

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN D. WEATHERSPOON,

Defendant-Appellant.

UNPUBLISHED
November 9, 2001

No. 225190
Oakland Circuit Court
LC No. 99-165163-FC

Before: Doctoroff, P.J., and Wilder and Schmucker*, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to imprisonment for fifty-seven months' to ten years' for assault with intent to do great bodily harm and two years' for felony-firearm. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is the former boyfriend of Tashyla Jamison, with whom he lived before their break-up about a month before this incident. Jamison and Christinian Hughes were at Jamison's house in the bedroom. They heard a tapping sound, and Jamison got up to investigate. She did not hear anyone at the door. However, she saw the back window being opened and then saw defendant in the window. Defendant asked her who was in the house, and Jamison told him it was a female.

Defendant's arm came through the window, and Jamison saw that he had a gun. At trial, Jamison testified that she grabbed defendant's wrist and they struggled. During the struggle, the gun discharged. The bullet struck Hughes in her chest. Hughes said, "Don't shoot again, I'm a girl." Defendant then said to Jamison, "Look what you made me do," and he ran away.

Jamison admitted that in her statements to police she mentioned nothing about struggling with defendant. She testified that a few weeks after the shooting, she contacted the police to tell them that she wanted to change her statement. The police invited her to come to the station and change her statement, but she never followed through.

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

Hughes testified that she heard a tapping sound and Jamison got up to investigate. Hughes saw a person coming through the window, but because of the lighting she could only generally describe the man.

Hughes heard Jamison talking to the man (defendant), but she could not hear what they were saying. She saw defendant's head come through the window and then saw his hands. He was holding a gun. He had his arms up, and Jamison had her hands on his arms, with one hand on defendant's right wrist. Defendant, holding the gun in his right hand, then brought the gun down and shot Hughes. According to Hughes, based on their positions, defendant had to let his arm down, aim and shoot her. She saw no struggling.

Defendant argues that his trial counsel was ineffective for failing to request an instruction on the defense of accident as a defense to a specific intent crime. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move in the trial court for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant failed to make such a motion, the issue is waived unless the record supports defendant's claim. *Id.* at 658-659.

To establish that his counsel was ineffective, a defendant must first demonstrate, through the record, that his counsel's performance was deficient by showing that counsel made errors so serious that he was not functioning as the counsel to which the defendant is constitutionally guaranteed. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Next, the defendant must establish that counsel's deficient performance prejudiced the defense by showing that the errors were so serious that they deprived the defendant of a fair trial whose result is reliable. *Id.* That is, defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant also must overcome the strong presumption that his trial counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

The trial court instructed the jury, at defense counsel's request, on the offense of careless, reckless or negligent discharge of a firearm. MCL 752.861. This instruction applies where the defendant, "because of carelessness, recklessness or negligence, *but not wilfully or wantonly*, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person" MCL 752.861. Having been given this instruction, the jury could have convicted defendant of the lesser offense if it found that defendant did not have the specific intent to do great bodily harm and the shooting was accidental. The jury rejected this option, and clearly found that defendant had the required specific intent. In light of the fact that the jury was instructed on an offense that does not require specific intent, he cannot demonstrate that trial counsel was constitutionally deficient or that, but for counsel's failure to request the instruction on accident, the outcome of the trial would have been different. He has therefore failed to establish ineffective assistance of counsel.

Defendant also argues that the prosecution presented insufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder. We disagree.

To determine whether the prosecution presented sufficient evidence of guilt to sustain a conviction, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have concluded that all the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). Assault with intent to do great bodily harm less than murder requires proof of “(1) an assault, i.e., ‘an attempt or offer with force and violence to do corporal hurt to another’ coupled with (2) a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996).

Hughes testified that defendant moved his arm to aim the gun in her direction and then fired it. She saw no sign of a struggle between defendant and Jamison. The jury could have found from this evidence that defendant deliberately aimed and fired the gun at Hughes. Viewing the evidence in a light most favorable to the prosecution, the evidence presented is sufficient to find defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm less than murder.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder

/s/ Chad C. Schmucker