STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME JUYSHA TAYLOR,

Defendant-Appellant.

UNPUBLISHED
April 2, 2002

No. 223408
Eaton Circuit Court
LC No. 99-020159-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORRANCE L. MCLEMORE,

Defendant-Appellant.

No. 223410
Eaton Circuit Court
LC No. 99-020222-FC

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a joint jury trial, defendants Jerome Taylor and Torrence McLemore both were convicted of assault with intent to commit murder, MCL 750.83, possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Taylor also was convicted of being a felon in possession of a firearm, 750.224f, and defendant McLemore was convicted of an additional count of carrying a concealed weapon (CCW), MCL 750.227. The trial court sentenced Taylor as a third habitual offender, MCL 769.11, to a prison term of twenty-five to fifty years for the assault conviction, a concurrent three to ten year term for the felon in possession conviction, a consecutive five to forty year term for the possession with intent to deliver cocaine conviction, and a consecutive two-year term for the felony-firearm conviction. The court sentenced McLemore to a prison term of fourteen to twenty-five years for the assault conviction, a concurrent one to four year term for the CCW conviction, a consecutive 1-1/2 to 20 year term for the possession with intent to deliver cocaine conviction, and a consecutive two-year term for the felony-firearm conviction. Taylor now appeals as of right in Docket No.

223408 and McLemore appeals as of right in Docket No. 223410, which have been consolidated for this Court's consideration. We affirm.

Both defendants challenge the sufficiency of the evidence in support of their convictions for assault with intent to commit murder. In a criminal case, 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. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The specific intent to kill may be proven by inference from any facts in evidence, including the use of a dangerous weapon. *Barclay*, *supra*; *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993).

McLemore contends that the prosecution failed to present sufficient evidence of a specific intent to kill because the victim was wounded only in his buttocks. The victim testified at trial that McLemore deliberately shot him in the hip while he turned to try to flee. McLemore shot the victim from fairly close range, one witness estimated five feet, with a .45 caliber handgun. This evidence was sufficient to enable a rational jury to infer that McLemore shot the victim with an intent to kill, but was unsuccessful either because he had poor aim or perhaps missed shooting the victim in a more vital area because the victim was moving. As this Court has observed, "[t]he intentional discharge of a firearm at someone within range is an assault. The usual result and purpose of such an assault is death." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

Taylor argues that the evidence failed to establish the requisite specific intent to convict him as an aider and abettor. A person who aids and abets the commission of a crime can be liable for a specific intent crime if he possesses the specific intent required to convict the principal of the underlying crime, or if he provides assistance with knowledge that the principal has the required specific intent. *People v King*, 210 Mich App 425, 429; 534 NW2d 534 (1995). As previously indicated, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that McLemore shot the victim under circumstances supporting an inference that he intended to kill the victim. To properly convict Taylor of this charge, the jury would have to find that Taylor either intended for the victim to be killed or assisted McLemore with knowledge that McLemore intended to kill the victim.

According to the victim, Taylor picked up the handgun, which had fallen from McLemore's waistband, and held it while the victim and McLemore fought. McLemore subsequently obtained the gun from Taylor and, according to some witness accounts, Taylor either handed the gun to McLemore or the transfer occurred in a permissive manner. Furthermore, the victim testified that although he did not know McLemore, he had had trouble with Taylor in the past and knew that McLemore was Taylor's "flunkie." The fact that Taylor

and McLemore approached the victim together and that McLemore became instantly aggressive raises an inference that he did so with Taylor's knowledge. Viewing together all this evidence, as well as the testimony indicating that Taylor later regained possession of the gun and ordered McLemore to dispose of it, we conclude that the prosecution presented sufficient evidence to allow a rational jury to find beyond a reasonable doubt that at the time Taylor assisted McLemore he intended to kill the victim or had knowledge that McLemore intended to shoot and kill the victim.

