STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE DAVENPORT,

Defendant-Appellant.

UNPUBLISHED
July 16, 1996

No. 171975
LC No. 93-002606

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON CHRISTOPHER BRANCH,

Defendant-Appellant.

No. 171976
LC No. 93-002606

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ.

PER CURIAM.

Following a bench trial, the court found defendants guilty of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The judge sentenced each defendant to twelve to twenty-five years in prison for assault with intent to commit murder and to a consecutive two-year prison term for the felony firearm convictions. Defendants now appeal and we affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In docket no. 171975, defendant Jermaine Davenport, argues that he was denied a fair trial because the prosecutor argued facts not in evidence and the trial court based its decision on facts not in evidence. We disagree.

Because defendant failed to object to the prosecutor's remarks at trial, appellate review is limited to determining whether a miscarriage of justice occurred. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). While a prosecutor may not argue facts not entered into evidence, the prosecutor may argue from the evidence and all reasonable inferences from the evidence. *Lee, supra*, 212 Mich 255. The prosecutor is free to relate the facts to his or her theory of the case. *Id*. The test for prosecutorial misconduct is whether the defendant was denied a fair an impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Here, although the prosecutor improperly argued facts not in evidence, we do not believe the prosecutor's argument resulted in a miscarriage of justice. Circumstantial evidence and the reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Warren (On Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). Here, the complainant identified defendant immediately after the shooting. The white car described by complainant was found parked at the apartment building where defendant was found and the car contained twenty-five spent nine millimeter shell casings. Two nine millimeter weapons were found in the apartment. Accordingly, it does not appear that the prosecutor's remarks resulted in a miscarriage of justice.

In docket no. 171976, defendant Aaron Christopher Branch, argues that there was insufficient evidence to find him guilty of assault with intent to commit murder. We disagree.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, the appellate court must view the evidence in the light most favorable to the prosecution and must determine whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Questions of credibility and intent should be left to the trier of fact. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987).

The elements of assault with intent to commit murder are 1) an assault, 2) with the specific intent to commit murder, 3) which, if successful, would make the killing murder. *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991). Circumstantial evidence and the reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (On Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

Complainant testified that defendant aimed and fired a gun at him while he was walking down the sidewalk, approximately fifteen feet away from the car in which defendant was riding. This evidence is sufficient to prove that an assault occurred. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). It may also be inferred from such evidence that defendant possessed the intent to commit

murder. *People v Drayton*, 168 Mich App 174, 177-178; 423 NW2d 606 (1988). Furthermore, there was no evidence of any mitigating or justifying reasons for the shooting.

Also, there was substantial evidence that defendant was one of the shooters. Complainant testified that he recognized defendant at the time of the shooting and identified defendant to the police while at the hospital immediately after the shooting. Defendant was found at the apartment building where the white car described by complainant was also found. The white car contained twenty-five spent nine millimeter shell casings and two nine millimeter weapons were found in the apartment. Viewed in the light most favorable to the prosecution, we find sufficient evidence to justify a rational trier of fact to find defendant guilty beyond a reasonable doubt of assault with intent to commit murder.

Defendant, Aaron Christopher Branch, also argues that he was denied effective assistance of counsel. We disagree.

To prove ineffective assistance of counsel, the defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, the defendant must show that there is a reasonable probability that, but for the error, the result of the proceedings would have been different. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Lavearn, supra*, 448 Mich 217. In order to succeed on a claim of ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant did not move for a new trial or a *Ginther*[1] hearing below, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to call as a witness the young lady, only known as Tiffany, to whom complainant was speaking immediately prior to the shooting. The decision whether to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58 (1994). To overcome the presumption of sound trial strategy, the defendant must show that the failure to call the witness deprived him of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra*, 207 Mich App 58. Furthermore, neglecting to interview witnesses is not, by itself, enough to constitute ineffective assistance of counsel unless it can be shown that such failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *People v Johnson (After Remand)*, 125 Mich App 76, 81; 336 NW2d 7 (1983).

This defendant has not shown that Tiffany would have revealed any information which would have affected the outcome of the case. Furthermore, complainant testified that, by the time the shooting began, Tiffany had already walked away and turned the corner. Because there is no indication that

calling Tiffany as a witness would have benefited defendant's case, the failure to call her as a witness does not constitute ineffective assistance of counsel.

Defendant also argues that he was denied effective assistance of counsel because defendant failed to adequately cross-examine complainant concerning his identification of defendant. However, the record does not support defendant's claim. Because defendant has failed to overcome the presumption that defense counsel's cross-examination of complainant was sound trial strategy, defendant has failed to demonstrate ineffective assistance of counsel.

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).