

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. COLLETTE,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 195534

Wayne Circuit Court

LC No. 95-10247

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant's convictions stem from the August 15, 1995 shooting of Maria and Thomas Bartolo. Following a two-day jury trial, defendant was sentenced to concurrent terms of ten to twenty years' imprisonment for the assault convictions and a consecutive two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

In the early morning hours of August 15, 1995, Maria and Thomas Bartolo were driving along Wendell Street in Detroit, along with several friends, brothers, and sisters, in an effort to locate the individuals who had just broken into their mother's home.¹ They had just recovered their stolen car and were driving back home, down Wendell Street, when defendant and two other individuals came out onto the balcony and porch of a multi-level apartment unit and began firing gunshots at the victims. Maria was hit in the hand by a bullet and Thomas was hit in the leg; both injuries required extensive medical attention and numerous surgeries. Defendant was later located at the address from which the shooting occurred. The arresting officers also found an assault rifle and ammunition at that address. At trial, several witnesses identified defendant as the individual who fired gunshots from the lower level of the apartment unit.

On appeal, defendant first argues that the in-court identifications made by several witnesses were tainted, and that his conviction must therefore be reversed. Absent manifest injustice, a claim of an unduly suggestive pretrial identification procedure will not be reviewed on appeal unless the defendant

objected or moved to suppress the identification. *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987). Similarly, issues regarding the propriety of an in-court identification are waived absent objection. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). In the present case, defendant failed to object, and has therefore waived this issue for review absent manifest injustice. We find no manifest injustice.

Our review of the record does not indicate that the in-court identification of defendant was tainted by an impermissibly suggestive identification of defendant at his preliminary examination. The witness who testified at the preliminary examination of defendant had a long time to view defendant during the incident and the subsequent confrontation. As such, the prosecution was not required to establish an independent basis for the witnesses' identification. *People v Syakovich*, 182 Mich App 85, 89; 452 NW2d 211 (1989). Although defendant points to some factors that might render the identification less credible, this goes to the weight of the evidence rather than its admissibility, and the issue was properly before the finder of fact.

Defendant next argues that the evidence was insufficient to support his convictions. The prosecution in a criminal case must introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing 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 proven beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We believe that the evidence supports both of defendant's convictions.

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 killing murder. MCL 750.83; MSA 28.278; *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The "actual intent to kill" may be proven by reasonable inference from any facts in evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

First, the evidence is undisputed that shots were repeatedly fired at the victims' cars and that the shots continued even after the victims were hit. This evidence clearly establishes an assault with intent to kill. Furthermore, there is sufficient evidence to support the conclusion that defendant was the individual who fired shots from the downstairs porch. Several witnesses to the shooting testified against defendant at trial. One witness testified that because it was daybreak, she could see quite clearly, and she was certain that it was defendant who came out of the lower level of the flat with a gun. She and a second witness testified that they were positive that defendant was the individual who had been on the lower level. When investigating officers arrived at the address in question, they found an SKS assault rifle, a white man and woman who were identified as the individuals who fired from the upper level, and defendant (also known as "Teardrop"). This evidence was sufficient to support defendant's convictions for assault with intent to murder and felony-firearm.

Finally, defendant argues that he was deprived of the effective assistance of counsel. Defendant points to a number of alleged errors in counsel's performance in support of his claim. First, defendant notes that defense counsel made no pretrial motions regarding the fact that the only pretrial identification of defendant was by one witness at the preliminary exam. Since four of the six witnesses did not identify defendant, he thus argues that counsel's failure to make any motions fell below the standard of care of a reasonable attorney. Furthermore, defendant also argues that defense counsel failed to request discovery before the preliminary examination and that counsel failed to highlight the fact that the witnesses' testimony was vague and unreliable. Since defendant did not move for a *Ginther* hearing² or new trial on this basis, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To establish ineffective assistance of counsel, defendant must show 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 Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Claims of ineffective assistance of counsel must be evaluated under an objective standard of reasonableness. *Id.* Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Id.* at 687. Defendant has the burden "to show, with regard to counsel's performance, 'that [1] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment . . . [and] that [2] the deficient performance prejudiced the defense.'" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We believe that defendant has failed to meet this burden because he did not show that counsel's actions were unreasonable or that the result of the trial would have been different had he done as defendant now suggests.

Initially, we note that the record does not support defendant's claim that counsel failed to emphasize and highlight the "weak identifications" of defendant. Defense counsel cross-examined the witness who identified defendant and pointed out, through this testimony, that the witness did not make a police statement describing defendant's appearance or identifying defendant as the shooter, and that she did not identify him as such until her in-court testimony. Counsel also questioned the witness' ability to identify defendant accurately and pointed out that she was under the influence of medication when she gave her police statement. The other identifying witnesses were also cross-examined with respect to the accuracy of their identifications.

Second, there is nothing on the record to support the claim that defense counsel did not request discovery before the preliminary examination or that counsel erred in failing to make a motion to suppress the witness' identifications of defendant. In any case, we believe that a pretrial motion would have been futile in light of this Court's ruling that there was no error in allowing the identification testimony. Because defense counsel is not required to argue a motion which would have been frivolous or meritless, *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), we find no error.

It is clear from the record that defense counsel attempted to dampen the credibility of the identifications. The guilty verdict, in this case, is a reflection of the credibility, or lack thereof, attributed to the various witnesses; defense counsel did an adequate job of bringing those issues and questions to

light. Therefore, we find that defendant has not met his burden of proving that counsel's performance fell below an objective standard of reasonableness or that defendant was unduly prejudiced by a deficient performance.

Affirmed.

/s/ Gary R. McDonald

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

¹ A number of items were taken from the home, including several sets of house keys, two purses, and a car.

² See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).