STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2004
v	No. 247826 Macomb Circuit Court
ARTHUR LOUIS SMITH, Defendant-Appellant.	LC No. 02-003692-FC

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

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to twenty to forty years' imprisonment for assault with intent to murder, two to five years' imprisonment for carrying a concealed weapon, and a two-year consecutive sentence for felony-firearm. He appeals as of right, and we affirm.

This case involves a drive-by shooting that occurred in the early morning hours of June 29, 2002. Tyrone Horton testified that he had been sitting on the curb, waiting for his wife to pick him up, when he heard gun shots and saw others running. He got up and was shot in the back as he tried to run. Vincent Durr was an eyewitness who provided the police with a description of the shooter, and identified defendant in a photographic lineup.

Defendant first contends that the trial court erred in denying his motion to suppress Durr's pre-trial identification, and that the subsequent in-court identification was tainted and lacked sufficient independent basis. We disagree.

This Court reviews a trial court's factual findings in a motion to suppress for clear error. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). "A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The fairness of the identification procedure is evaluated in light of the total circumstances to determine whether the procedure was impermissibly suggestive, leading to a substantial likelihood of misidentification. *Id.* The relevant inquiry is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of the circumstances surrounding the identification. *People v Kurylczyk*, 443

Mich 289, 306; 505 NW2d 528 (1993). When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification:

> . . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Id.*]

Defendant argues that these factors weigh against the reliability of the identification. Durr had never seen defendant before; he saw the shooter only briefly and in a stressful situation; he did not give consistent descriptions of the shooter; he was shown the photographs a month after the shooting; and the array was suggestive because defendant was the lightest skinned person in the array. We conclude that the court did not err in refusing to suppress the identification.

Defense counsel questioned Durr and Detectives Langley and Bishop about defendant's photograph -- specifically, whether defendant was the lightest-skinned individual included in the lineup. They did not agree that he was the only light-skinned person in the photo array. Further, the testimony made clear that the array was not presented in a fashion that conveyed the message that the shooter's picture was among those presented in the array.[1] After reviewing the photographs and the relevant testimony, we conclude that the array was not impermissibly suggestive. Defense counsel also questioned Durr about the description he gave Langley -- that defendant had a "nappy, wild" hairstyle. While defendant did not have such a hairstyle (at least at trial), "[a]ny discrepancy between complainant's initial description and defendant's actual appearance is relevant to the weight of such evidence, not to its admissibility." *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000).

An independent basis for a witness' in-court identification is not necessary where a defendant has not shown that the pretrial identification was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 288; 545 NW2d 18 (1996). Because we conclude that the pretrial photographic lineup was not unduly suggestive, an independent basis for Durr's in-court identification is not necessary.

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[1] Durr was asked if the detectives stated that the shooter's picture was included in the lineup, and he responded, "No." Detective Bishop testified that he read the following before showing Durr the photographs:

> You'll be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses nor indicate in any way that you have identified someone.

Defendant also contends that insufficient evidence was presented to support his convictions of assault with intent to commit murder, carrying a concealed weapon, and felony-firearm. "When analyzing whether sufficient evidence has been presented to sustain a criminal conviction, this Court reviews the evidence in a light most favorable to the prosecutor and determines whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

The elements of assault with intent to commit murder are: (1) an assault, (2) with an intent to kill, and (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant contends that even viewing the evidence in a light most favorable to the prosecution, the evidence was not sufficient to establish the intent element. The intent to kill may be proved by inference from facts in evidence, and the intent may exist without directing it at any particular victim. *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). However, "it is not enough that the defendant acted only with an intent to cause serious bodily injury or with a conscious disregard of the risk of death." *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). Our Supreme Court has stated that the following may be taken into consideration when determining intent: the temper or disposition of mind with which they were apparently performed; whether the instrument and means used were naturally adapted to produce death; the defendant's conduct and declarations prior to, at the time, and after the assault; and all other circumstances calculated to throw light upon the intent with which the assault was made. *People v Guy Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *McRunels*, *supra* at 181.

Here, trial testimony revealed that numerous people were present in the neighborhood the morning this shooting took place. According to Durr, a car entered the neighborhood, and the passenger of this vehicle started shooting. Durr testified that he heard seven or eight shots. Officer Medley recovered seven shell casings from a .45 automatic. One of the bullets hit Horton in the back as he tried to run. Given the obvious deadly potential of a bullet, a reasonable factfinder, considering the evidence in a light most favorable to the prosecution, could conclude beyond a reasonable doubt that defendant acted with an intent to kill.

Defendant also argues that if the victim had died, the facts in the case would not have sustained a first-degree murder conviction because no evidence of premeditation or deliberation was presented. While certain states of mind that are sufficient for a second-degree murder conviction - - intent to inflict great bodily harm or willful and wanton conduct creating a very high risk of death - - will not suffice for a conviction of assault with intent to commit murder, *Guy Taylor*, *supra* at 567, defendant has provided no case law requiring proof of premeditation or deliberation in order to sustain a conviction for assault with intent to murder. What is required is proof of an actual intent to kill. Here, defendant shot his gun seven times into a location where numerous persons were present, striking the victim with one of the bullets. A jury could have concluded from such conduct that defendant intended to kill someone. Further, the prosecution was not required to present medical evidence that the injury was actually life threatening.

Defendant does not challenge the sufficiency of the evidence as it relates to the elements of carrying a concealed weapon and felony-firearm. Rather, he argues that the jury erred in finding that he was the one who committed these crimes. Defendant argues that it is well

recognized that when a defendant raises the issue of alibi, and offers proof, as was the case here, the prosecutor must overcome any presumption that defendant was not present at the scene of the crime.

Defendant's argument addresses the credibility of the witnesses. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). All three of defendant's alibi witnesses, Nichole Hughley, Thomas Hughley and Jessica Banks, testified that defendant was at Banks' apartment at the time of the shooting. However, the prosecutor questioned these witnesses as to why they did not come forward with this information before trial. Ms. Hughley testified that she did not go to the police with this information. When asked why, she stated:

> No reason. Really no reason. Because I knew he didn't do it so I mean -- I don't know. I just didn't I guess. I have no reason.

Mr. Hughley also testified that he did not go to the police and tell them that they had the wrong person. Banks testified that she did not go to the police because she did not think defendant was a suspect since he was at her house at the time of the shooting.

The jury had the opportunity to hear and observe these witnesses, as well as Durr, who was present at the time of the shooting and who identified defendant as the shooter. The jury apparently found Durr credible and defendant's witnesses not credible, and convicted accordingly. Therefore, we conclude that defendant's argument fails.

Defendant also raises numerous prosecutorial misconduct claims. Because defendant failed to object to the complained-of statements, our review is for plain error that affected defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the prosecutor erred in his comments regarding witness availability and attempted to interject unfounded prejudicial innuendo into the trial. In his closing argument, the prosecutor discussed how the police were frustrated because witnesses refused to cooperate. At trial, Detective Bishop testified that he approached several people soon after the shooting and asked them if they saw anything. According to Bishop, "they were very uncooperative and nobody wanted to say anything to me." To the extent the prosecution was explaining why Durr was the only identification witness, the argument was permissible. To the extent the prosecutor implied that there was other evidence of defendant's guilt that the prosecution was simply unable to present, the argument was improper. We conclude, however, that a timely objection would have cured any prejudice and that the argument did not affect the outcome of the trial.

Defendant also argues that the prosecutor improperly vouched for Durr. It is well settled that the prosecutor cannot vouch for the credibility of his or her witness to the effect that he or she has some special knowledge concerning the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, the prosecutor did not suggest that he personally believed that Durr was testifying truthfully. In addition, the prosecutor did not urge the jury to improperly "suspend its own powers of critical analysis and judgment in deference to those of the police and prosecution." *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Rather, the prosecutor was merely describing the factors that show why Durr should be

believed. See *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992), where this Court stated that the prosecution may comment upon its own witness' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt turns on which witness is to be believed.

Defendant also argues that the prosecutor shifted the burden to him by commenting on his alibi witnesses. Our Supreme Court has stated that "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Id.* Thus, the Court stated that the prosecutor could comment on the weakness of the defendant's alibi. *Id.* We conclude that the prosecutor's arguments in this regard permissibly commented on the weakness of defendant's alibi witnesses by pointing out that they did not go to the police with the alibi, and that they all remembered the night in remarkable detail.

Finally, defendant contends that the trial court committed error mandating reversal in failing to read the requested instruction on identification. We disagree.

This Court reviews claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). "The crucial question in determining whether an omitted portion of a criminal jury instruction requires reversal is whether the instruction as a whole adequately informed the jury of its responsibilities." *People v Storch*, 176 Mich App 414, 418; 440 NW2d 14 (1989).

In instructing the jury regarding the issue of identification, the court read paragraphs (1), (3) and (5) of CJI2d 7.8. After the trial court instructed the jury, and outside the presence of the jury, defendant's counsel requested that the trial court read paragraph four (4) of CJI2d 7.8. Paragraph four (4) provides the following:

> (4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with his identification of the defendant during trial.

Durr did not identify anyone else, but his earlier descriptions of the shooter were not all consistent. We conclude, however, that any error in failing to give this portion of the instruction was harmless in light of the testimony, arguments, and the portion of the instruction that was given. The jury was fully aware of the fact that Durr was the only identification witness, with the strengths and weaknesses in his testimony, and with the need to evaluate the identification testimony carefully.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White