Both defendants also argue that insufficient evidence supported their convictions of possession with intent to deliver less than fifty grams of cocaine. The elements of possession with intent to deliver cocaine are that (1) the defendant knowingly possessed a controlled substance, (2) the defendant intended to deliver this substance to someone else, (3) the substance possessed was cocaine and the defendant knew it was cocaine, and (4) the substance was in a mixture that weighed less than 50 grams. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). With regard to the element of possession, a person need not have actual physical possession of a controlled substance to be found guilty of possessing it. *Wolfe, supra* at 519-520. Possession may be either actual or constructive, and may be joint or exclusive. *Id*. at 520. The controlling question is whether the defendant had dominion or control over the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). An individual's presence at the place where drugs are found is not itself sufficient to prove constructive possession; some additional link between the defendant and the contraband must be shown. However, circumstantial evidence and reasonable inferences arising from the evidence may suffice to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

In this case, the occupant of the apartment, into which defendants fled following the shooting and in which the cocaine subsequently was found, testified that she saw Taylor remove the plastic baggie that contained the cocaine from his pocket and throw it at her, telling her to get rid of it. She refused and the baggie fell to the floor. Taylor told McLemore to pick it up, then pulled a black handgun out of his waistband and handed it to McLemore. Taylor directed McLemore to dispose of the drugs and the gun and McLemore ran upstairs. The parties stipulated at trial that the plastic baggie contained thirty-five separately "knotted clear plastic packages each containing off-white chunky material" weighing in total 10.24 grams, that one randomly selected package tested positive for cocaine, and that a police lieutenant was prepared to testify that in his experience the thirty-five individually packaged rocks of cocaine were consistent with trafficking. This evidence was sufficient to enable the jury to find that both defendants knowingly possessed the cocaine found in the apartment with the intent to deliver it. Although Taylor emphasizes that the apartment occupant witness did not identify him at the preliminary examination, the witness explained that the reason she did not identify him then was because Taylor stared at her and she was scared, and the credibility of her trial testimony was for the jury to resolve.[1]

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[1] We note our rejection of Taylor's related suggestion that the prosecutor violated MCL 600.2167(4) by failing at his preliminary examination to call as a witness the state police evidence technician who analyzed the substance contained in the plastic baggie. Taylor's claim lacks any merit because MCL 600.2167(1) expressly permits a prosecutor to introduce at a

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McLemore further disputes that sufficient evidence supported his CCW conviction, which requires a showing that McLemore carried a pistol concealed on or about his person. MCL 750.227(2). The victim testified that after defendants approached him and McLemore initiated a physical confrontation, a handgun dropped to the ground from the area of McLemore's waist during the struggle. This evidence amply supported the jury's rational determination beyond any reasonable doubt that McLemore carried a concealed weapon. *People v Charron*, 54 Mich App 26, 29-30; 220 NW2d 216 (1974).

Taylor also challenges his felony-firearm conviction, again claiming that the evidence was insufficient to establish his possession of the firearm. To sustain a conviction for felony-firearm, the prosecution must prove that the person charged had possession of the firearm during the commission of a felony. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). "Possession may be actual or constructive and may be proved by circumstantial evidence." *Id*., citing *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). Whether actual or constructive, possession may be joint as well as exclusive. *Hill*, *supra* at 470-471.

The aforementioned testimony that Taylor possessed the firearm while McLemore and the victim were fighting and that Taylor subsequently transferred possession of the firearm to McLemore, whereupon McLemore shot the victim, was sufficient to enable the jury to find Taylor guilty of felony-firearm. Furthermore, according to the testimony of the apartment occupant, Taylor exercised dominion and control of a firearm while possessing the cocaine found in the apartment, and Taylor subsequently gave control of both to McLemore with orders for him to get rid of them. This evidence amply supported Taylor's felony-firearm conviction beyond a reasonable doubt.

Taylor also argues that he received ineffective assistance of counsel when, during jury deliberations, McLemore's attorney agreed to stand in for Taylor's trial attorney and then failed to object to the trial court's rereading of the instructions pertaining to intent following a question from the jury. Because defendant failed to move for a new trial or an evidentiary hearing regarding the issue of ineffective assistance of counsel, our review of this issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993).

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To justify reversal, the defendant first must show that counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's decisions constituted sound trial strategy. *Stanaway*, *supra*. The defendant also must show that counsel's deficient performance prejudiced the defense; the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Pickens*, *supra* at 312.

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preliminary examination "a report of the findings of a technician of the . . . state police . . . in place of the technician's appearance and testimony." In this case, the prosecutor complied with subsection 2167(1) at Taylor's preliminary examination.

The trial court instructed the jury on the elements of the offenses, including the requisite intent elements, and gave a specific instruction regarding the necessary findings concerning Taylor's intent as an aider and abettor. Taylor's counsel expressed that she approved these instructions. She then indicated that she had a scheduling conflict and had to leave the court, but that McLemore's attorney could stand in for her. The jury deliberated for most of the day and Taylor's counsel returned before court was dismissed for the evening, but stated that she again would be unavailable the following morning due to another court appearance. The next morning, with Taylor's express permission, the trial court allowed deliberations to continue with McLemore's attorney again standing in for Taylor's counsel. The trial court noted that Taylor's counsel would be available by phone. In response to a jury request to hear additional instructions regarding the elements of intent, the trial court provided essentially the same instructions that it had read the previous day. When questioned about their propriety, McLemore's attorney approved of the instructions.

The jury requested another instruction on intent later in the day pursuant to a note that read as follows:

> Judge, with regard to document CJI, Criminal Jury Instructions, 2nd 8.1, number 3c, point of clarification requested: 1) Does this item accurate [sic] reflect the options available to the jury? 2) Is this item worded correctly? 3) Must the findings of the jury match the charge (or lack thereof) to the finding of the other defendant charge [sic] under the aiding and abetting theory?

The trial court subsequently instructed the jury again, in a manner substantially comporting with CJI2d 8.1. Afterwards, the trial court stated the following:

> So, with that I'm going to send you folks back. I don't know if that answers your question or clarifies things or not. I don't feel at this point I can say anything beyond that. So, you're back, I guess, into the jury room and I'll await further instructions.

After the jury again retired to deliberate, McLemore's counsel advised that she had no comments or concerns with the instructions, and the following conversation ensued:

> *The Court*: All right. . . . I don't think that's going to answer their question in all honesty.
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> *The Prosecutor*: I think they want to know what that intent is. If it's specific intent to kill or if it's knowing that the other person intended to kill when he provided the assistance.
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> *The Court*: Yeah.
>
> *The Prosecutor*: I guess all I can say is maybe after you had reread it, just said that accurately reflects the state of the law. They asked if it's accurately worded, what can you say?

> *The Court*: Yeah. Perhaps I should have answered their question directly, "Is this item worded correctly?" It is. But - -
>
> *The Prosecutor*: By reading it you're saying it is.
>
> *The Court*: If I, if I get another note I think I'm going to take a close look at the notes under, after 8.1 and I might elaborate and in effect summarize what different Supreme Court cases have held in regard to 8.1. It might help them to clarify, I don't know. There's some language in here that I think would help them, and I hesitate to put it on the record, but I might because it's the state of the law. So, we'll see what they say. Thanks.

The jury did not return with another question regarding intent, but with a verdict approximately 1-1/2 hours later.

Taylor now argues that the foregoing circumstances demonstrate that he did not receive the effective assistance of counsel due to an inadvertent conflict of interest on the part of McLemore's attorney. Taylor maintains that McLemore's attorney deliberately kept silent instead of informing the trial court that the correct answer to the jury's third question should have been "no," that the jury remained free to find that McLemore had the specific intent to commit murder, while finding either that Taylor did not have the specific intent to commit murder or that Taylor did not know that McLemore had the specific intent to kill.

We are not convinced that Taylor was denied the effective assistance of counsel. The existing record does not substantiate Taylor's suggestion of a theoretical conflict of interest. We first note that both Taylor's counsel and McLemore's attorney had approved of the instructions initially read to the jury, and that the trial court's subsequent instructions mirrored the initial, correct instructions. Measuring the performance of McLemore's attorney against an objective standard of reasonableness and without the benefit of hindsight, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), we find that the decision to allow the jury to rehear the standard jury instruction does not appear so objectively unreasonable as to support a conclusion that McLemore's attorney was not functioning as the counsel guaranteed Taylor by the Sixth Amendment. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Furthermore, "[e]ven if imperfect, instructions do not create error if they fairly present to the jury the issues for trial and sufficiently protect the defendant's rights." *People v Bartlett*, 231 Mich App 139, 155; 585 NW2d 341 (1998). Because the jury was properly instructed that to find Taylor guilty as an aider or abettor it must find that Taylor specifically intended the victim's death or knew that McLemore possessed that intent, *King*, *supra* at 429, any failure to object by McLemore's attorney was not objectively unreasonable, and we are unpersuaded that the absence of any objection prejudiced Taylor. We therefore conclude that Taylor has failed to show that he was denied the effective assistance of counsel.

Taylor also avers for the first time on appeal that the prosecutor engaged in misconduct at the preliminary examination. We find no merit to this unpreserved issue. First, we are not persuaded that defendant has demonstrated plain error in the prosecutor's questioning of a witness or introduction of a law enforcement information network printout regarding Taylor. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Even assuming defendant could establish misconduct, he has failed to show how the prosecutor's actions at the preliminary

examination prejudiced him at trial. Accordingly, appellate relief is not warranted. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Taylor's unpreserved claims of a fair cross-section violation and improper use of peremptory challenges during jury selection likewise do not warrant appellate relief. Although Taylor asserts that his particular jury consisted of all white jurors, Taylor provides no indication of the composition of the jury pool itself, of the process used to select the pool, or any indication of how the selection process systematically excluded minorities. Thus, Taylor has failed to establish a prima facie violation of the fair cross-section requirement. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Taylor also has failed to demonstrate that the prosecutor improperly used peremptory challenges to remove members of his race. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Although defendant states that his jury contained no minorities, he provides no indication of the racial makeup of the jurors who were excluded and this information is not apparent from the record.

McLemore contends that the trial court erred when it allowed evidence of a photographic identification made by the victim twenty-nine days after the shooting. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

McLemore's challenges to the use of a photographic lineup lack merit. A photographic lineup should not be used for identification "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *Kurylczyk*, *supra* at 298 n 8; *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). A defendant is subject to legal compulsion to appear at a lineup when a warrant has been issued for his arrest. *People v Harrison*, 138 Mich App 74, 77; 359 NW2d 256 (1984). At the time of the photographic identification in this case, McLemore was not in custody and no warrant had issued for his arrest. Accordingly, the photographic lineup was not per se improper. Furthermore, we have reviewed the circumstances surrounding the lineup to the extent possible from the existing record and conclude that the photographic lineup was not impermissibly suggestive. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Kurylczyk*, *supra* at 302.

McLemore next asserts that the trial court erred in allowing the parties to stipulate that (1) the plastic baggie found inside the apartment to which defendants fled following the shooting contained thirty-five "knotted clear plastic packages each containing off-white chunky material" with a total weight of 10.24 grams, (2) one sample of the material tested positive for crack cocaine, and (3) a police officer was prepared to testify that in his opinion the amount of the cocaine and the manner in which it was packaged was consistent with drug trafficking. Because defense counsel affirmatively stipulated to the admission of this evidence, defendant has waived any claim of error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Furthermore, considering that McLemore raised an alibi defense at trial, he has not shown that defense counsel was ineffective in deciding to stipulate to this evidence. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

McLemore further claims that the trial court abused its discretion when sentencing him to a term of fourteen to twenty-five years' imprisonment for his conviction of assault with intent to

commit murder, and 1-1/2 to 20 years' imprisonment for his possession with intent to deliver cocaine conviction. Because defendants committed the instant offenses after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2). Where, as here, the trial court imposes a minimum sentence within the sentencing guidelines range, this Court must affirm the sentence absent an error in scoring the guidelines or the trial court's reliance on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). A sentencing judge has wide discretion in determining the number of points to be scored provided that evidence on the record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

McLemore challenges the trial court's scoring decision for offense variable thirteen (OV 13), which considers whether the offenses were related to the defendant's involvement in an organized criminal group. MCL 777.43. Given the fact that McLemore abandoned his challenges to the prosecutor's offer of proof concerning both defendants' involvement with the Garden Boys, a subset of the Gangster Disciple gang, we find that the trial court properly considered this evidence at sentencing. In light of this information, coupled with evidence that the victim had had prior trouble with Taylor, a high-ranking member of the gang, the fact that the victim was carrying cocaine at the time of the offense, and that Taylor also was carrying cocaine packaged for sale, the record supports the prosecutor's theory that the altercation with the victim involved a turf war between the victim and defendants. The trial court did not err in determining that the crimes constituted part of a pattern of felonious criminal activity related to membership in an organized criminal group. *Elliott, supra*. We conclude that the court properly scored ten points for OV 13, and we affirm McLemore's sentences, which fell within the guidelines ranges.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter