

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 15, 2018

v

DAYQUAN MARTELL JACKSON,

Defendant-Appellant.

No. 336745
Wayne Circuit Court
LC No. 16-002137-01-FC

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant, Dayquan Jackson, appeals as of right his bench trial convictions of assault with intent to commit murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ He was sentenced to serve concurrent sentences of 10 to 20 years for assault with intent to commit murder and one to five years for carrying a concealed weapon and a consecutive sentence of two years for felony-firearm. Because there was sufficient evidence to support his conviction and because Jackson's trial lawyer did not provide ineffective assistance, we affirm.

I. BASIC FACTS

Around midnight on January 16 or 17, 2016, Dayvonta Winston was shot in the face and in the hand after a grey vehicle pulled up on the right side of his vehicle while he was stopped at a traffic light. Winston testified that just before the shooting, he had looked at the vehicle to his right. He identified Jackson as sitting in the front passenger seat. According to Winston, Jackson raised the gun, so he turned away and was shot. Winston fled his vehicle and headed to a nearby gas station. When the police arrived, he identified Jackson as the individual who shot him. The police collected a number of .40 caliber shell casings from the street, but were unable to recover the gun that fired the shots.

¹ Jackson was acquitted of discharging a weapon from a vehicle causing serious impairment, MCL 750.234a(1)(c) because the factfinder found that there was insufficient evidence of a serious impairment of a body function.

In addition to testimony about the shooting itself, the prosecution presented testimony about the events leading up to the shooting. Winston testified that he had known Jackson for at least five years, and he stated that his sister had been dating Jackson for about a year before the shooting. Winston explained that in the hours before the shooting, Jackson had called him and told him to pick up his sister, who lived with Jackson and Jackson's grandmother. When he arrived at the house, his sister and Jackson were having a verbal altercation. The record reflects that they may have also had a physical altercation either as Winston was arriving or before he arrived. Winston took his sister and left. Later that night, Jackson called him and Winston told him that he was at a house on Lamphere, Street in Detroit, Michigan. About 30 minutes later, Winston stated he saw Jackson pull up in a four-door grey car. He stated that Jackson spoke to him aggressively with what he characterized as "fighting words" and then left. The shooting occurred shortly thereafter.

Jackson presented testimony from Jalen Harper, who testified that he knew Winston and Jackson. He first testified that he was at the house on Lamphere Street with Winston, and stated that Jackson never drove by them while he was there. He also testified that, later that night, he was in the vehicle in front of Winston's when he saw a four-door vehicle pull alongside Winston's vehicle. He testified that the light then changed color, so he drove through it. He then heard gunshots and saw the four-door car drive past. He stated that he was 100% positive that Jackson was not in the driver's seat or the front passenger's seat. Jackson also presented testimony from his grandmother, who testified that she was awake until around 2:00 a.m., and that Jackson had never left the house that night. Jackson's mother also testified that Jackson was still at his grandmother's house when she left it around midnight. Jackson's mother's husband testified similarly. In addition, during closing argument, Jackson's lawyer argued that based on where the shell casings were located, it would have been impossible for the shots to have been fired from the passenger side of the grey vehicle.

II. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Jackson argues that his trial lawyer provided ineffective assistance because he did not call a firearms expert. "When no *Ginther*² hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. ANALYSIS

A defendant can establish that his lawyer provided ineffective assistance by showing (1) his defense lawyer's decision fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that in the absence of the unprofessional error the outcome of proceedings would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Mich 864 (2012). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court presumes that the defendant’s lawyer provided effective assistance, and the “defendant bears a heavy burden of proving otherwise.” *People v Putman*, 309 Mich App 240, 247-248; 870 NW2d 593 (2015).

Jackson argues that his lawyer should have called an expert witness in support of his theory that, based on the location of the recovered shell casings, it would have been impossible for the shooter to have fired from the passenger side of the vehicle. During closing argument, in addition to challenging the credibility of the prosecution’s key witnesses and arguing in favor of the credibility of Jackson’s alibi witnesses, Jackson’s lawyer emphasized the logistics of the scene before the shooting. Winston’s car was in the left travel lane and the shooter’s vehicle was in the right travel lane, which meant a shooter in the passenger seat of the shooter’s car would have had to fire through the driver’s seat of his vehicle and the passenger seat of Winston’s vehicle in order to shoot Winston. He then argued:

What’s important to remember here and I didn’t quite think about this until I was looking at People’s Exhibit Number 2, is where the casings are in the street. Now if you believe him, and I apologize to the court reporter for this because I’m going to be pointing my hand in his direction like I have a gun. But you’ve got the driver here on this side of the car in the sedan and the passenger is seated over here like Mr. Winston claims, and Mr. Winston is over there in that car and you have supposedly allegedly the prosecution’s theory is that the passenger is shooting over there. His casing would have fallen inside the car.

