

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 24, 2018

v

DONELL CHRISTOPHER THOMPSON,
Defendant-Appellant.

No. 338660
Wayne Circuit Court
LC No. 15-008123-01-FC

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant, Donell Thompson, appeals as of right his jury convictions of second-degree murder, MCL 750.317, and assault with intent to commit murder, MCL 750.83.¹ The trial court sentenced Thompson to prison terms of 30 to 60 years for the murder conviction and 25 to 50 years for the assault conviction, to be served concurrently. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

Thompson's convictions arise from an August 20, 2015 drive-by shooting on Elmdale Street in Detroit. Witnesses testified that a black vehicle, identified by several witnesses as a Grand Prix, drove down Elmdale Street, passing Eric Carter, who was seated in his parked vehicle, and Sandra Bradford, who stood outside the vehicle talking to Carter. The Grand Prix made a U-turn, and the front-seat passenger reached out the window with a gun and fired multiple shots. Carter, who was struck by approximately 10 bullets, survived the assault. However, Bradford, who was shot in the back, died as a result of the shooting.

The police suspected that Carter was the target of the shooting because he and several other individuals were named as defendants in a federal indictment charging them with conspiracy to deliver narcotics. As a result, the police assembled photographs of Carter's known associates in an attempt to identify the shooter and driver of the vehicle. The police started

¹ The jury acquitted Thompson of first-degree premeditated murder, MCL 750.316(1)(a), and an additional count of assault with intent to commit murder.

investigating Thompson after receiving an anonymous tip that he was the driver of the vehicle used to perpetrate the shooting. Additional photographic lineups were conducted using his photograph, and two eyewitnesses, Patricia Howard and MB,² identified Thompson as the driver.

Thompson was arrested and charged with first-degree premeditated murder and two counts of assault with intent to commit murder. The police were able to link him to the area the shooting occurred by using cellular phone records associated with Thompson's phone number. They also searched a black Grand Prix associated with Thompson and discovered an "empty nine millimeter 30-round magazine" and five cellular phones in the vehicle. In addition, at trial, an inmate who had been lodged with Thompson, Kevin Corley, testified that Thompson told him that he had been charged in relation to a shooting on the east side of Detroit. Corley recounted that Thompson stated that a person named Dorian "Smoke" Calhoun paid him \$25,000 to kill someone, that he had received half the payment before the shooting, and that he drove a black Grand Prix while his friend, Lominelle Jackson,³ fired the gun. Like Carter, Calhoun was a defendant named on the federal indictment. The police and prosecution theorized that Carter was the target of the shooting because of his involvement in the federal narcotics case.

Thompson presented evidence challenging the eyewitnesses' identification testimony by pointing out discrepancies between his appearance and that their descriptions of the driver, inconsistencies between their various statements, and their ability to accurately see the driver given the time and distance involved. He also testified about his whereabouts throughout the day. With regard to Corley's testimony, Thompson asserted that he had been hospitalized after he received his discovery packet, and he contended that Corley must have used that information in order to turn informant and get a better sentencing deal in his own case.

II. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Thompson argues that his lawyer was ineffective for failing to present expert testimony to undermine the accuracy and reliability of the eyewitness identification testimony. Because Thompson did not raise this claim in either a motion for a new trial or request for a *Ginther*⁴ hearing in the trial court, our review is limited to errors apparent on the record. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015).

B. ANALYSIS

In order to establish error warranting relief, Thompson must show that his lawyer's decision fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional error, the outcome of his

² MB was 13 years old at the time of the shooting.

³ The record reflects that Jackson was listed as a contact in Thompson's phone.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

trial would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. In reviewing the issue, this Court may not second guess a defense lawyer on matters of trial strategy or assess his or her competence with the benefit of hindsight. *People v Foster*, 319 Mich App 365, 391; 901 NW2d 127 (2017). Further, the defendant must establish the factual predicate for his or her claim. *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). It is presumed that a defendant's lawyer provided effective assistance, and the defendant bears the burden of proving otherwise. *People v Blevins*, 314 Mich App 339, 351; 886 NW2d 456 (2016).

Thompson argues his lawyer provided ineffective assistance because he did not retain an expert witness on eyewitness identification. Decisions regarding which witnesses to call and how to question witnesses are presumed to be matters of trial strategy. *Jackson*, 313 Mich App at 432. Here, Thompson's lawyer extensively cross-examined the eyewitnesses to the shooting regarding their identifications of Thompson as the driver. The record reflects that Thompson's lawyer impeached Howard's identification testimony by challenging her ability to see the driver, her descriptions of the driver's facial hair, and by pointing to inconsistencies between her trial testimony and prior statements and prior testimony. Thompson's lawyer also thoroughly inquired into MB's response to the photographs the police showed him, his alleged identification of one of these subjects, and inconsistencies in his description of the shooter. Further, Thompson's lawyer challenged the police investigators to explain why they did not investigate the person in the photograph that MB allegedly identified. In addition, Thompson's lawyer presented testimony and photographs showing that, at the time of the shooting, Thompson did not have braids, which further impeached the identification testimony to the extent that the eyewitnesses recounted that the driver had braids.

Accordingly, on this record, we cannot conclude that Thompson's lawyer was ineffective for failing to present expert testimony on eyewitness identification where the lawyer's defense strategy was to impeach the witnesses using inconsistencies in their statements, discrepancies in descriptions, distance, the amount of time each witness had to make an observation, and the witnesses' confidence in their identification. See *Blevins*, 314 Mich App at 351 (rejecting a claim that a defendant's lawyer was ineffective for failing to present expert testimony on eyewitness identification where the defendant's lawyer adopted a strategy of impeaching witnesses "on issues of intoxication, lighting, distance, discrepancies in descriptions, and the amount of time each witness had to make an observation"). In *Blevins*, this Court explained that even though expert testimony on eyewitness identification may be helpful and that a defendant's lawyer could have conceivably done more, the fact that a particular strategy failed does not mean that the lawyer provided ineffective assistance. *Id.* Thompson has, accordingly, failed to establish that his trial lawyer's performance was deficient.

III. FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

A. STANDARD OF REVIEW

Thompson next argues that his right to due process was violated because the police and the prosecution suppressed exculpatory evidence. Thompson contends that MB purportedly identified someone other than him as the driver of the vehicle during an early photographic lineup. During trial, the trial court denied his motion for dismissal on this basis. Due process

claims—including an alleged violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)—are reviewed de novo on appeal. *People v Dimambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016).

B. ANALYSIS

A defendant's due process right to evidence has been recognized in cases such as *Brady*, 373 US 83, and *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). A criminal defendant has a due process right to obtain exculpatory evidence possessed by the state if it would raise a reasonable doubt about the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). In *Brady*, 373 US at 87, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." However, in *Youngblood*, 488 US at 58, the Court held that the failure to preserve potentially useful evidence does not constitute a denial of due process absent a showing of bad faith by the police. To establish a *Youngblood* violation, "the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996).

In this case, Thompson has not demonstrated either that the prosecution failed to disclose exculpatory evidence or that the police acted in bad faith by failing to preserve the name of the person who was the subject of MB's comment. It is undisputed that MB's interview was recorded and that the recording of the interview was provided to Thompson. Although not all of MB's statements on the recording are discernable, there is no record support for Thompson's claim that MB made an *exculpatory* identification. One police officer testified that "the pointing out of the individual was not a specific identification of the person. And [MB] was unsure as if he, where he recognized the person." Another officer testified that MB "said that guy looks familiar," but he "could not expound upon why he looked familiar" and "then he started saying what was different about the guy." At both the preliminary examination and at trial, MB denied that he recognized or identified anyone in the computer photographs as the driver of the car involved in the shooting. Thus, regardless of the exact nature of the comment MB made, it is clear that the police did not view it as an identification of a suspect.

Moreover, the police did not have any motive to suppress the "identification" because, at the time of the interview, the police were unaware of Thompson and had not identified any other suspects. Thus, the record establishes that the officers made a good-faith determination that MB's remark was not useful in identifying a suspect. The remark did not inculcate the subject of the photograph, nor did it exculpate Thompson. Therefore, Thompson has not satisfied the first two requirements for establishing a *Youngblood* violation. The third element, the defendant's inability to obtain comparable evidence, is at best only partially established because Thompson was provided with a videotape of MB's interview, the computer photographs, and the names of the subjects in the photographs. In other words, there was a finite number of identified people who MB could have been referring to with his comment that one of the persons looked familiar. For these reasons, we reject this claim of error.

