

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVELIN CORDELL PIPPINS,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 246631

Wayne Circuit Court

LC No. 02-003161-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAROME SOLOMAN SMITH,

Defendant-Appellant.

No. 246632

Wayne Circuit Court

LC No. 02-003161-02

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendants Kevelin Pippins and Larome Smith were tried jointly before a single jury. Defendant Pippins was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ Defendant Smith was convicted of assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, and felony-firearm. Defendant Pippins was sentenced to a prison term of twenty-three months to ten years for the assault with intent to do great bodily harm conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Smith was sentenced to concurrent prison terms of eleven to twenty-five years for the assault with intent to murder conviction, and six to ten years for the assault with intent to do great bodily

¹ Defendant Pippins was acquitted of an additional charge of assault with intent to murder, MCL 750.83.

harm conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Pippins appeals as of right in Docket No. 246631, and defendant Smith appeals as of right in Docket No. 246632. We affirm.

I. Docket No. 246631

A. Impermissibly Suggestive Pretrial Identification

Defendant Pippins first claims that he was denied his right to due process by the admission of the victim's in-court identification because it was tainted by impermissibly suggestive pretrial procedures. As support for this claim, defendant asserts that a police officer told the victim that "Kevin" was in a mug shot book, and that defendant Pippins had only one frontal view photograph, while other individuals were shown from multiple angles.

Following an evidentiary hearing, the trial court concluded:

There's nothing in this record that would indicate to me that the review of the mug book as occurred in this case, which is not unusual at all, that there was anything impermissibly suggestive or unnecessarily that would even get us to [*People v*] *Gray*, [457 Mich 107, 111; 577 NW2d 92 (1998)] or [*People v*] *Kachar*[, 400 Mich 78, 95-97; 252 NW2d 807 (1977)].²

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Photographic identification procedures violate a defendant's due process rights if, based on the totality of the circumstances, they are so impermissibly suggestive as to give rise to a substantial likelihood that there will be a misidentification. *Gray, supra* at 111. An improper suggestion may arise when a witness is shown only one person or a group in which one person is singled out in some way. *Id.* Mere differences in the composition of photographs have been held not to render a show-up impermissibly suggestive. See *Kurylczyk, supra* at 304-305.

The record contains no indication that any impermissible or unduly suggestive identification procedure occurred here. The police officer, the victim, and the victim's mother, who accompanied the victim to the police station, testified at the evidentiary hearing. The testimony revealed that, upon his arrival, the victim was asked to look at a mug shot book.³ The officer explained that the precinct uses one mug shot book, which is similar to a photo album.⁴

² In citing *Gray, supra*, and *Kachar, supra*, the Court was apparently referring to the need to determine whether, despite a suggestive pretrial identification, there was an independent basis to admit the victim's in-court identification of defendant Pippins.

³ Defendant Pippins was not in custody.

⁴ The mug shot book and defendant Pippins' mug shot were presented at the hearing.

When the victim reviewed the book, it had sixty-three pages, and contained photographs of approximately 167 individuals. Some individuals, including defendant Pippins, had one photograph, while other individuals were depicted from more than one angle. The officer had obtained defendant Pippins' driver's license photograph from the Secretary of State, and added it about ten pages into the book. Other photographs were on the page with defendant Pippins' photograph.

While the victim viewed the book, his mother was seated directly next to him. When the victim got to the page that contained defendant Pippins' photograph, he stopped, pointed at it, whispered to his mother, and closed the book. The officer did not speak. Seconds later, the victim reopened the book, leafed through the pages, and again stopped, pointed at defendant Pippins' photograph, and spoke to his mother. The officer motioned to speak with the victim's mother outside of the victim's presence, and explained that he could not communicate with the victim and that the victim must talk to the officer. When they returned, the victim's mother relayed the proper communication process to the victim. Thereafter, the victim opened the book, pointed to defendant Pippins' photograph, and identified him to the officer.

It was undisputed that the officer never showed the victim a single photograph, or told him to select a particular photograph. The officer denied mentioning any name to the victim. Although the victim indicated that, at some point, the officer mentioned the name "Kevin" before he viewed the book, he also indicated that he did not know defendant Pippins. Moreover, there were no identifying names, addresses, or any other information on the photographs. In sum, the pretrial identification procedure was not unduly suggestive or impermissibly tainted, and, therefore, the trial court did not err in denying defendant Pippins' motion to suppress the victim's in-court identification.

B. Sufficiency of the Evidence

Defendant Pippins also argues that the evidence was insufficient to support his convictions because the victim was the only witness who identified him as the shooter, the victim failed to report the incident, and the "alleged factual scenario" was unbelievable. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit great bodily harm less than murder are (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The elements of felony-firearm are that the defendant possessed a firearm during the

commission or attempted commission of a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000); MCL 750.227b.

The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to infer all the necessary elements of assault with intent to commit great bodily harm less than murder and felony-firearm. The evidence, if believed, indicated that defendant Pippins was an active participant in the shooting incident that occurred on July 30. Testimony revealed that, while the victim was sitting in his car, codefendant Smith pulled beside him. At that point, the rear seat passenger opened his door and fired four or five shots at the victim's car. The victim identified defendant Pippins as the shooter.

Although defendant asserts that the victim was incredible and that the "factual scenario does not make sense," the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). This Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra*. Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, the evidence was sufficient to enable a rational jury to conclude beyond a reasonable doubt that defendant Pippins committed the crimes of assault with intent to commit great bodily harm less than murder, and felony-firearm.

II. Docket No. 246632

A. Voir Dire

Defendant Smith argues that the trial court should have sua sponte ordered a mistrial after a prospective juror expressed a "damaging" opinion regarding guns in the presence of the entire jury pool. We disagree.

Because defendant failed to timely raise this claim below,⁵ this Court reviews this unpreserved issue for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During voir dire, a prospective juror stated that he was stabbed and robbed fifteen years previously and that no one was apprehended. The following exchange then occurred:

Trial Court: And you're not blaming Mr. Pippins and Mr. Smith for doing it?

Prospective juror: No.

⁵ Following his convictions, defendant Smith moved for a new trial on this basis, which the trial court denied.

Trial Court: Can you set that aside and be fair?

Prospective juror: Yeah.

The only thing I will say, I don't like guns, and I really do have an opinion about guns, that I just, *I believe if you pull one out, I believe you have an intent to use it.*

That's just my opinion.

Trial Court: Okay. Will you be able to listen to the law that I give you?

Prospective juror: Mm-hmmm.

Trial Court: And could you follow the law I give you even if you may disagree with it?

Prospective juror: Yes.

Trial Court: Okay. And as long as you do that, we got no problem.

Following questions and a motion by defense counsel, the juror was excused for cause. Nonetheless, defendant Smith claims that he was denied his right to a fair and impartial jury because the prospective juror's comments about the use of guns "negatively tainted the jury."

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The jury is required to consider only the evidence received in open court and is not permitted to consider extraneous facts not introduced in evidence. *Id.* A defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89. A reviewing court must closely examine the entire voir dire to determine if an impartial jury was impaneled. *People v Jendrzewski*, 455 Mich 495, 516-517; 566 NW2d 530 (1997). Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id.* at 519.

We are not persuaded that the jury was exposed to extraneous facts. First, defendant has failed to provide any authority for his position that the prospective juror's comments about guns rise to the level of extraneous facts or evidence. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Further, although the jury heard the prospective juror's comments, it is unclear what, if any, negative effect the comments could have had on defendant Smith's case. In this case, there was no issue regarding whether a perpetrator intended to shoot a gun. In addition, the trial court instructed the jury to consider only the evidence properly admitted in court. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, in light of defendant Smith's failure to timely object to the prospective juror's comments, and his satisfaction with the composition of the jury, defendant Smith has failed to establish that the jury was prejudiced by the comments during voir dire. Accordingly, defendant has failed to establish plain error. *Carines, supra*.

B. Ineffective Assistance of Counsel

In a related argument, defendant Smith claims that he was denied the effective assistance of counsel because defense counsel failed to object to the prospective juror's comments and failed to move for a new jury pool. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Because defendant Smith has failed to demonstrate that the prospective juror's comments were prejudicial, he cannot establish his claim of ineffective assistance of counsel. In addition, the trial court's instructions, viewed in their entirety, adequately protected defendant Smith's rights. Therefore, defendant Smith cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Id.* Defendant Smith is not entitled to a new trial on this basis.⁶

C. Prosecution's Failure to Produce an Endorsed Witness

Defendant Smith's final argument is that he was entitled to a mistrial, after the trial court concluded that the prosecution failed to produce an endorsed witness. We disagree.

Because defendant failed to request a mistrial below, this unpreserved claim is reviewed for plain error affecting defendant's substantial rights. *Carines, supra.*

Shanae Williams was an endorsed witness. During trial, the prosecutor informed the court and defense counsel that he had never spoken with the witness and was unable to locate her. Codefendant Pippins' counsel requested a due diligence hearing, and defense counsel acquiesced. In response to the trial court's inquiry, codefendant Pippins' counsel acknowledged that he was "looking for an adverse instruction." Defense counsel did not comment. The prosecutor declined to consent to the instruction and requested a hearing. Following the hearing, the court found that the prosecution did not exercise due diligence and indicated that it would give the adverse witness instruction, i.e., CJI2d 5.12. There were no objections. Defendant Smith now argues that, instead of instructing the jury in accordance with CJI2d 5.12, the court should have ordered a mistrial.

⁶ We note that the prospective juror was excused as a result of defense counsel's motion.

If the prosecution endorses a witness, it is generally obliged to exercise due diligence to produce the witness at trial. MCL 767.40a; *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004); *People v Cummings*, 171 Mich App 577, 583-585; 430 NW2d 790 (1988). If the trial court concludes that the prosecution failed to exercise due diligence, the court should instruct the jury, in accordance with CJI2d 5.12, that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. *Eccles, supra*.

In its final instructions, the trial court instructed the jury in accordance with CJI2d 5.12:

Shanae Williams, [sic] is a missing witness, whose appearance was the responsibility of the prosecution.

You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

The court's instructions cured any prejudice to defendant Smith and adequately protected his rights. *Eccles, supra*. Moreover, because defense counsel acquiesced in the trial court's handling of the matter, any challenge in this regard was waived. *People v Carter*, 462 Mich 206, 214-216, 219-220; 612 NW2d 144 (2000). Consequently, reversal of defendant Smith's convictions is not warranted on this basis. *Id.* at 219-220.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood