

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP DILLARD,

Defendant-Appellant.

UNPUBLISHED

September 11, 1998

No. 199977

Recorder's Court

LC No. 96-002094 FY

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, felonious assault, MCL 750.82; MSA 28.277, intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to an enhanced term of eight to twenty years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, five to ten years' imprisonment for the felonious assault conviction, five to ten years' imprisonment for the intentional discharge of a firearm at a dwelling conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecution presented insufficient evidence to support his convictions. We disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crimes beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder." *People v Pena*, 224 Mich App 650; 659; 569 NW2d 871 (1997). Intent to do great bodily harm less than murder is defined as an intent to do serious injury of an

aggravated nature. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). The law presumes that every person intends the usual consequences which accompany the use of

the means employed in the manner employed. *People v Gilliam*, 27 Mich App 314, 317; 183 NW2d 364 (1970). A jury may find that a defendant possessed the intent necessary to commit an offense in the defendant's conduct or words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

Marcellius Stitts testified that he was standing in the door to the house when the codefendant, Benjamin Taylor, and defendant started shooting. Stitts testified that he was shot, several times, and that he could see that it was defendant who was shooting him. Viewing Stitts' testimony in the light most favorable to the prosecution, the jury could have found that defendant shot Stitts and inferred that defendant had the required specific intent to inflict great bodily harm. Thus, the prosecution presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm less than murder.

The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Mattie Taylor testified that she was standing in the door to her house, near Stitts, when she saw defendant raise a gun. According to Taylor, when she saw the gun, she backed up and ran through the house and into the kitchen. Viewing Taylor's testimony in the light most favorable to the prosecution, the jury could have found that defendant intended to injure Taylor or place her in reasonable apprehension of an immediate battery. Thus, the prosecution presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of felonious assault.

The elements of discharging a firearm at a dwelling are as follows: (1) the defendant intentionally discharged a firearm; (2) the firearm was discharged at a dwelling; and (3) the defendant knew or had reason to believe when he discharged the firearm that the facility was a dwelling. CJI2d 11.26a. Jabbar Newson testified that he observed defendant aiming at the house and shooting. Viewing Newson's testimony in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of discharging a firearm at a dwelling.

Finally, the elements of felony-firearm are "that the defendant possessed a firearm during the commission or attempt to commit a felony." *Davis, supra*. As stated above, the prosecution presented sufficient evidence for the jury to find defendant guilty of assault with intent to do great bodily harm less than murder, felonious assault, and discharging a firearm at a dwelling. Further, the prosecution presented extensive testimony that defendant had a firearm at the time he committed these crimes. Given this testimony, we find that the prosecution also presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of felony-firearm.

Defendant next argues that the judge should have waited until the jury returned a verdict in defendant's case before ruling in codefendant's case. Defendant failed to properly present this issue for review because it was not identified in defendant's statement of questions presented. MCR 7.212(C)(5); *People v Yarger*, 193 Mich App 532, 540, n 3; 485 NW2d 119 (1992). Defendant

also failed to cite any legal authority for this proposition; therefore, the issue is waived. *Pena, supra* at 664.

Defendant also claims that he received ineffective assistance of counsel. We again disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell 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).

Defendant first claims that he asked his attorney for a lineup before the preliminary examination and then later requested another, and his trial counsel was ineffective for failing to request a lineup. Nothing in the record, however, indicates that defendant requested that his counsel arrange a lineup. Further, because several witnesses identified defendant at trial as the shooter, identification was not an issue. Therefore, this argument is without merit.

Defendant next argues that his attorney was ineffective for failing to call any witnesses, including a known alibi witness, and for advising him not to testify in his own defense. However, defendant was specifically asked by the trial court when the defense rested if there were any other witnesses who he wished to have called, and defendant indicated that there were not. Therefore, a review of the record does not establish ineffective assistance of trial counsel for failing to call witnesses. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). With respect to trial counsel's advice to defendant not to testify, the trial court asked defendant if he had any questions about his right to testify and whether he understood his rights, and defendant answered the court that he did not have any questions about his rights, he understood his rights, and he did not want to testify. Trial counsel's advice to a defendant not to testify on his own behalf is a matter of trial strategy, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), and we will not substitute our judgment for that of trial counsel in matters of trial strategy, *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987). Defendant's contention is without merit.

Finally, defendant argues that his trial counsel was ineffective for failing to make a motion for a mistrial after a juror disclosed that she had heard the outcome of the codefendant's case prior to the conclusion of jury deliberations on defendant's case. The record reveals, however, that the trial court questioned the juror regarding whether she had relayed that information to anyone else on the jury and if hearing the codefendant's verdict had affected her ability to remain fair. The juror stated that she did not relay the information to any of the jurors and that she could remain fair. Given these circumstances, we cannot say that trial counsel was ineffective for electing not to move for a mistrial in the wake of the juror's revelation.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage