

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN SANTANA,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 273271

Wayne Circuit Court

LC No. 06-005310-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REINALDO LEBRON,

Defendant-Appellant.

No. 273545

Wayne Circuit Court

LC No. 06-005156-01

Before: Whitbeck, P.J., Owens and Schuette, JJ.

PER CURIAM.

Codefendants Juan Santana and Reinaldo Lebron were jointly tried before separate juries as a result of their alleged participation in a shooting in which the victim suffered three gunshot wounds to the arm and back.

Santana was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced as a second habitual offender, MCL 769.10, to 54 months' to 15 years' imprisonment. Lebron was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He received consecutive sentences of 13 to 30 years' imprisonment for the assault with intent to commit murder conviction and two years' imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

I. Facts

Defendants are members of a southwest Detroit gang known as the Latin Counts. The victim, Gonzalo Flores, is a member of a rival gang known as the Sureños. Apparently the Latin Counts and Sureños were involved in some sort of rivalry at this time. At some point in the months preceding the events at issue in this case, either Flores or his older brother, who was also a member of the Sureños, shot Lebron. Lebron gave a statement to police claiming that either Flores or his brother shot him, and Flores' brother was tried in relation to the shooting.

Flores was shot in the arm and back at about noon on April 10, 2006, as he was driving a red Pontiac Grand Am westbound on West Lafayette Boulevard in Detroit. Defendants, Flores, and Stephanie Copley, the driver of the van in which defendants were riding immediately before the shooting, gave different accounts of the events surrounding the shooting.

Copley testified that she was driving her green minivan around southwest Detroit when she saw Lebron, who was an acquaintance, standing with Santana and a white male teenager near a gas station. Lebron motioned for her to stop and asked if she would take them to another gas station. She agreed, and the three men entered the van. In the van, Copley claimed, Santana showed the other men a gun he had in his possession. When they reached the gas station, Lebron exited the van, performed a quick errand, returned, and asked Copley to drive them to an intersection a few blocks away. As Copley was driving to the intersection, Lebron spotted Flores driving alongside the van and asked Copley to pull over. She did, and the men got out of the van. After they shut the door, she turned on a side street and drove away. Shortly thereafter, she heard four or five gunshots, but continued driving home. Later that day, Lebron and Santana visited Copley at her house. During the visit, Santana bragged that "they shot a Sureño," although he admitted that he did not know if they shot the driver or just hit the car.

Flores gave conflicting accounts of the events surrounding the shooting. Both when talking with police in the hospital and when testifying at the preliminary examination, Flores told the police that when he was driving down Lafayette Boulevard that day, he saw a woman driving a green minivan. The minivan pulled over and three men got out. Flores recognized Lebron but not the other men. One of the men, whom the victim described as a "white boy," ran up the street toward Flores and started shooting at him, while Lebron and "the other Puerto Rican guy" stood on the sidewalk. Lebron flashed a gang sign and shouted, "Count love, n---a, I'm going to get you."

At trial, however, Flores testified that he lied to the police at the hospital and that his preliminary examination testimony was false. Flores claimed that he did not see anyone exit the green minivan and did not see who shot him. Rather, Flores testified that he saw the minivan pull over and then he felt the gunshots, two in his right arm and one in his back, on his right side. Flores admitted that immediately after he was shot, he drove to a fellow gang member's house and told a friend that Lebron shot him.

When questioning Flores, the prosecutor theorized that Flores was reluctant to identify Lebron as the shooter because his brother would soon be on trial for attempting to kill Lebron, and Lebron was the prosecution's main witness in that case. The prosecutor asked Flores

whether he and Lebron agreed that if Flores did not identify Lebron as his shooter, Lebron would not identify Flores' brother as his shooter. Flores denied that they made such an agreement.¹

Santana also gave two different accounts of the shooting. In his initial interview with police, Santana said that Copley, Lebron, "some old lady," "Tonic," and someone's baby were in the green minivan when Copley picked him up the day of the shooting. Once Santana entered the minivan, Lebron showed him a .357 Magnum that he had in his waistband. As they were driving down Lafayette Boulevard, Lebron saw Flores driving a red car and told Copley to drop them off at the corner. When asked what he thought was going to happen next, Santana told police, "I already knew what was going to happen. He was trying to kill that n----r." Santana, Lebron, and "Tonic" exited the minivan at the corner. Lebron then walked toward Flores' Grand Am and began shooting. All six shots hit the car, but Flores kept driving. The three men got back in the minivan and drove off. Santana told police that Lebron used the .357 Magnum to shoot Flores.

The next day, the police interviewed Santana again. This time, Santana told police that a "white boy" nicknamed A-1 was in the minivan when they saw Flores driving the red Grand Am. A-1 gave Lebron a gun, but then took the gun back, saying, "Let me shoot him." After Copley pulled over, Lebron, Santana, and A-1 exited the van. A-1 stood in the street by the curb and fired six shots at the car. Santana claimed that he did not know A-1's last name, but he told police that his first name is Anthony and that he lives on Pearl Street, north of Vernor Highway. Santana acknowledged that he previously told police that Lebron shot Flores, but he claimed that he was mistaken and A-1 actually shot the victim.

Lebron's version of events is somewhat similar to Santana's second statement to police. Lebron told police that he was in the van with Copley, a Cuban man named Jonathan, and a white boy. The Cuban man told the woman to pull over. The three men got out of the van, and the Cuban fired six shots at a red four-door car. Lebron identified the Cuban man as "little Olsa," and the white boy as "A-1."

II. Sufficiency of the Evidence

On appeal, codefendants argue that the prosecution presented insufficient evidence to support their convictions. We disagree. We review claims that the evidence presented at trial was insufficient to support a conviction by considering the evidence in the light most favorable to the prosecution and then determining whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). We review these claims for an abuse of discretion and "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that

¹ After Flores received legal advice about perjury, the prosecutor asked him if he wanted to change his testimony. Flores stated that he did not want to change his testimony. Later, the prosecutor had Flores' preliminary examination testimony read into the record.

evidence can constitute satisfactory proof of the elements of a crime.” *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (internal quotations omitted).

A. Docket No. 273271

Santana was convicted as an aider and abettor of assault with intent to do great bodily harm less than murder. The elements of this offense are as follows: “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis omitted). To convict a defendant of a crime under an aiding and abetting theory, a prosecutor must establish that

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *Carines*, *supra* at 768 (quotations omitted).]

“In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement given is not material if it had the effect of inducing the commission of the crime.” *Moore*, *supra* at 71. However, “[m]ere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor.” *People v Rockwell*, 188 Mich App 405, 412; 470 NW2d 673 (1991), quoting *People v Vicuna*, 141 Mich App 486, 495-496; 367 NW2d 887 (1985).

Sufficient evidence existed to support Santana’s conviction for assault with intent to do great bodily harm. First, the evidence establishes that Santana, Lebron, or another perpetrator shot Flores three times. The perpetrator’s intent can be inferred from his use of a dangerous weapon: because the perpetrator used a gun, a fact-finder can reasonably infer that the perpetrator intended to seriously injure the victim. See *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Therefore, the first element of aiding and abetting, that Santana or some other person committed an assault with intent to commit great bodily harm, is satisfied.

Next, the prosecutor presented sufficient evidence to establish that Santana assisted in the commission of this crime. The jury could reasonably conclude from witness testimony that Santana had a gun in the van and aided the perpetrator by supplying the gun that was used to commit the crime, thereby facilitating the commission of this offense.

Finally, Santana also had the requisite intent to be convicted under an aiding and abetting theory. He told police that he knew what would happen when Lebron asked Copley to stop the van and let them out, stating, “I already knew what was going to happen. He was trying to kill that n----r.” Santana, therefore, knew what the perpetrator intended to do when he gave him the gun and exited the van.

Although the evidence presented at trial was often contradictory, this Court must resolve all evidentiary conflicts in favor of the prosecution. *Nowack*, *supra* at 399-400. After reviewing

the record, we conclude that the jury could have reasonably inferred from the evidence presented that Santana aided and abetted in this assault by providing the gun used to perpetrate the crime and by accompanying the perpetrator, although he knew that the perpetrator intended to try to kill Flores.

B. Docket No. 273545

The prosecution presented sufficient evidence to support Lebron's convictions for assault with intent to commit murder and felony-firearm under an aiding and abetting theory. "The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Brown, supra* at 147-148 (citations and internal quotations omitted).

The parties do not dispute that Flores suffered an assault when he was shot three times. Further, sufficient evidence was adduced at trial from which the jury could conclude that the perpetrator intended to kill Flores. The intent to kill may be inferred from facts in evidence, including the use of a lethal weapon, and because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *Ray, supra* at 615. The jury heard evidence that the perpetrator used a gun to commit the assault and shot at Flores six times. The perpetrator's use of a gun to fire several shots at the victim evidences his intent to kill the victim. Finally, the prosecutor presented sufficient evidence to establish that if the assault were successful, the perpetrator would have murdered Flores. See *Brown, supra* at 147-148. Flores suffered three gunshot wounds, two to his right arm and one to his back. As discussed above, the perpetrator intended to shoot and kill the victim and if he had achieved this goal, he would have murdered Flores.

For the prosecution to secure Lebron's conviction under an aiding and abetting theory, it must establish that Lebron performed acts or gave encouragement that assisted in the commission of the crime and that at the time that he gave aid and encouragement, he either intended the commission of the crime or knew that the principal intended its commission. *Moore, supra* at 67-68. Again, if a defendant's conduct had the effect of inducing the crime, the amount of advice, aid, or encouragement given is immaterial. *Id.* at 71. In this case, both Crowley and Santana stated that Lebron asked Crowley to pull over after he saw Flores. Santana also told police that Lebron pulled a gun from his waistband as Crowley slowed down to drop them off. From these facts, Lebron's jury could reasonably conclude that he initiated the crime and either shot Flores himself or gave the gun to the principal. It is also evident from the record that Lebron either intended the commission of the crime or knew that the principal intended to commit the assault. Flores and Lebron were rival gang members and either Flores or his brother shot Lebron a few weeks before this shooting occurred, indicating that Lebron had a possible motive to seek revenge and, therefore, intended for the shooting to occur. Also, the jury could infer based on evidence that Lebron had a gun that he intended for the crime to be committed or knew that the crime would be committed when he gave the gun to the perpetrator. After the shooting, Lebron yelled, "Count love, n----r, I'm going to get you." A reasonable juror could infer from this statement that Lebron shared the principal's intent to commit the crime. Because the evidence supports the conclusion that Lebron induced the assault and either shared the principal's intent or knew the principal intended to commit the crime when he induced the crime, a rational trier of fact could find Lebron guilty of assault with intent to commit murder under an aiding and abetting theory.

Lebron also challenges the sufficiency of the evidence supporting his conviction for felony-firearm under an aiding and abetting theory. The elements of felony-firearm are as follows: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. To establish a felony-firearm conviction under an aiding and abetting theory,

The prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes Rather, the prosecutors must demonstrate that defendants specifically aided the commission of felony-firearm. Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *Carines, supra*, at 768. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. *People v Smock*, 399 Mich 282, 285; 249 NW2d 59 (1976). It must be determined on a case-by-case basis whether the defendant “performed acts or gave encouragement that assisted,” *Carines, supra* at 768, quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), in the carrying or possession of a firearm during the commission of a felony. [*Moore, supra* at 70-71.]

The parties do not dispute that Lebron or some other person violated the felony-firearm statute by using a gun to commit the felony of assault with intent to commit murder. Considering the evidence in the light most favorable to the prosecution, Lebron’s jury also could reasonably conclude that Lebron aided or encouraged the felony-firearm violation and intended that the violation occur or knew that the violation would occur when he gave the aid or encouragement. See *Hardiman, supra* at 421; *Moore, supra* at 70-71. Here, the prosecution presented evidence indicating that Lebron committed the felony-firearm violation either because he was the perpetrator or because he gave his gun to the shooter to use. Regardless whether he committed this violation himself or provided the gun to the perpetrator, Lebron either intended to use a gun in the commission of a felony or knew that the principal would use the gun in the commission of a felony when he gave it to him. From this evidence, Lebron’s jury could reasonably conclude that the prosecutor established that Lebron violated the felony-firearm statute, either as a principal or under an aiding and abetting theory. Accordingly, Lebron’s claim of insufficient evidence fails.

III. Ineffective Assistance of Counsel

Lebron also argues that he was denied the effective assistance of counsel at trial. Because Lebron did not move for an evidentiary hearing or a new trial before the trial court, “our review is limited to mistakes apparent on the record.” *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Generally, “[w]hether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575,

579; 640 NW2d 246 (2002). We review factual findings for clear error and questions of law de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*LeBlanc, supra* at 578.] In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id.* at 314; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). [*People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).]

To establish ineffective assistance of trial counsel, the defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; (2) but for trial counsel's errors, there is a reasonable probability that the result of his trial would have been different; and (3) that the proceedings were fundamentally unfair or unreliable. *Toma, supra* at 302-303. To show that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise.

First, Lebron claims that his counsel was ineffective for failing to file a pre-trial motion in limine to exclude Lebron's statement to police that he was a victim of a shooting perpetrated by Flores and his brother. We disagree. MRE 801(d)(2) provides that statements made by party-opponents, such as Lebron, are not hearsay. Lebron's statement is relevant because it establishes that he had a motive to shoot the victim and, therefore, makes it more probable that he participated in the shooting. See MRE 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Relevant evidence is generally admissible. MRE 402. Further, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. See MRE 403. This evidence, taken alone, does not present Lebron in a bad light, but as the victim of a violent act performed by Flores.

Regardless, defense counsel orally moved to exclude the statement after opening statements, and the trial court denied her motion. Counsel again objected when the statement was admitted. Under these circumstances, trial counsel's failure to make a pre-trial motion in limine to exclude the statement did not render her performance ineffective. The timing of the motion is irrelevant because the statement is admissible as an admission by a party opponent, and making the motion earlier would not have made the evidence inadmissible. Because trial counsel attempted to exclude the statement, and the statement is admissible evidence, Lebron has failed to meet his burden of proving that his counsel was ineffective for not making a pre-trial motion in limine.

Next, Lebron argues that his counsel was ineffective for failing to challenge Crowley's testimony that Lebron and Santana came to her house on the afternoon of the shooting and Santana stated that "they shot a Sureno." We agree with Lebron's assertion that his counsel should have challenged the admission of this statement. This statement was not admissible against Lebron as an admission of a party opponent under the theory that it was an adoptive statement. Under MRE 801(d)(2)(B), a statement is considered an admission by a party opponent, and not hearsay, if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth. However, a defendant's silence in the face of an accusation is not admissible as an adoptive or tacit admission unless the defendant manifested his adoption or belief in its truth with a statement. *People v Hackett*, 460 Mich 202, 212-215 & n 6; 596 NW2d 107 (1999). A "statement" is defined by MRE 801(a) as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Here, there is no evidence that Lebron made any oral, written, or nonverbal assertions to adopt the statement as his own. Therefore, his silence cannot be construed as an action adopting Santana's statement. As a result, Santana's testimony constituted hearsay when offered against Lebron. Because Crowley was not the declarant and Santana's statement was offered to prove the truth of the matter asserted, the statement constituted inadmissible hearsay when used against Lebron.² See MRE 801(c); MRE 802. Therefore, Lebron's counsel should have challenged the admission of Copley's testimony against him. By failing to do so, her performance fell below the objective standard of reasonableness under prevailing professional norms.

Nevertheless, Lebron has failed to show that but for his counsel's error, the outcome of his trial would have been different. Lebron admitted that he was present during the shooting. Santana's statement to the witness merely confirmed Lebron's presence and did not identify Lebron as the shooter. Rather, Santana's statement that "they shot a Sureno" places them at the crime scene and evidences their participation. Other evidence presented at trial had the same effect, including Lebron's and Santana's statements to police and Flores' testimony. Therefore, Santana's statement to Crowley was merely cumulative. Lebron failed to show that his counsel's failure to challenge the admission of this statement affected the outcome of his trial. As a result, Lebron has not overcome the presumption of effective assistance and is not entitled to relief.

Finally, Lebron argues that his trial counsel was ineffective for failing to move for a directed verdict. As discussed above, the prosecution presented sufficient evidence to support Lebron's convictions. Because the evidence was sufficient to sustain the verdict, Lebron's trial counsel was not ineffective for failing to move for a directed verdict. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (trial counsel is not ineffective for failing to make a frivolous or meritless motion).

² The statement was admissible against Santana as an admission by a party-opponent. See MRE 801(d)(2)(A).

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette