

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DEKYLE BAILEY,

Defendant-Appellant.

UNPUBLISHED

October 14, 2010

No. 291840

Wayne Circuit Court

LC No. 08-16055

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of two counts of assault with intent to commit murder (MCL 750.83), possession of a firearm during the commission of a felony (felony firearm) (MCL 750.227b), and felon in possession of a firearm (MCL 750.227f). We affirm.

I. FACTS

On December 24, 2007 Amir Taylor, his brother Ishmael Taylor, Brian McClendon, Jr., and Bishop Allen arrived at an abandoned house in Detroit to sell marijuana to Tyrell Adams. The Taylor brothers, McClendon, and Allen pulled up to the house, got out of the vehicle and entered the house through the front door. Allen was armed with a .40 caliber handgun and the other three men were unarmed. Adams, defendant, and Keith Maxey were already inside. As soon as the four men came inside, Adams closed the door and pulled out a handgun. Defendant also pulled out a semiautomatic handgun and pointed it at McClendon.

Adams told the four men to “lay down.” Allen testified that Maxey, who was unarmed, grabbed him from behind and tried to wrestle him to the ground. As he was wrestling with Maxey, Allen heard a gunshot. Allen grabbed his gun from the waistband of his pants and shot it into the floor. This caused Maxey to let go of him and run. Allen continued to fire and chased Maxey as he ran out the back of the house.

Ishmael Taylor testified that when Adams told the men to “lay down,” his brother Amir pushed him to the ground and laid on top of him to protect him. As the brothers lay on the floor together, Amir was shot twice in the left leg. Ishmael could not see who shot his brother, but testified that defendant and Adams were the ones holding guns before he was on the floor. He

heard more than five gunshots. Amir testified that he saw defendant with something dark or black in his hand, but was unsure if it was a gun or not.

Officer Adlone Morris testified that he and his partner were the first on scene. They found Amir Taylor lying halfway out the front door with gunshot wounds to his left leg. Maxey was also at the scene and also suffered from a gunshot wound. Maxey told police that Amir Taylor had tried to rob him. Morris stated that they found numerous shell casings in the house. Upstairs in the house police found a back window had been broken out and there was blood around the sill. McClendon's dead body lay outside, below the sill, near a spent casing. He had been killed by a "through and through" shot to the neck.

Michigan State Police Sergeant Reinhard Pope is a member of the firearms and tool marks identification. He testified that he examined the spent casings and six fired bullets. He also examined a .40 caliber handgun¹ and concluded that five .40 caliber spent casings came from that gun. Two of the six spent bullets were .40 caliber and also came from that handgun. Pope noted that there were five 9 mm Luger cartridge cases that were all fired from the same firearm. Additionally, he examined four other bullets which were consistent with being fired from the same 9 mm gun as one another, but he did not think that those bullets had been fired from the same weapon as the five cartridge cases. He thought that the bullets could have been fired from a 9 mm revolver, and he concluded that the cartridge cases had some shearing marks that were consistent with a semiautomatic pistol.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction. We disagree.

This Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). An abuse of discretion occurs when the decision results in an outcome outside the range of reasonable and principled outcomes. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009).

The concept of sufficiency of the evidence focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988).

Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). The elements of assault with intent to commit murder, MCL 750.83, are: "(1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing a

¹ This was the gun Allen turned over to police.

murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and citation omitted). Assault with intent to commit murder requires a specific intent to kill. *Id.* at 148.

Here, Amir Taylor was shot at close range, while he was lying on the ground. A person’s intent to kill may be inferred from any facts in evidence, including the use of a gun at close range. *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Furthermore, the fact that another individual was killed during the course of this violent crime supports a conclusion that death was the intended result of the shooting. As this Court noted in *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974):

The intentional discharge of a firearm at someone within range is an assault. The usual result and purpose of such an assault is death. The unjustified and unexcused intention to kill when committing an assault constitutes the crime charged.

There would rarely be a conviction if a criminal’s intent had to be confessed or proven directly by a witness. Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows. [*Id.* at 304].

Questions of credibility and intent should be left to the trier of fact to resolve. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Intent and premeditation may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant also argues that there was insufficient evidence that he was, in fact, the individual who shot Amir Taylor. Testimony indicated that both defendant and Adams were in the room where the shooting took place and both were holding guns. One of the witnesses described defendant as having a semi-automatic weapon in his hand. The physical evidence suggested that the gun used to shoot at the Taylor brothers was probably a 9 mm semi-automatic gun. This evidence was sufficient to support defendant’s conviction.

However, even if it were not enough to clearly indicate that defendant was the perpetrator, defendant could also have been convicted based on his role as an aider and abettor. To establish that a defendant aided and abetted a crime, the prosecutor must show 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 he gave aid and encouragement. *People v Plunkett*, 485 Mich 50, 61; ___ NW2d ___ (2010). An aider and abettor’s state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the

crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757-758.

Generally, an aider and abettor must possess the same requisite intent as that required of a principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). To establish the necessary intent of an aider and abettor, a prosecutor must prove that the defendant had a specific intent to commit the crime, that the defendant had knowledge of his principal's intent, or that the criminal act committed by the principal was an incidental consequence that would have been reasonably expected to result as a natural and probable consequence of the intended wrong. *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006).

Here, Amir Taylor was shot at close range. The testimony indicates that defendant was an active participant in attempting to force the victims on the ground and in possibly trying to steal their marijuana. Also, defendant fled the jurisdiction and refused to participate in a line-up, both of which support a finding of guilt. An incidental consequence of an attempt to steal a pound of marijuana using guns to threaten the victims, and actually shooting at the victims is that the victims might die or be seriously injured. Therefore, we conclude that even if there had not been sufficient evidence to convict defendant as a principal in this crime, there was sufficient evidence to support defendant's conviction as an aider or abettor.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel was ineffective for failing to question Amir Taylor about who shot him. We disagree.

A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* at 579. We review the trial court's findings of fact for clear error and its ultimate decision whether the defendant was denied the effective assistance of counsel de novo. *Id.* at 579. If resolution of a factual issue depends on the credibility of witnesses or the weight of evidence, we must defer to the trial court's superior opportunity to evaluate these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel erred so seriously that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment, overcoming a strong presumption that the performance was sound trial strategy and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298 (1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). Generally, defense counsel's "failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

(internal quotation omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to prepare for trial resulted in counsel’s ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant.” *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). The defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant’s argument is that his trial counsel was ineffective for failing to ask Amir Taylor specifically who shot him. However, there was ample evidence from which the trial court could conclude that defendant either shot Taylor, or aided and abetted in his shooting. Further, Amir Taylor might well have testified that defendant was the one who shot him, and that it was probably good trial strategy not to ask the victim directly who shot him when the victim’s answer could have further damaged defendant’s defense. Defense counsel has wide discretion with respect to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens