

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON L. MILLER,

Defendant-Appellant.

UNPUBLISHED

March 19, 2002

No. 228236

Wayne Circuit Court

LC No. 99-011283

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of thirteen to twenty years' imprisonment for the assault convictions and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant raises a number of concerns on appeal related to the trial court's rulings and sentencing. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C). However, questions of law are reviewed de novo on appeal. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

Defendant first argues that the trial court erroneously considered inconsistent identification testimony. We disagree.

A positive identification by witnesses may be sufficient to support a conviction, despite the potential unreliability of such testimony. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is a question for the trier of fact and will not be resolved anew on appeal. *Id.* The record in the instant case does not reveal any error in the trial court's determination that the witness' identification was credible. In fact, we find that the witness' identification of defendant and the car was consistent and credible.

Next, defendant alleges that the trial court erred by relying on its own special knowledge when it determined that there would be no gunshot residue in defendant's car if the gun was fired outside the car. We disagree.

A court may not rely on its own specialized knowledge to convict a defendant but must reach a decision based on the evidence presented. *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991). However, the trial court is permitted to rely on its every day experience and common sense in evaluating evidence. *Id.*

The parties stipulated at trial that a forensic chemist, if called, would testify that a gunshot residue test performed on defendant's car three days after the shooting was negative. However, there was no further evidence presented relating to the implications of this negative result. When the trial court convicted defendant it explained the negative test results by concluding that the shots were obviously fired outside the car because the gunman's windshield remained intact. Based on the evidence presented at trial we find that this was a common sense conclusion as opposed to a decision based upon specialized knowledge.¹

We further note that there was no argument or evidence presented to the trial court in support of defendant's assertion on appeal that the trial court's conclusion regarding the gunshot residue test was erroneous. The record is devoid of any evidence suggesting that a positive result would have been expected from a test of the interior of defendant's car taken three days after a gun was fired outside the car window. The trial court did not rely on the test as positive evidence of guilt; rather, it rejected the test as establishing defendant's innocence, or raising a reasonable doubt, in the face of the evidence establishing his guilt. We find no error.

Defendant next asserts that the trial court impermissibly shifted the burden of proof to defendant. To support this claim defendant cites the following statements made by the trial court during its ruling:

Now, usually as far as the charge and as far as refuting the charge is concerned on a waiver trial I try to find an excuse to give the benefit of the doubt to reduce the charge to a lesser offense. But I see the picture of this car with bullet holes all over the place.

It seems to me that whoever fired, and I just can't see how they intended to do anything except to kill those people in the car. This was not a long range shooting out there. They were trying to kill them. And if either of those people had died that were in that other car, the charge clearly would have been murder one. I don't see how it could have been anything else.

We find that these remarks were related to the intent element of the crime and did not shift the burden of proof to defendant. Considering the close proximity of the cars and the number of bullet holes, the trial court explained that the intent to kill was clear. Additionally, there is no merit to defendant's contention that the use of the word "whoever" meant that the trial court failed to determine that defendant was the gunman beyond a reasonable doubt. In fact, the

¹ In *Simon*, *supra*, the trial judge relied on his previous experience as a prosecutor to find the defendant guilty. The trial judge stated that he did not believe the defendant's testimony because as a former prosecutor he knew how the police performed drug raids. *Id.* at 567.

trial court further stated that it had no doubts about defendant's identity as the perpetrator. As such, we find no error in the trial court's remarks.

Defendant finally argues that the trial court's sentencing decision improperly considered the fact that defendant did not testify at trial. We disagree.

A defendant cannot be punished for exercising his constitutional right to remain silent at trial. *People v Anderson*, 391 Mich 419, 423; 216 NW2d 780 (1974). However, we find no indication that defendant's sentence in this case was based on his refusal to testify. When defendant and his mother professed defendant's innocence during the sentencing hearing, the trial court merely informed them that such statements could not be considered as evidence because the trial was over. Indeed, the trial court properly instructed defendant and his mother that they were allowed to make statements relating to defendant's sentence. MCR 6.425(D)(2)(c); see also *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). Moreover, defendant's minimum sentences fell within the appropriate sentencing guidelines' range. Absent an error in scoring the sentencing guidelines or the use of inaccurate information to determine defendant's sentence, we must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jessica R. Cooper