 532 NW2d 508 (1995).

Defendant's remaining argument is that the trial court incorrectly scored Offense Variable 2 at one hundred points. In *People v Mitchell,* 454 Mich 145; ___ NW2d ___ (1997), the Supreme Court held that a claim of miscalculated variable is not in itself a claim of legal error as the guidelines do not have the force of law. The *Mitchell* Court stated:

> On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. Thus, application of the guidelines

states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, *and* (3) the sentence is disproportionate. [*Id.*, p 177. Emphasis added.]

Since we have held that defendant's sentence is proportionate, this Court is precluded from appellate review on the issue of scoring. See *People v Bass*, ___ Mich App ___; ___ NW2d ___ (No. 178342, issued 4/25/97).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey