

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON LEWIS STEPHENSON,

Defendant-Appellant.

UNPUBLISHED

April 29, 2010

No. 288867

Calhoun Circuit Court

LC No. 2005-002483-FC

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felonious assault, MCL 750.82, assault with intent to commit murder, MCL 750.83, intentionally discharging a firearm from a motor vehicle, MCL 750.234a, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 45 months to 8 years' imprisonment for felonious assault, 40 to 70 years' imprisonment for assault with intent to commit murder, 43 months to 8 years' imprisonment for intentional discharge of a firearm from a motor vehicle, and 2 years' imprisonment for each felony-firearm conviction. Defendant's sentences for the felony-firearm convictions run consecutive to his other sentences, which run concurrent to each other.¹ We affirm, but remand for ministerial correction of the judgment of sentence.

Defendant contends that he was denied the effective assistance of counsel when his trial counsel failed to meet with him before the start of trial. Defendant contends that he was completely deprived of counsel during the pretrial stage of the proceedings and that there was a complete breakdown of the attorney-client relationship in this case. Defendant cites to a motion hearing held one day before his trial began wherein defense counsel acknowledged that she and defendant had not met in person to discuss defendant's case. Defendant contends that defense counsel's deficient performance amounted to presumed prejudice and structural error requiring reversal. Alternatively, defendant argues that defense counsel's deficient performance amounted to actual prejudice that affected the outcome of the proceedings. We disagree.

¹ The amended judgment of sentence does not properly reflect that defendant's felony-firearm sentences run consecutive to his other sentences. The judgment must be corrected to accurately reflect this.

Defendant failed to preserve this issue for review because he did not first move for a hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Our review is therefore limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *Id.* We review a trial court's findings of fact, if any, for clear error and issues of constitutional law de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). However, "[i]t is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). "The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case." *Dixon*, 263 Mich App at 397, quoting *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003). In this case, we conclude that defendant was not deprived of his right to counsel during the pretrial or trial stage of the proceedings, and that defendant has failed to show that defense counsel rendered deficient performance that affected the outcome of the proceedings.

At the pretrial motion hearing, defense counsel stated that defendant failed to contact her to arrange an appointment to discuss his case. Defendant knew how to contact defense counsel, yet he failed or refused to do so. Defense counsel explained that defendant contacted her for other purposes and during the weeks leading up to the trial, defendant was free on bond and able to contact counsel. Moreover, defendant fails to indicate what he would have told defense counsel to do differently in relation to presenting a defense and he fails to indicate what evidence he would have provided counsel at a meeting had one taken place. Although defendant expressed displeasure with his appointed counsel, "[a]s an indigent receiving counsel at public expense, defendant was not entitled to choose his attorney." *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003).

Defense counsel met her constitutional burden to adequately investigate the case during the pretrial stage of the proceeding. *Dixon*, 263 Mich App at 397. Counsel made demands for discovery, objected to prosecution motions, represented defendant at several motion hearings to argue on behalf of his best interests, and moved the trial court to release defendant on a personal recognizance bond, which the trial court granted. Defense counsel's effective representation continued during the trial stage of the proceedings where she zealously represented defendant. Defense counsel appeared knowledgeable concerning the facts and circumstances of the case and cross-examined all of the prosecution's witnesses; she also impeached one witness with his prior inconsistent statements. In addition, defense counsel raised objections and made an opening

statement and closing argument. Defendant does not suggest on appeal what other measures counsel could have taken at trial to advance his defense in this case. Rather, he merely states that he would have testified if he and counsel had a proper attorney-client relationship. In making this assertion, he completely fails to explain how his testimony would have helped his defense where three eyewitnesses implicated him in the shooting, where there was evidence that defendant had motive to commit the charged offenses, and where defendant himself admitted to a police officer after the shooting that he fired a gun to scare members of a motorcycle gang. Moreover, with respect to counsel's method of cross-examining the witnesses and her decisions regarding what evidence to introduce, we will not second-guess counsel with the benefit of hindsight on matters of trial strategy. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

Next, defendant contends there was insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, we will not interfere with the trier of fact's determination with respect to the credibility of the witnesses or the weight to be given witness testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

After reviewing the record, we conclude that there was sufficient evidence to allow a rational trier of fact to convict defendant of all six offenses beyond a reasonable doubt. Here, two eyewitnesses testified that defendant drove into the parking lot of the Iron Coffins Motorcycle Club's clubhouse in a white Pontiac Grand Am where multiple people were located, exchanged words with an individual, and then raised a gun and fired it eight to ten times out the passenger window in a manner described as "fan firing." At the time of the shooting, the two victims were standing approximately ten feet away from the passenger-side of the vehicle and defendant shot one victim in the abdomen causing serious injuries. In addition, evidence showed that defendant had motive to commit the charged offenses where defendant had an acrimonious history with the Iron Coffins. See *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000) (evidence of motive can be relevant to prove a defendant's guilt). Additionally, defendant acknowledged to a police officer after the shooting that he fired a gun at the clubhouse.

Defendant argues that the evidence was insufficient because the prosecutor relied on the testimony of gang members who perjured themselves. However, "positive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). And, "[t]he credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Id.* Additionally, defendant asserts that there was insufficient evidence because the prosecution did not present any scientific evidence to link defendant to the Pontiac. However, circumstantial evidence and reasonable inferences arising from that evidence can be sufficient to support a jury's finding of all the elements of the charged offenses beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

In sum, viewed in a light most favorable to the prosecution, we conclude that there was sufficient evidence to support the jury finding defendant guilty beyond a reasonable doubt of all six offenses in this case. *Johnson*, 460 Mich at 722-723.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Peter D. O'Connell