We have four casings on the street, your Honor; which suggests to me common sensically if anybody was shooting out of that car it would have been the driver with his hand extended outside the car for shell casings to be [sic] have ejected on the street.

* * *

The physical evidence totally undercuts [the prosecution’s theory]. It’s clear to me that whoever was shooting was on the drivers’ side of the car in that sedan because the casings are out on the street. Had the passenger, like I said earlier, been shooting the casings would have been ejected inside the car because the passenger is shooting over from the other side of the car. The gun would not have been outside the car.

Here, arguably, the performance by Jackson’s lawyer fell below an objective standard of reasonableness. Testimony from an expert witness that the shooter had to have fired from outside the driver’s side of the vehicle in order for the shell casings to have ended up on the street would have cast additional doubt on Winston’s credibility. Even though Jackson’s lawyer presented a strong alibi defense and eyewitness testimony directly contradicting Winston’s

identification of Jackson as a passenger in the shooter's vehicle, the addition of an expert witness interpreting the physical evidence at the scene would have likely strengthened the defense.³ And, given the admission by Jackson's lawyer that he did not think about the significance of the physical evidence until the case was being tried, it cannot reasonably be argued that Jackson's lawyer declined to call an expert as part of his trial strategy.

Nevertheless, even if Jackson's lawyer erred by not calling an expert witness, Jackson cannot establish that there is a reasonable probability that the outcome would have been different had an expert been called. The trial court chose not to credit Harper's testimony that Jackson was not in the grey vehicle because the court found Winston's eyewitness identification testimony was credible. Winston testified that he had known Jackson for about five years and saw him two times before the shooting: first at Jackson's grandmother's house and then in a grey-four door vehicle a short time before the shooting. He also testified that just before he was shot, he saw Jackson raise a gun while seated in the passenger seat of a grey vehicle that had pulled up beside him. After the shooting, Winston told police that he knew the person that shot him and that it was Jackson. Winston also identified defendant as the shooter in court.

Further, Jackson's lawyer elicited testimony from a responding police officer that the only casings he found were in the street near the scene of the crime. Jackson's lawyer relied on this evidence to argue in his closing argument that the bullet casings would have fallen in the shooter's car, not on the street, had the passenger been the person shooting at Winston. Thus, although not supported by an expert witness, the bullet-casings defense was before the trial court and was supported by reasonable inferences drawn from the evidence presented. Despite that evidence and Jackson's lawyer's argument, the trial court convicted Jackson of shooting Winston on the basis of Winston's identification. Given that the trial court credited Winston's identification of Jackson as the shooter, we conclude that the result of the proceedings would not have been different had Jackson introduced testimony from a firearms expert to bolster the bullet-casings defense.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Jackson argues that there was insufficient evidence to support a finding that he was the shooter. This Court reviews de novo a challenge on appeal to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

³ Although a defendant may not expand the record on appeal, this Court notes that in support of his motion for a remand for a *Ginther* hearing, Jackson attached an affidavit from an expert witness who averred that he would have testified that the shooter had to have fired out of the driver's side of the vehicle. Thus, this is not a case where the defendant only offers speculation that an expert would have testified favorably had one been called.

B. ANALYSIS

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) (citation and quotation marks omitted). Identity is an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Positive identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve, and this Court will not resolve it anew. *Id.*

Jackson challenges only the identification element. He asserts that there was no direct evidence regarding who shot Winston because Winston never testified that he actually saw Jackson shoot at him. Jackson further asserts that the prosecution failed to present any physical evidence including fingerprints, DNA, a gun, or matching ballistics connecting him to the incident. However, direct evidence is not necessary. “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted). Here, Winston testified that a vehicle pulled up beside him, he saw Jackson in the front passenger seat, Jackson raised a gun, and then, after Winston looked away, he was shot in the face and the hand. Viewed in the light most favorable to the prosecution, this evidence allows for a reasonable inference that Jackson shot Winston. See *Hawkins*, 245 Mich App at 457. For the same reasons, there is no merit to Jackson’s claim that the trial court erred by denying his motion for a directed verdict because there was insufficient evidence identifying him as the shooter. See *People v Schrauben*, 314 Mich App 181, 198; 886 NW2d 173 (2016) (stating that a challenge to a court’s decision on a motion for directed verdict is reviewed in the light most favorable to the prosecution to determine whether the essential elements of the crime were proven beyond a reasonable doubt).

Finally, Jackson contends that the trial court erred when it rendered an inconsistent verdict in this bench trial. He argues the verdict was inconsistent because the court found him guilty of assault with intent to commit murder but not guilty of discharging a firearm from a vehicle causing serious impairment. In order to convict a defendant of discharging a firearm from a vehicle causing serious impairment, the prosecution must establish that the discharge of the firearm caused serious impairment of a body function as that term is defined in MCL 257.58c. The court found that element was not met. That does not equate to a finding that Jackson did not discharge a firearm from a vehicle, however. As such the verdicts are not inconsistent.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Patrick M. Meter