

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL AMBERS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 277022

Wayne Circuit Court

LC No. 06-009117-01

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon, MCL 750.82, intentional discharge of a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 14 to 30 years for the assault with intent to murder conviction, one to four years each for the felonious assault and intentional discharge of a firearm at a dwelling convictions, and to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that he did not receive the effective assistance of counsel at trial. This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Such a claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id.* at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

I

Defendant argues that he was denied the effective assistance of counsel because defense counsel elicited damaging testimony on cross-examination, had no apparent defense theory of the case, declined to argue any lesser-included offenses, admitted that defendant was guilty of aiding and abetting, failed to challenge the element of intent required for a conviction for assault with intent to commit murder, and did not argue that defendant's actions were mitigated by events that transpired at an earlier altercation.

As a preliminary matter, we note that defendant's analysis of the first five allegations of ineffective assistance is minimal, and there is a conspicuous absence of any argument regarding the application of relevant law. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Nonetheless, defendant has failed, in each of his first five allegations of error, to overcome the heavy presumption that sound trial strategy motivated defense counsel. Defendant first asserts that his trial counsel was ineffective because counsel elicited damaging testimony from a witness during cross-examination. However, the decision of trial counsel to pursue a line of questioning will not form the basis for an ineffective assistance of counsel claim unless it is impossible to conceive of a valid strategic reason for the questioning, even in light of the possibility that the resulting testimony could be damaging. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

The record reveals that defense counsel attempted to impeach witness Amir Collins with inconsistencies between the statements he provided to the police and his testimony at trial. The inference drawn from defense counsel's questioning of Collins is that counsel was attempting to persuade the trier of fact that Collins's testimony was unreliable, or alternatively, that Collins was fabricating all or part of his testimony. Thus, although trial counsel's questioning of Collins resulted in testimony that was ultimately unfavorable to defendant, because defense counsel's decision to pursue the line of questioning was a matter of trial strategy, this Court will not substitute its judgment for that of counsel regarding this matter. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also asserts that defense counsel failed to articulate a defense theory. However, the record reveals that defense counsel did in fact present a cognizable defense theory. Defense counsel argued that although defendant was present at the time and place of the shooting, the evidence demonstrated that Brandon Jones, and not defendant, shot the victim, and that the inconsistencies between the witnesses' testimony and their prior statements to the police showed that the witnesses freely embellished their recollections of the events at trial. Moreover, defense counsel argued that, under the circumstances, it would have been impossible for the witnesses to actually observe what they claimed to have seen with regard to defendant's participation in the shooting. Defense counsel concluded by arguing that the prosecution had not sustained its burden of proving that defendant possessed a firearm; accordingly, defense counsel asserted that defendant could not be guilty of the charged crimes either directly or as an aider and abetter. Although defense counsel's theory of the case did not result in acquittal on any of the charges, because defendant has failed to demonstrate that defense counsel deprived defendant of

a substantial defense, defendant's argument that his trial counsel was ineffective fails. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant next asserts that his trial counsel failed to argue that the trial court should consider a lesser-included offense. However, defendant's argument is insufficient to overcome the strong presumption that defense counsel's decision was motivated by sound trial strategy. Although an argument that a lesser-included offense could possibly have resulted in defendant's conviction of a less serious crime, it would have been equally possible that such an argument would have made it easier for the trial court to find defendant guilty. Thus, defense counsel's decision to ask for acquittal on all four charges is presumed to have been sound trial strategy.

With regard to defendant's next argument, that defense counsel conceded during closing argument that defendant was guilty of aiding and abetting Jones, the record reveals that counsel actually argued that but for the prosecution's failure to prove that defendant possessed a firearm during the altercation, defendant would be guilty of aiding and abetting. Because the record shows that defense counsel did not make the argument asserted on appeal, defendant's assertion is without merit.

Defendant next contends that defense counsel failed to argue that the prosecution failed to prove the specific intent element of assault with intent to murder charge. However, in closing argument, defense counsel argued:

Finally, I think I have to kind of address the specific intent argument as to Mr. Jones since the theory on that appears to be primarily aiding and abetting. That under the circumstances, while you might have a straight angle on one plane, you do not have a straight angle on another plane. Seeing all the way through from one side of the house to the other, with a ten foot rise, I think that would negate specific intent, even as to Mr. Jones.

Because the record demonstrates that defense counsel did in fact argue that the prosecution failed to prove that Jones possessed the requisite specific intent to commit murder, and because defense counsel was aware that the prosecution's theory was that defendant had aided and abetted Jones, defendant's claim that his counsel was ineffective in failing to contest that the prosecution proved the element of intent lacks merit.

Finally, defendant argues that defense counsel failed to argue that defendant's actions were mitigated by an earlier altercation. However, defendant fails to explain how the earlier altercation could mitigate the subsequent actions of defendant and Jones. Further, there is nothing in the record to demonstrate that either defendant or Jones acted in the heat of passion caused by adequate provocation, or that defendant would have been entitled to invoke the theory of self-defense had he not been an initial aggressor; therefore, circumstances where mitigation could arguably apply are absent from this case. *People v Pouncy*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Because the record does not reveal any basis for defense counsel to have raised a mitigation defense, and because defense counsel is not required to advance a meritless argument, defendant's contention that his trial counsel was ineffective fails.

II

Defendant collaterally attacks the trial court's decision to assess five points under OV 12, MCL 777.42, by asserting he was denied the effective assistance of counsel when counsel failed to object to the score at his sentencing. Had the trial court assessed zero points instead of five points for OV 12, defendant's minimum range would have been 108 to 180 months' imprisonment, and not 126 to 210 months, the actual range under which defendant was sentenced. MCL 777.62. The trial court assessed a total of 80 points under the sentencing guidelines, which placed defendant in OV level V. Had the trial court assessed zero points for OV 12, defendant's total OV score would have dropped to 75, and defendant's score would have consequently fallen within the range of OV level IV. MCL 777.62. The trial court sentenced defendant to 168 months, which is within both the actual and disputed ranges. MCL 777.62.

This Court may review a challenge to a trial court's scoring decision where the defendant claims that his counsel was ineffective in failing to object to a scoring error. *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006).

MCL 777.42 provides, in relevant part:

(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(d) One contemporaneous felonious criminal act involving a crime against a person was committed. . . . 5 points

(e) Two contemporaneous felonious criminal acts involving other crimes were committed. . . . 5 points

* * *

(2) All of the following apply to scoring offense variable 12:

(a) A felonious criminal act is contemporaneous if both of the following circumstances exist:

(i) The act occurred within 24 hours of the sentencing offense.

(ii) The act has not and will not result in a separate conviction.

Here, the record demonstrates that the trial court found defendant guilty as charged on all counts. Moreover, the trial court did not articulate its reasons for assessing five points under OV 12, and the scoring of OV 12 was mentioned at defendant's sentencing only in the context that defense counsel advised the trial court that he did not object to the scoring of OV 12. However, there is sufficient evidence in the record to show that defendant could have been charged with at least one additional count of aiding and abetting assault with intent to murder. 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 Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005), quoting *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). “The intent to kill may be proven by inference from any facts in evidence.” *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999), quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). “A person may have that state of mind without directing it any particular victim.” *Abraham, supra* at 658. “The three elements necessary for a conviction under an aiding and abetting theory are: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

Here, witness Traveil Petties testified that he and Johnson sought shelter in the basement when defendant and Jones approached the house carrying firearms. Petties observed a man outside the west-side window load a shell into a shotgun. Although Petties was unable to identify Jones as the shooter, witnesses Collins, Carl Evans, and Demeshiho Bomer testified that Jones was the man who pointed his gun from the west side of the house. Petties attempted to pull Johnson down the basement stairs when Petties heard the discharge of a gun, and Johnson fell, having been shot.

This record evidence demonstrates that by loading the shotgun and pointing the gun at the window, Jones committed an unlawful act that placed Petties in reasonable apprehension of receiving an immediate battery. Further, a reasonable trier of fact could infer that Jones fired his gun with the intent to kill an occupant of the house when fired his gun through the window of the residence. Moreover, had Jones killed Petties, the killing would have been murder because there was no evidence that Jones was acting with justification or excuse when Jones recklessly shot through the window of the occupied dwelling. See *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007).

The evidence shows that defendant gave aid, encouragement and assistance to Jones when Jones assaulted Petties with the intent to commit murder. Both Collins and Evans testified that defendant proceeded with his gun to the rear of the house before Jones pointed his gun at the west side window of the residence. Collins testified further that he observed defendant discharge a firearm at the house. Thus, defendant aided and abetted Jones when Jones assaulted Petties with the intent to commit murder.

Accordingly, defendant committed at least one contemporaneous felonious criminal act against Petties within 24 hours of the sentencing offense, and that act, aiding and abetting assault with intent to murder, has not and will not result in a separate conviction. MCL 777.42. Accordingly, the trial court correctly assessed five points for OV 12, and an objection by defense counsel to the trial court’s decision to score five points for OV 12 would have been futile. Because an ineffective assistance of counsel claim cannot be premised on defense counsel’s failure to raise a futile objection, defendant’s claim of ineffective assistance on this ground lacks merit. *People v Jordan*, 275 Mich App 659, 668; 739 NW2d 706 (2007).

III

Defendant argues that the evidence was insufficient to demonstrate that defendant possessed the specific intent to kill, which is an element of assault with intent to commit murder. We disagree.

This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

Here, when viewed in a light most favorable to the prosecution, the evidence demonstrates that three men armed with firearms, including defendant, approached a residence on the corner of Bessemore Street and McClellan Street in the city of Detroit. One of the three men, Brandon Jones, positioned himself at the McClellan side of the dwelling, and defendant proceeded to the rear of the house. Jones raised his firearm at the window on the McClellan side of the house. One witness, Tiffany Larkin, testified that Jones fired at least one shot at the house. Another witness, Collins, testified that he saw both defendant and Jones fire guns at the house. A reasonable inference a rational trier of fact could draw from this testimony is that if the witnesses could see defendant and Jones, defendant and Jones could see the witnesses; therefore, both defendant and Jones knew the dwelling was occupied when Jones, or both defendant and Jones, fired through the windows of the house. Both the side window where Jones pointed his weapon, and the rear window sustained damage attributable to a firearm. Finally, Terrance Johnson sustained a non-fatal gunshot wound to the head.

This evidence demonstrates that Jones discharged a firearm at an occupied dwelling, and as a result, Johnson sustained a gunshot wound. From these facts a rational trier of fact could infer the actual intent to kill from Jones's willful disregard of the possibility that death or great bodily harm could result by firing his gun through the window of the Bessemore Street house. *Abraham, supra* at 658. When viewed in a light most favorable to the prosecution, this evidence and the inferences that may reasonably be drawn from it, demonstrates that Jones committed an assault with the actual intent to kill. *Robinson, supra* at 6.

Under an aiding and abetting theory, the prosecution was then required to show that defendant "performed acts that assisted in the commission of the crime," and that defendant "intended the commission of the crime at the time" defendant "gave aid and encouragement." *Robinson, supra* at 6. Resolving any conflicts in the evidence in the prosecution's favor, a rational trier of fact could infer that defendant aided and abetted Jones in shooting Johnson from the evidence that defendant proceeded with his gun to the rear of the house while Jones fired the shot through the McClellan side window of the house. This conclusion is supported by Collins's testimony that he observed defendant discharge a firearm at the house, and evidence that both the

side window where Jones was standing and the rear window where defendant was standing sustained damage from gunshots. A rational trier of fact could also infer from this evidence that defendant aided and abetted Jones when Jones assaulted Johnson with the intent to commit murder. *Robinson, supra* at 6. Accordingly, the evidence was sufficient to support defendants' conviction of assault with intent to commit murder.

IV

Lastly, defendant argues that the trial court improperly assessed ten points for OV 4 because there was no evidence that the victim suffered serious psychological injury. We disagree.

This Court reviews a trial court's scoring decision under the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The construction and application of the sentencing guidelines presents a question of law that is reviewed de novo. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

Ten points are allocated under MCL 777.34(2) where "serious psychological injury" to a crime victim "may require professional treatment." Moreover, "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). If there is evidence in the record to show that the victim was fearful during the incident, ten points are properly assessed under OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). This Court will affirm a scoring decision, provided that there is any evidence in the record supporting the decision. *Hornsby, supra* at 468.

Here, the record reveals that Johnson was shot in the head. Johnson testified that the gunshot wound worsened his memory and rendered him unable to work. The trial court had the opportunity to observe the demeanor of Johnson and hear his description of events, and reviewed the relevant medical records. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005) (holding that it was not an abuse of discretion for the trial court to assess ten points under OV 4 where the trial court reviewed a videotape of a criminal sexual conduct incident and was able to observe the demeanor of the victims). In light of the fact that Johnson was shot in the head and suffered at least some memory loss attributable to the gunshot wound, the evidence is adequate to support a finding that Johnson sustained a serious psychological injury that may require professional treatment in the future. Accordingly, the trial court did not abuse its discretion in scoring OV 4.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra