STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2010
v	No. 295101 Oakland Circuit Court
JOHNNIE LEE BURKETT, Defendant-Appellant.	LC No. 2009-225617-FC

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Because sufficient evidence supports defendant's convictions and defendant was not denied the effective assistance of counsel at trial, we affirm.

This case arises from a shooting that occurred on April 26, 2006, on Florence Street in Pontiac, Michigan. On the date in question, Robert Geter dropped his girlfriend, Angelina Parker, off at her friend Jimela's house on Florence Street. Robert Geter left for about an hour and a half. During that time, Parker smoked marijuana with Jimela.[1] When Robert Geter returned to Jimela's house, he brought his brother, Arthur Geter. Arthur Geter remained in the car. Robert Geter confronted Parker, believing that she had spent time with another man, defendant, who is also known as "Red." Robert Geter said that he did not know defendant's name but he had seen him with Parker on one prior occasion. Parker denied seeing defendant.

Robert Geter left Jimela's house and headed across the street to another house where a person named "D.A." resided. Parker followed. When they crossed the street, they found both D.A. and defendant sitting outside D.A.'s house. Robert Geter started an argument with defendant that lasted about five minutes. Parker attempted to calm down Robert Geter. She was

[1] Parker testified that in approximately an hour and a half she and Jimela shared a "blunt" which is a cigarillo casing filled with marijuana instead of tobacco.

able to coax him back across the street toward where Robert Geter's car was parked in front of Jimela's house. Arthur Geter was still sitting in the car. Robert Geter and Parker argued as they stood outside near the car. Robert Geter continued to accuse Parker of having some kind of relationship with defendant. Parker continued to deny it.

As the argument continued on the street, Parker saw defendant emerge from an apartment building across the street a few doors down from D.A.'s house with a black handgun in his hand. Defendant walked over to Robert Geter. Arthur Geter believed defendant drove up to the house in a gold Grand Prix, got out of the car, and then approached Robert Geter on foot. Arthur Geter did not initially see that defendant had a gun. Parker did see the gun, and afraid of it, walked away from the car and approached the sidewalk near Jimela's porch. Arthur Geter stated that defendant said, "I'm tired of this shit, this is the second time you tried to play me." Arthur Geter then saw the gun as defendant shot at Robert Geter. Robert Geter testified that he was shot in the chest. Neither Robert Geter nor Arthur Geter had weapons. Parker saw defendant fire his gun and also heard a gunshot. Robert Geter began running down the street away from defendant. Parker did not know if Robert Geter had been shot. Parker, hysterical, ran into Jimela's house. Parker heard additional gunshots.

Arthur Geter ran away from the scene as defendant continued shooting. Arthur Geter was shot in the back of his right leg and heard a total of about five shots. Arthur Geter called 911 as he was leaving the scene. Police picked up Arthur Geter on the next street over and took him to the hospital. Parker remained in Jimela's house until she was sure defendant was gone. Parker thought Robert Geter had been shot but she was not sure. Parker left Jimela's house and drove around trying to find Robert Geter. When she could not find him, she drove to the police station and reported to police that her boyfriend had been shot on Florence Street.

Lieutenant Josephine Fagan of the Pontiac Police Department testified that she spoke to Parker during the early evening of the day of the shooting. Parker was crying and very upset. Parker admitted that she did have contact with defendant, whom she identified as "Red," earlier in the day. Defendant had given her his phone number on a small piece of paper. Later, Robert Geter confronted her about seeing defendant, and at that point she gave him the piece of paper and Robert Geter put it in his pocket. Fagan searched Robert Geter's clothing and found the piece of paper in a pocket. Fagan also testified that Parker stated that she saw defendant shoot Robert Geter when she was still outside, then after she ran into the house she saw defendant shoot Arthur Geter as she watched out the window.

On the day after the shooting, police prepared a photo array including six pictures. Parker chose defendant as the shooter. That same day, police visited Robert Geter at the hospital where they found him responsive. Police showed Robert Geter the photo array and he selected defendant. Robert Geter signed his name by defendant's picture. Two days after the shooting, police showed the same photo array to Arthur Geter. Arthur Geter also selected defendant as the shooter and indicated the identification by circling the picture and signing his name by defendant's photo.

By the time of trial, Parker, Robert Geter, and Arthur Geter were reluctant to testify. Parker and Arthur Geter testified under subpoena. Parker testified that she did not want to testify because she was scared and did not want to "snitch." Arthur Geter did not remember telling

police defendant was the shooter and stated that he told police that he was not sure about his identification of defendant in the photo array and that he signed the picture only because he "looked at it." Robert Geter provided minimal testimony before declaring that defendant was not the shooter and refusing to further testify. The trial court declared Robert Geter a hostile witness and ordered him to testify. Robert Geter continued to refuse to testify and the trial court held him in contempt, sentenced him to 91 days in jail, and fined him $7,500. Robert Geter's preliminary examination testimony was then read to the jury.

Defendant's theory of the case was that he was not the shooter and that he was mistakenly identified as the shooter as a result of a series of errant witness identifications and police coercion of the witnesses. After the close of proofs, the jury convicted defendant as charged. The trial court sentenced defendant to 210 months to 40 years in prison for the assault with intent to murder convictions, consecutive to two two-year terms for the felony firearm convictions. Defendant now appeals as of right.

Defendant first argues that this Court must vacate defendant's convictions because the prosecution's evidence of his identity as the shooter was legally insufficient. Defendant specifically asserts that the prosecution only presented one eyewitness, Parker, who testified at trial that defendant was the shooter and that her testimony was both coerced and incredible, and she admitted to smoking marijuana on the day of the shooting. Defendant asserts that police coerced the photo array identifications because police told the witnesses who to choose. Further, Parker was high on marijuana, Arthur Geter was drunk, and Robert Geter was heavily medicated at the hospital when they identified defendant as the shooter. In light of all this, defendant contends that Parker's trial testimony alone is insufficient to prove beyond a reasonable doubt that defendant was the shooter.

We review a challenge to the sufficiency of evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, 440 Mich at 514. Therefore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of assault with intent to commit murder requires proof of the following elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and citations omitted). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). But defendant's brief on appeal does not make issue of the individual elements of the convicted offenses, but rather challenges the credibility of the witnesses and their identification of defendant as the shooter.

Identity is an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution, to justify a conviction, must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. See *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction of a crime. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Questions concerning the credibility of the identification testimony are for the trier of fact to resolve, and this Court will not resolve them anew. *Id*.

In this case, there was ample evidence to enable the jury to find that defendant was the shooter. At trial, Parker specifically testified that as she saw the shooting occur and as she was watching the shooting on Florence she felt confident that she would be able to recognize defendant. She then pointed to defendant in the courtroom and identified him as the shooter. Parker affirmed at trial that there was no doubt in her mind that defendant was the person who committed the shootings on Florence Street on the date in question. The prosecution also presented evidence that only one day after the shooting Parker picked defendant out of a photo array by initialing his picture. Parker stated that she selected defendant from the array because he was the person she saw commit the crimes. Additionally, Parker testified at trial that she also positively identified defendant as the shooter at the preliminary examination.

Defendant asserts that Parker's testimony should not be believed because she was pressured by police during the identification and because she had been smoking marijuana on the day of the shooting. But Parker specifically testified at trial that while police were present as she reviewed the photo array, police did not tell her who to select and did not in any way suggest who might be the shooter. She stated that she selected defendant because he was the perpetrator. Detective Darren McAllister also testified that he merely presented Parker with the photo array and that she selected defendant as the perpetrator. He stated that he did not tell her who to pick and did not influence her selection in any way. With regard to Parker's marijuana use on the date of the shooting, Parker testified at trial that although she did use marijuana that day, she was confident she could see what was happening during the incident and she has a good memory of it.

There were conflicts in the evidence because Robert Geter and Arthur Geter changed their testimony between the preliminary examination testimony and testimony at trial. With regard to their identifications of defendant in the photo array, McAllister testified that he presented the photo array to Arthur Geter and asked him to if he recognized anyone pictured as the shooter. In doing so he did not indicate that Parker had already selected someone from the array and did not suggest any of the photos to Arthur Geter. McAllister testified that after reviewing the photos, Arthur Geter selected defendant's picture and circled it and also signed his name next to it. At trial, Arthur Geter acknowledged that he had been presented the photo array by police and admitted to signing his name on the array. But, he also testified that McAllister told him someone had already selected defendant and that McAllister actually circled defendant's picture and then told him to sign it.

McAllister testified that he went to see Robert Geter at Royal Oak Beaumont Hospital to show him the photo array and found him to be very responsive. McAllister testified that he presented the photo array to Robert Geter and asked him to if he recognized anyone pictured as the shooter. In doing so he did not indicate that anyone had already selected someone from the

array and did not suggest any of the photos to Robert Geter. After reviewing the photos, Robert Geter selected defendant's picture and attempted to circle it and he also attempted to sign his name next to it. In Robert Geter's preliminary examination testimony that was read at trial, he indicated that he did not recall a police officer visiting him at the hospital.

