STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LEONARD WELLS,

Defendant-Appellant.

UNPUBLISHED
February 15, 2000

No. 209822
Washtenaw Circuit Court
LC No. 95-004738-FC

Before: Hood, P.J., Smolenski and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant, a juvenile, was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as an adult to six to twenty years' imprisonment for the second degree murder conviction and a consecutive two-year term for the felony firearm conviction. He appeals as of right. We affirm.

Defendant argues that the trial court erred in failing to instruct the jury on the lesser offenses of involuntary manslaughter and reckless discharge of a firearm. We disagree. The evidence demonstrated that defendant made a conscious, mental decision to retrieve the firearm, a rifle, that he aimed it at a crowd of people, and then intentionally fired two shots before the rifle jammed. Given these facts, the evidence did not support jury instructions for either involuntary manslaughter or reckless discharge of a firearm. *People v Beach*, 429 Mich 450, 478; 418 NW2d 861 (1988). *People v Clark*, 453 Mich 572, 577-578; 556 NW2d 820 (1996); *People v Dabish*, 181 Mich App 469, 474; 450 NW2d 44 (1989).

Next, defendant argues that he did not receive the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced him as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Pickens*, *supra* at 314.

Defendant first asserts that trial counsel was ineffective for failing to request lesser offense instructions for assault with intent to murder, assault with intent to do great bodily harm less than murder, and felonious assault. The record reveals that all three offenses were discussed on the record and the trial court indicated that, if it instructed on felonious assault, as requested by defendant, it would also instruct on assault with intent to murder and assault with intent to commit great bodily harm less than murder, as requested by the prosecutor. Defense counsel, after consulting with defendant, subsequently withdrew the request for an instruction on felonious assault, noting that the prosecution was proceeding under an aiding and abetting theory as opposed to claiming that defendant was a direct participant, whereupon the prosecutor withdrew the requests for instructions on the other two assault offenses. We conclude that defense counsel's decision to forego having the jury instructed on the three assault offenses was a matter of trial strategy and defendant has not overcome the presumption of sound strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy may not have worked does not constitute ineffective assistance of counsel. *Id.*

Defendant further argues that defense counsel was ineffective for failing to file a motion to suppress his statement. However, the record reflects that defense counsel did file a motion to suppress defendant's statement, which was denied by the trial court, and that defense counsel also attempted to raise this issue in an interlocutory appeal with this Court, but this Court denied leave to appeal that issue. Accordingly, we find no merit to this issue.

Next, defendant contends that the trial court clearly erred in ruling that his police statement was made knowingly, intelligently and voluntarily. We review the record de novo to determine whether defendant's statement was voluntarily made, but will not disturb the trial court's factual findings unless convinced they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996); *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). To the extent that resolution of disputed factual questions turn on the credibility of witnesses or the weight of the evidence, we will ordinarily defer to the findings of the trial court. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). Our review of the trial record, upon which defendant relies, convinces us that, under the totality of the circumstances, defendant's statement to the police was voluntarily made.[1] *People v Givans*, 227 Mich App 113, 120-122; 575 NW2d 84 (1997).

Next, defendant argues that the trial court abused its discretion in allowing evidence that the rifle that he fired during the charged offense had been stolen from a home on an occasion when defendant and the two other shooters were present. The admission of other bad-acts evidence pursuant to MRE 404(b) is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We conclude that the evidence was properly admitted under MRE 404(b). The evidence was not admitted for the purpose of showing defendant's bad character, but was relevant to show defendant's connection to the actual shooter at the party and was also relevant to the prosecution's theory of aiding and abetting. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52,

64-65, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). Thus, the trial court did not abuse its discretion in admitting the evidence at trial.

Next, defendant contends that the evidence was insufficient to support his conviction of second-degree murder. We disagree. In reviewing claims of insufficiency of the evidence to sustain a verdict, this Court views the evidence in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Defendant admitted that, when the shooting began, he went around to the side of the house where he knew a rifle was hidden, obtained the rifle, went back to the front of the house, pointed the rifle at the crowd of people, and fired off two shots. These actions demonstrate a culpable intent, specifically, that defendant acted with an intent to kill or, at a minimum, an intent to cause great bodily harm. Thus, there was sufficient evidence to enable the jury to conclude beyond a reasonable doubt that defendant possessed the requisite malice to support a conviction of second-degree murder. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998); *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995); *In re McDaniel*, 186 Mich App 696, 699-670; 465 NW2d 51 (1991).

The circumstances of defendant's involvement in the offense, viewed most favorably to the prosecution, also demonstrate that defendant "performed acts or gave encouragement that assisted the commission of the crime" and had "knowledge that the principal intended its commission at the time . . . defendant gave the aid or assistance." *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The fact that the victim was killed by a bullet from another gun does not detract from defendant's guilt as an aider and abettor. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991).

Finally, defendant argues that the trial court erred in sentencing him as an adult instead of a juvenile. Review of a trial court's decision to sentence a minor as a juvenile or as an adult involves a bifurcated process. First, the trial court's factual findings supporting its determination regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed under the clearly erroneous standard. MCL 2.613(C). A factual finding is clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. The abuse of discretion standard requires a reviewing court to determine whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Lyons (On Remand)*, 203 Mich App 465, 468-470; 513 NW2d 170 (1994). See also *People v Perry*, 218 Mich App 520, 540; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999).

After conducting a juvenile sentencing hearing in accordance with MCR 6.931(A), the trial court made extensive findings of fact on each of the criteria enumerated in MCR 6.931(E)(3). Contrary to what defendant argues, the record reveals that the trial court did not rely solely on the seriousness of

the offense in determining that defendant should be sentenced as an adult. *People v Dunbar*, 423 Mich 380, 387-388; 377 NW2d 262 (1985). Although the trial court recognized that defendant had matured while in detention and had the potential for rehabilitation, its finding that defendant would not be subject to the juvenile justice system for a period sufficient to accomplish the rehabilitation is not clearly erroneous. *People v Black*, 203 Mich App 428, 430-431; 513 NW2d 152 (1994). After reviewing the record, we conclude that the trial court's findings of fact are not clearly erroneous. We further find that the trial court did not abuse its discretion in its decision to sentence defendant as an adult.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] The trial court's March 12, 1997, order states that defendant's motion to suppress was denied "[b]ased upon the opinion of the Court stated on the record on March 18, 1996." Defendant has not provided a transcript of the hearing referenced in the trial court's order. This Court could consider the issue abandoned for failure to provide the transcript. *Taylor v BCBSM*, 205 Mich App 644, 654; 517 NW2d 864 (1994). Defendant instead relies on the trial testimony as factual support for his claim that his statement was involuntary, however, as we have indicated, our review of that testimony discloses that defendant's statement was voluntarily made.