IV. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Thompson challenges the sufficiency of the evidence in support of his identification as the driver of the vehicle involved in the drive-by shooting. “Appeals regarding the sufficiency of the evidence are reviewed de novo.” *People v Henderson*, 306 Mich App 1, 8; 854 NW2d 234 (2014). “In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *Id.* at 9. This Court “must not interfere with the jury’s role” in deciding the weight of evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

B. ANALYSIS

Thompson does not dispute that the evidence was sufficient to prove that the driver of the suspect vehicle was guilty of second-degree murder⁵ and assault with intent to commit murder⁶ under an aiding or abetting theory.⁷ His challenge to the sufficiency of the evidence pertains only to whether the evidence was sufficient to establish his identity as that driver. Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 354; 749 NW2d 753 (2008). “This Court will not interfere with the jury’s role of determining the weight of the evidence or deciding the credibility of the witnesses,” including the credibility of identification testimony. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

⁵ “[T]he elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.” *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007).

⁶ “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 McRunels*, 237 Mich App 168, 181; 603 NW2d 95, 102 (1999).

⁷ “Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” MCL 767.39. To support defendant’s conviction pursuant to an aiding or abetting theory of guilt, the prosecutor had to show that (1) defendant or some other person committed the crime charged, (2) defendant performed acts or offered encouragement that assisted the crime’s commission, 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) (quotation marks and citation omitted). “An aider and abettor’s state of mind may be inferred from all the facts and circumstances.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

Substantial evidence linked Thompson to the crime. Howard identified Thompson as the driver of the vehicle involved in the shooting. MB also identified Thompson as the driver, but then equivocated when asked if he presently thought Thompson was the driver. A jailhouse informant testified that Thompson confessed his involvement in the offense and admitted that he drove the car while his passenger, Lominelle Jackson, fired the gun. Thompson also told the informant that Dorian Calhoun—another defendant in the federal indictment—paid Thompson to kill Eric Carter. The informant’s testimony regarding Jackson and a person known as Savage was corroborated by evidence that persons with those names were listed as contacts on Thompson’s phone. Further, cellular phone records confirmed that Thompson was in the Elmdale neighborhood at the time of the shooting. Finally, the police found a 30-round nine-millimeter magazine in Thompson’s black Grand Prix, which was consistent with the discovery of 26 nine-millimeter shell casings at the location of the shooting. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish Thompson’s identity as the driver.

V. RIGHT TO PRESENT DEFENSE

A. STANDARD OF REVIEW

Thompson finally argues that the trial court violated his constitutional right to present a defense when it restricted his cross-examination of Eric Carter and disallowed questioning about the federal drug charges. “This Court reviews for an abuse of discretion the trial court’s decision to admit or exclude evidence.” *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014). “The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law.” *Id.* “This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense.” *People v Powell*, 303 Mich App 271, 277; 842 NW2d 538 (2013) (quotation marks and citations omitted).

B. ANALYSIS

The United States Constitution provides criminal defendants with the right “to present a complete defense.” US Const, Ams VI, XIV; *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). However, “[t]he right to present a complete defense ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’ ” *King*, 297 Mich App at 473, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). “Thus, an accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ ” *King*, 297 Mich App at 474 (quotation marks and citation omitted).

In general, all relevant evidence is admissible and evidence that is not relevant is not admissible. MRE 402. “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Nonetheless, relevant evidence may be excluded under MRE 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Thompson contends that the perpetrator was motivated to kill Carter because Carter was a subject of a multi-defendant federal narcotics indictment. When cross-examining Carter, Thompson's lawyer elicited testimony that Carter recognized the federal indictment and that Carter's twin brother (who was also named in the federal indictment) was fatally shot in November 2015. The trial court, however, did not permit Thompson to question Carter about the specific circumstances of his brother's death or whether a suspect had been arrested in connection with it. Further, he was not allowed to inquire into whether Carter had cooperated with federal authorities against any of the other defendants in the federal case or if he had stolen from his codefendants. If permitted, that testimony, at best, would have suggested that someone named on the federal indictment had a motive to kill Carter. However, given that the jailhouse informant testified that Thompson admitted to him that someone named on the federal indictment had, in fact, paid Thompson to kill Carter, the trial court's decision to limit cross-examination on this topic, was not an abuse of discretion and did not violate Thompson's right to present a defense.⁸

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

⁸ Thompson also argues he was deprived of his right to present a defense because his lawyer was prohibited from inquiring into Carter's involvement with the Ravendale gang and other criminal activity. However, as he has not even speculated what that testimony might have been or how it might have affected his defense, we find this claim without merit. Moreover, we note that, as a defendant named on a current federal indictment, Carter would have been free to invoke the Fifth Amendment to halt any such questions.