

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RODGER PENZABENE,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 237169

Wayne Circuit Court

LC No. 01-000912-01

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to commit murder, MCL 750.83, assault with intent to commit great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and assault with intent to commit great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 135 months to twenty-five years for the assault with intent to commit murder conviction, five to ten years for the assault with intent to commit great bodily harm conviction, one to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to support his convictions for assault with intent to commit murder, assault with intent to commit great bodily harm, and felony-firearm. We disagree. In reviewing the sufficiency of the evidence in a bench trial, we view the evidence de novo and in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. Deference is given to the trial court's determinations of credibility. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). Additionally, while this Court reviews de novo the trial court's determination that the elements were proven beyond a reasonable doubt, when dealing with credibility issues, we give the trial court's findings "special deference." *Sherman-Huffman, supra* at 265. Thus, we will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove the crime of assault with intent to commit murder, the prosecution must establish: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the

killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The intent to kill may be proven by inference from any facts in evidence. *Id.*

We conclude that there was sufficient evidence to support defendant's conviction for assault with intent to commit murder with regard to the male victim, Robert Smith. Smith testified that while waiting in the car outside defendant's house, he saw a shadow come from the side of the house. Smith then saw defendant emerge into the light with an automatic assault weapon in hand. Defendant then began firing the gun directly at Smith's side of the car, breaking the driver's side window and leaving several bullet holes in the car. Smith was shot in the left side of his back by one of the bullets from defendant's gun. Smith further testified that he had met defendant before that night, so he had no doubt defendant was the man who shot at him. We hold that this testimony was sufficient for a reasonable factfinder to find all the elements of assault with intent to commit murder beyond a reasonable doubt.

To prove the crime of assault with intent to commit great bodily harm less than murder, the prosecution must establish proof of (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Assault with intent to commit great bodily harm is a specific intent crime. *Id.* The fact that the bullet does not hit the victim does not negate the intent element. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). No actual physical injury is required for the elements of the crime to be established. *Id.*

We also conclude that there was sufficient evidence to support defendant's conviction for assault with intent to commit great bodily harm with regard to the female victim, Candice Roberts. Defendant attempted to do corporal harm to her when he fired at least five shots into the car in which Roberts was a passenger, from only about thirty to forty feet away from the car. Roberts also testified that she was able to get a faint glimpse of defendant as Smith pushed her head down to protect her from defendant's gunshots. Although the bullets missed Roberts, defendant's intent to commit great bodily harm can be inferred from defendant's conduct. *Parcha*, *supra* at 239. Thus, we hold that a rational trier of fact could have found that the prosecution proved the essential elements of assault with intent to commit great bodily harm less than murder beyond a reasonable doubt.

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The facts support a finding that defendant assaulted the victims with a firearm. Thus, having already concluded that there was sufficient evidence to support defendant's convictions for assault with intent to commit murder and assault with intent to commit great bodily harm, both of which are felonies, we hold there was also sufficient evidence to allow a reasonable factfinder to find that the elements of felony-firearm were also established beyond a reasonable doubt.

In addition, we will not disturb the trial court's conclusion that defendant did not have a credible alibi for his whereabouts at the time of the shooting. The trial court found defendant's two alibi witnesses successfully confirmed that defendant visited them on the day of the shooting; however, the court concluded neither witness was credible in regard to the time and duration of defendant's visit on that day. Giving the trial court's determinations of credibility

special deference, *Sherman-Huffman*, *supra*, we hold that defendant failed to provide any credible evidence to support his claim that he was not at his home at the time of the shooting.

Defendant's second issue on appeal is that he was denied the effective assistance of counsel because his defense attorney failed to call witnesses defendant requested be called to testify. We disagree. Because defendant failed to move for a new trial or a *Ginther*¹ hearing below, our review is limited to errors that are apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and a court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Id.* In this case, the only argument defendant provides in support of his claim of ineffective assistance of counsel is that defense counsel failed to call additional witnesses as requested by defendant. Counsel's failure to call a particular witness is presumed to be trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). In addition, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* Defendant presented an alibi defense, and although the trial court ultimately rejected it, defendant was able to call two witnesses who testified that defendant had visited them on the day of the shooting. We hold that defendant was not deprived of a substantial defense by counsel's failure to call the witnesses.

Moreover, while defendant indicates that the other potential witnesses were individuals who had been arrested with him or observed him being arrested, there is nothing in the record regarding what these witnesses would have testified to if called to the stand. Defendant has failed to show that a reasonable probability exists that, if counsel had called any of these people as witnesses, the outcome of the proceedings would have been different. We hold that counsel's failure to call additional witnesses was neither deficient nor prejudicial.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).