STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DAWSON,

Defendant-Appellant.

UNPUBLISHED
July 30, 1999

No. 209534
Recorder's Court
LC No. 97-001907

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years, six months to four years' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant first argues that his convictions are against the great weight of the evidence because essential corroborating evidence of the complainant's testimony was not presented by the prosecution. A new trial based on the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

In the body of his argument, defendant contends that there was insufficient evidence presented to sustain his convictions. This issue requires a different standard from the claim that a conviction is against the great weight of the evidence. *Id.*, pp 633-634. A directed verdict of acquittal must be entered when sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt is lacking. *Id.* "If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *Id.*, p 634.

The complainant testified that he was driving his car when defendant, who was driving a Ford Explorer, shot a gun at the complainant. Specifically, defendant was stopped at a traffic light on the opposite side of the street when he shot at the complainant. A bullet passed within inches of the complainant's head. The complainant further testified that he had known defendant for about fourteen years. Clearly, the complainant's testimony establishes the elements of both felonious assault, *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), and felony-firearm, *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Moreover, the trial court, sitting as the fact finder in this case, found the complainant to be a credible witness.

Defendant, however, counters that the trial essentially centered on the issue of identification and that the only testimony regarding the identity of the shooter came from the complainant. Defendant asserts that an independent witness existed, that being the passenger in the complainant's car. That witness, although endorsed by the prosecution, was not produced at trial. Because of this, the trial court agreed, as a remedy, to take notice of the adverse witness instruction that it could infer that the missing witness' testimony would have been unfavorable to the prosecution. Accordingly, we find that the trial court fashioned an appropriate remedy where the prosecution failed to produce an endorsed witness, *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995), and that, in any event, the complainant's testimony was sufficient to sustain defendant's convictions under either the great weight of the evidence or sufficiency of the evidence standards.[1]

Defendant next argues that his sentence for the felonious assault conviction is disproportionate.

Defendant's minimum sentence of thirty months exceeds the guidelines range of six to twenty-four months. Defendant notes his positive factors which include verified employment and his five minor children. He also acknowledges his negative factors which include two prior felony convictions and a domestic violence charge. Unfortunately, our review of this issue is extremely difficult given that defendant has failed to provide this Court with a copy of the presentence report, as required by MCR 7.212(C)(7). In considering the background of the offender and the circumstances surrounding the offense, we cannot conclude that the trial court abused its discretion in sentencing defendant to thirty to forty-eight months' imprisonment. Therefore, the sentence is not disproportionately harsh. *People v Lemons*, 454 Mich 234, 258-260; 562 NW2d 447 (1997); *People v Houston*, 448 Mich 312, 319-321; 532 NW2d 508 (1995).

Lastly, defendant argues, in his brief filed in pro per, that he was denied the effective assistance of counsel. Defendant proffers eight bases in support of this claim. According to defendant, counsel failed to: (1) give notice of an alibi defense; (2) investigate, interview, and subpoena a known alibi witness; (3) insure the presence of one of the prosecution's res gestae witnesses; (4) file a motion to recuse the trial court based on its knowledge of defendant's prior criminal record; (5) file any pretrial motions; (6) make an opening statement; (7) properly apprise defendant of his right to a jury trial; and (8) to inform defendant of his right to testify. Defendant failed to move for a new trial or an evidentiary hearing. Therefore, our review of this issue is limited to the record before us. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

After reviewing the record, we conclude that defendant failed to overcome the presumption that he was provided effective assistance of counsel. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant has failed to show that the actions of his trial counsel were deficient and he has failed to establish the requisite prejudice. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] In his brief, defendant also notes that the prosecution presented no evidence connecting defendant to the Ford Explorer and that the prosecution presented no closing argument. These facts do not concern the essential elements of the crimes.