

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNY DANCY,

Defendant-Appellant.

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UNPUBLISHED

April 22, 2021

No. 352300

Wayne Circuit Court

LC No. 19-002512-01-FC

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f(1), carrying a concealed weapon (CCW), MCL 750.227, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant challenges the sufficiency and weight of the evidence supporting his convictions, the sanctity of his jury, and errors in the judgment of sentence. We remand for the limited purpose of modifying defendant’s judgment of sentence to specify that his CCW sentence is to be served concurrently with the felony-firearm sentences, and affirm in all other respects.

**I. BACKGROUND**

Defendant’s convictions arise from parental concern gone too far. Upon learning that his teenaged daughter was sneaking to her boyfriend’s house for late-night trysts, defendant decided to make an armed visit to the teen’s home. Defendant drove to the home, parked in the street, and walked toward the door. Eighteen-year-old Damonte Muex was sitting in a car outside with a friend. He exited the vehicle to speak to defendant. Defendant accused Damonte of having intercourse with his daughter, but Damonte denied knowing her. Defendant demanded to speak to an adult. Before an adult could be found, defendant returned to his vehicle and drove away.

Defendant returned on foot a few minutes later. Damonte summoned his 20-year-old brother Damon for assistance. The men argued and defendant telephoned his daughter to confirm that Damonte was her boyfriend. After the call, defendant became angrier. He threatened to “Swiss cheese this bitch up.” Damonte retorted that defendant would not make such threats if the boys’ father was around. Defendant pulled out a handgun and pointed it at Damonte. Damonte

ran toward the house. He heard four to five shots, turned around, and saw Damon lying on the ground. Defendant had shot Damon several times in the torso.

Damon survived the shooting. A week later, Damon and Damonte both identified defendant in a photo lineup. They also testified before a grand jury and described how defendant confronted them in their front yard and then shot at them. At the trial 10 months later, however, both brothers claimed they could not remember the details of the shooting, did not remember their grand jury testimony, and could not identify defendant as the shooter. The court permitted the prosecution to present the brothers' grand jury testimonies to impeach their trial testimonies. The prosecution also presented the testimony of Arveyon Stevenson (Damonte's friend who was at the scene) and Ena Luchie (a neighbor who assisted Damon after the shooting).

The prosecution charged defendant with two counts of assault with intent to commit murder, felon-in-possession, CCW, and three counts of felony-firearm. The defense theory at trial was that defendant was misidentified as the shooter and that Damon's and Damonte's earlier identifications were not credible. The jury acquitted defendant of assault and the connected charge of felony-firearm in relation to Damonte, but convicted defendant of the remaining charges.

## II. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

Defendant challenges the sufficiency and weight of the evidence presented by the prosecution at trial. Specifically, defendant challenges the evidence supporting his identity as the shooter and that he harbored an intent to commit murder.

We review de novo a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the prosecution to determine whether a rational fact-finder could find the elements of the offense proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "All conflicts in the evidence must be resolved in favor of the prosecution, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *People v Solloway*, 316 Mich App 174, 180-181; 891 NW2d 255 (2016) (citations omitted).

We also review for an abuse of discretion a trial court's decision denying a motion for a new trial. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A defendant is entitled to a new trial when the verdict is against the great weight of the evidence, meaning that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (quotation marks and citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. *Lemmon*, 456 Mich at 642-643.

### A. IDENTIFICATION

Identity is an essential element in any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identification can be established through eyewitnesses or through circumstantial evidence. *People v Sullivan*, 290 Mich 414, 418; 287 NW 567 (1939);

*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. *People v Dunigan*, 299 Mich App 579, 582, 584; 831 NW2d 243 (2013).

Damon and Damonte unequivocally identified defendant as the shooter six days after the shooting, both through a photographic lineup and in their grand jury testimonies. During the grand jury hearing, the brothers described that they stood face-to-face, within arm's reach of their assailant, and were certain of their identification of defendant. At trial, the brothers tried to recant their earlier testimony, claiming that they could not identify the shooter and identified defendant during the photographic lineup under duress. However, they also asserted that their grand jury testimonies were truthful.

Damon's and Damonte's earlier identifications of defendant as the shooter, standing alone, were sufficient to support defendant's convictions. Their belated attempts to avoid accusing defendant did not destroy the credibility of those earlier identifications such that defendant would be entitled to a new trial based on the weight of the evidence. Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Lemmon*, 456 Mich at 643. Moreover, a jury is free to believe all, none, or part of a witness's testimony. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The jury heard the prosecution witnesses' testimonies and was aware of the inconsistencies and discrepancies between their trial and grand jury testimonies. Defense counsel cross-examined the witnesses at length, clearly emphasizing these matters, and challenged Damon's and Damonte's credibility in closing argument. A reviewing court must defer to the jury's determination of credibility "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or [it] contradicted indisputable physical facts or defied physical realities[.]" *Id.* at 644-646 (quotation marks and citation omitted). That is not the case here.

As additional support for defendant's identification, the prosecution presented evidence that Damonte was involved with defendant's daughter, and that defendant was upset about her being at Damonte's house late at night. This evidence established a connection between the parties and provided defendant a motive for his actions. It also supports the reliability of the eyewitnesses' identifications of defendant. Defendant is not entitled to relief on this ground.

## B. ASSAULT WITH INTENT TO COMMIT MURDER

Defendant also challenges the sufficiency of the evidence supporting that he harbored an intent to kill. Assault with intent to commit murder requires proof that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). A jury may infer an intent to kill from the manner and use of a dangerous weapon and the defendant's motive. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

Viewed in the light most favorable to the prosecution, there was sufficient evidence to establish that defendant acted with an intent to kill. Defendant had motive to attack Damonte and his brother—the safety and reputation of his teenaged daughter. Record evidence supported that defendant’s confrontation with the brothers escalated, and that defendant became “[o]verly hostile, very intimidating.” Defendant then pulled a handgun from his pocket, racked it, pointed it at Damon, and fired at least five shots before Damon fell to the ground. From the ground, Damon saw defendant “extending, shooting at [Damonte],” “at least four to five shots.” After the shooting, defendant calmly walked away. Although Stevenson and Luchie did not identify defendant, they did testify that the shooter aimed his gun and fired several shots. Considering evidence that defendant pointed his firearm at Damon and fired it, striking Damon multiple times, a jury could rationally infer that defendant acted with an intent to kill.

### III. JUROR MISCONDUCT

Defendant also argues he is entitled to a new trial because two jurors independently researched grand-jury proceedings and shared the information learned with their fellow jurors.

Consistent with a defendant’s right to a fair and impartial jury, “jurors may only consider the evidence that is presented to them in open court.” *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To establish that extrinsic influence requires reversal, a defendant has the initial burden to prove that: (1) the jury was exposed to an extraneous influence, and (2) the extraneous influence “created a real and substantial possibility” that it could have affected the jury’s verdict. *Id.* at 88-89. To do so, the defendant must show that the extraneous influence is “substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.* at 89. In determining whether extrinsic information created a “real and substantial” possibility of prejudice, a court may also consider the following factors:

(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Id.* at 89 n 11 (quotation omitted).]

If a defendant meets this initial burden, the burden shifts to the prosecution, which must demonstrate that the error was harmless beyond a reasonable doubt. *Id.* at 89.

The trial court did not err by finding that defendant failed to meet his burden. Defendant presented no admissible evidence to support his argument. Defendant relies on an affidavit from an intern of trial counsel’s law firm, in which the intern avers that after the jury was discharged, two jurors stated that they researched grand-jury proceedings, saw that a grand jury consists of 12 to 24 jurors, shared this information with other jurors, and that one of the jurors indicated that this information affected his decision. However, the affidavit of trial counsel’s intern is inadmissible hearsay, see *id.* at 92 n 14, and defendant has not provided an affidavit from either juror who allegedly conducted this independent research, or from any juror who allegedly was a recipient of this information.

Moreover, absent information directly from the subject jurors, the court could not consider the various factors outlined in *Budzyn* to determine if the independent research of the two jurors created a real and substantial possibility of prejudice. Such information could have been obtained and settled the matter. We may not speculate that reversal is required on this record.

#### IV. JUDGMENT OF SENTENCE

Finally, defendant correctly notes that the trial court erroneously provided in the judgment of sentence that his felony-firearm sentences would be served consecutively to his sentence for CCW.

“In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.” *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (quotation marks and citation omitted). MCL 750.227b(3) requires that a defendant serve a sentence for felony-firearm consecutive only to the sentence for the predicate felony. When a defendant is convicted of multiple felonies, a court is not permitted to order a felony-firearm sentence to be served consecutive to all sentences for other convictions. *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).

Defendant was convicted of two counts of felony-firearm predicated on his assault and felon-in-possession convictions. Defendant was neither charged with nor convicted of felony-firearm predicated on his CCW conviction. Indeed, the felony-firearm statute specifically precludes CCW from serving as the underlying felony for a felony-firearm offense. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). Accordingly, the trial court clearly erred in making defendant’s felony-firearm sentences run consecutive with his CCW sentence. We remand for the limited purpose of correcting this error.

We affirm defendant’s convictions, but remand for the limited purpose of modifying defendant’s judgment of sentence to specify that his CCW sentence is to be served concurrently with his felony-firearm sentences. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Stephen L. Borrello

/s/ Brock A. Swartzle