Defendant's argument regarding the disparities in testimony is unpersuasive. Generally, conflicting testimony and witness credibility are issues for the trier of fact. *Wolfe*, 440 Mich at 514. Here, the jury apparently credited Parker's testimony and McAllister's testimony with regard to defendant's identification as the shooter both at the scene and in the photo array. Furthermore, all conflicts in the evidence must be resolved on appeal in favor of the prosecution. *McRunels*, 237 Mich App at 181. Accordingly, we conclude that there was sufficient evidence for a trier of fact to conclude beyond a reasonable doubt that defendant possessed a gun and shot Robert Geter and Arthur Geter.

Next, defendant argues that he was denied his constitutional right to effective assistance of counsel when his attorney intentionally injected highly inflammatory evidence that a witness was afraid to testify at trial when there was absolutely no indication that defendant or anyone acting on his behalf had caused her fear. Defendant specifically asserts that there was no strategic reason for defense counsel eliciting testimony from Parker that she had been offered a bribe by someone to not appear to testify against defendant because it painted defendant as a bad person and opened the door to further exploration of the testimony by the prosecutor.

Because no *Ginther*[2] hearing was held, review is limited to errors apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). A court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id*. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Here, the record shows that defense counsel questioned Parker about whether someone had offered her money ($500) in exchange for her not to appear for trial. In particular, defense counsel was attempting to assert that Parker may have contacted one of defendant's family members through a third party and suggested that in exchange for money she would not show up at trial. Parker testified that though someone did call her, it was not at her request and in fact she

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[2] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

did not know the person who offered her the money. She also testified that she did not need any money because she was going into the army. It seems defense counsel was attempting to impeach Parker's credibility or insinuate that she had a monetary reason to lie during her testimony. This was a legitimate trial strategy. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich 393, 398; 688 NW2d 308 (2008).

At the end of the line of questioning by defense counsel with regard to Parker's reluctance to testify at trial, Parker volunteered that she never asked for money not to testify and that she did not want to testify because she was "scared." Defense counsel then stopped the line of questioning. On redirect, the prosecutor asked Parker follow-up questions with regard to the offer of money not to testify as well as her fear about testifying. Parker explained that since the shooting, she had seen defendant once as she was driving with Jimela and defendant pointed at Parker. Parker explained that she did not want to testify because "you don't snitch on somebody. It was just – you know, I mean, you probably don't understand, but I don't know, it's a hood thing."

Clearly, it was defense counsel's strategy to attempt to impeach Parker, an eyewitness and possibly the most important witness in the case. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). On this record, attempting to create an inference that Parker had a reason to lie was a legitimate trial strategy considering the importance of this witness and the fact that she stated that she was offered money not to testify. *Dixon*, 263 Mich at 398. We cannot fault defense counsel for Parker's volunteered and unexpected answer about being "scared" to testify or the resulting questioning by the prosecutor because counsel's strategy was a valid one. We may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted). In any event, even if we were to consider this error, considering the plethora of evidence against defendant, he has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243.

Finally, defendant argues that he was denied the effective assistance of counsel at trial when his counsel failed, midtrial, to move to suppress Parker's identification of defendant when Parker testified at trial that she was coerced to identify defendant at the initial photo lineup and had previously identified someone else. Defendant asserts that prior to trial there was no indication that Parker's identification of defendant in the photo array had been coerced by being threatened to be charged as an accessory by police, or that she had been told who to identify as the perpetrator by police. However, because this information that Parker's identification of defendant to police was coerced and suggestive came out at trial, defense counsel should have immediately made a motion to suppress Parker's in-court identification of defendant.

Defendant's argument is not supported by the record. Parker consistently identified defendant as the shooter, at the photo array, at the preliminary examination, and also at trial. Parker also testified that she was sure of the identification and that no one told her what to say or made inappropriate suggestions regarding the identification. McAllister also testified that Parker identified defendant as the shooter at the photo array and stated that he did not prompt her in any

manner during the process. Defendant points to nowhere in the record where Parker identified someone other than defendant as the shooter. Instead, defendant mischaracterizes Parker's trial testimony describing her first encounter with police when she went to the police station on the day of the shooting. Parker testified that at that time she thought the police did not believe her story about the shooting. She testified that police stated that if she did not tell the truth that she could be charged as an accessory to the crime. Lieutenant Brian Flye testified that during the initial meeting with Parker at the police station, he never told her that he did not believe her story and never threatened her that she could be charged as an accessory to this crime. Flye further testified that he never heard another police officer say Parker was lying or threaten her with prosecution. Fagan, another officer present, similarly testified. Because defendant has not supported his argument with a factual predicate, any motion made by defense counsel in support of the argument would have been meritless. A failure to pursue a meritless objection does not constitute ineffective assistance of counsel. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio