

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

CARLOS LAMONT HICKS,

Defendant-Appellant.

No. 298126
Wayne Circuit Court
LC No. 09-029908-FC

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Carlos Lamont Hicks of shooting Dorain Williams. Despite that Williams had known defendant for over a decade and specifically identified defendant as his shooter, defendant challenges the sufficiency of the evidence supporting his convictions. Defendant also challenges trial counsel's failure to object to another eyewitness's courtroom identification of defendant as the shooter. And defendant claims that his minimum sentence of 20 years' imprisonment is a disproportionate, cruel and unusual punishment even though his sentence falls squarely within the minimum sentencing guidelines range. As these challenges completely lack merit, we affirm.

I. BACKGROUND

On August 1, 2009, Douglas Buchanan was killed in the City of Detroit. In the late morning of August 2, 2009, Williams, Buchanan's long-time friend, went to pay his respects at the home of Buchanan's parents, Phyllis and Jerry Adams. Defendant is the father of the Adams' granddaughter, the late-Buchanan's niece, and was also at the Adams' home that day. Williams testified that defendant exited the house and walked past him, but did not acknowledge Williams' presence. Defendant seemed very emotional and Williams saw him head down the street and stop to talk to a man named "Jeffrey." Williams indicated that he and Jeffrey had been friends in the past but had a "falling out."

Williams remained in the Adams' front yard and stood talking to Jerry Adams. Williams testified that Jerry suddenly threw his hands out and widened his eyes. This prompted Williams to turn around. At that point, Williams saw defendant approaching him holding a black gun. Defendant shot Williams in the hip and Williams fell to the ground. When Williams asked defendant why he shot him, defendant replied, "[Y]ou should of did something." Defendant pursued Williams as he tried to take cover by a vehicle in the Adams' driveway. Defendant shot

Williams six times on his lower body before his gun jammed. Williams was then able to escape and encountered an acquaintance that drove him to the hospital.

A jury convicted defendant of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 20 to 48 years' imprisonment for the assault conviction and two to five years' imprisonment for the felon in possession conviction, to be served consecutive to a two-year term imprisonment for the felony-firearm conviction.

II. SUFFICIENCY OF THE EVIDENCE

Defendant claims that the prosecution presented insufficient evidence to prove his identity as the perpetrator of the charged offenses. When reviewing a defendant's challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). A prosecutor need not present direct evidence of a defendant's guilt. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The witnesses gave varied accounts regarding the identity and description of the shooter. The prosecution presented the testimony of Williams and an independent eyewitness, Paulette Young. Williams testified that he had known defendant for 10 to 12 years and specifically recognized defendant as the shooter. Williams gave defendant's name to the investigating officers and then identified defendant in photographic lineup. Williams testified that defendant was wearing dark blue on the day in question. Neither attorney questioned Williams regarding the appearance of defendant's hair or facial hair on the day of the shooting.

Young testified that she heard gunshots and looked through her bedroom window to see what had happened. Young claimed to see defendant shoot Williams with a black gun. Young described defendant as wearing all black. Young told investigating officers that the shooter was between 25 and 30 years old, six feet and one inch tall, 220 pounds, dark skinned, with a bald head and no facial hair. This description matched defendant who was 31 years old at the time of the shooting, stands five feet and nine inches tall, and is 220 pounds with dark skin.¹ Young was unable to contemporaneously identify defendant in a photographic lineup, but later identified him as the shooter at trial. Young explained on the stand that defendant had longer hair and appeared thinner in the picture used in the photographic lineup than on the day of the shooting. Because of the discrepancies between the picture and her memory of the suspect's appearance on the day of the shooting, Young claimed she could not positively identify him at the lineup.

¹ Neither attorney questioned the other witnesses regarding whether defendant had facial hair or a shaved head on the day of the shooting.

Defendant theorized that “Jeffrey” was actually the shooter. Jeffrey apparently was close in size to defendant, had a receding hairline and was lighter-skinned than defendant. Defendant presented the testimony of Phyllis Adams that she was upstairs at the time of the shooting. Phyllis indicated that she looked outside and saw defendant, wearing a light blue shirt and blue jean shorts, trying to diffuse the situation. Phyllis further indicated that the actual shooter was wearing all black, had a light complexion and a bald head. Phyllis further testified that Jerry Adams was in the basement during the shooting and she had to summon him for assistance.

Jerry Adams agreed with his wife that defendant was wearing a light blue shirt and blue jean shorts. He also agreed that the shooter was lighter skinned than defendant and was wearing all black. Inconsistent with Phyllis’s testimony, Jerry claimed that defendant left the area before the shooting. Jerry also contradicted Phyllis by testifying that he was outside when the shooter approached and opened fire. However, both Jerry and Phyllis Adams originally told investigating officers that they did not see or hear anything in regard to the shooting.

Positive witness identification, standing alone, can be sufficient to support a defendant’s conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Eyewitness identification by someone well-acquainted with the defendant is especially reliable and more likely to be accurate. *Haliym v Mitchell*, 492 F3d 680, 706 (CA 6, 2007) (“Witnesses are very likely to recognize under any circumstance the people in their lives with whom they are most familiar, and any prior acquaintance with another person substantially increases the likelihood of an accurate identification.”). Discrepancies between witness descriptions of a suspect and a witness’s inability to select a suspect out of a lineup go to the weight, not admissibility, of such evidence. *People v Kurylczyk*, 443 Mich 289, 309; 505 NW2d 528 (1993); *Davis*, 241 Mich App at 705. Weighing the conflicting evidence and judging the credibility of the witnesses is within the sole purview of the trier of fact. *People v Mardlin*, 487 Mich 609, 626; 790 NW2d 607 (2010). The jury was presented with conflicting evidence regarding the identity and description of the shooter and fulfilled its function in arbitrating that credibility contest. We may not interfere with that judgment.

III. ASSISTANCE OF COUNSEL

Defendant asserts that trial counsel was ineffective in failing to object when Young identified him as the shooter at trial given that Young could not previously identify him from a photographic lineup. Defendant raised this issue for the first time on appeal in a motion to remand for an evidentiary hearing. This Court denied defendant’s motion and no evidentiary hearing was held. As such, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

A claim of ineffective assistance of counsel “is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant’s constitutional right to the effective assistance of counsel.” *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review the trial court’s factual findings for clear error and constitutional determinations de novo. *Id.* at 484-485. To establish that counsel was ineffective, a defendant must show that counsel’s performance was so deficient that it actually denied him of the right to counsel. We presume, however, that counsel employed sound trial strategy. The defendant must then show “that, but for counsel’s error, the result of

the proceeding would have been different.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Here, Young described the shooter to police consistent with defendant’s actual appearance. Young explained on the stand that she had been unable to identify defendant from the photographic lineup because defendant had facial hair and longer hair in the picture, while defendant had no facial hair and a shorter haircut on the day of the shooting. Any questionability connected with Young’s identification of defendant as the shooter would go to the weight of the evidence, not its admissibility. *Kurylczyk*, 443 Mich at 309; *Davis*, 241 Mich App at 705. Accordingly, counsel had no grounds to object. Counsel is not ineffective in failing to raise meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In any event, Williams’ identification of defendant as the shooter was a much stronger piece of evidence that could have supported defendant’s conviction standing alone. As such, defendant has failed to establish any prejudice as a result of counsel’s failure to challenge Young’s identification testimony.

IV. SENTENCING

Defendant argues that his 20 to 48-year sentence for assault with intent to murder is disproportionate and cruel or unusual punishment. Defendant bases this claim on his assertion that his convictions were not supported by the record evidence. However, as already noted, the prosecution did present sufficient evidence to support defendant’s convictions. Moreover, MCL 769.34(10) mandates that we affirm sentences falling within the applicable minimum sentencing guidelines range absent an error in scoring the guidelines or reliance on inaccurate information. “[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment.” *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citations omitted).

Assault with intent to murder is a Class A felony against a person. MCL 777.16d. Following various corrections to the guidelines scoring in defendant’s favor, the trial court calculated his total prior record variable (PRV) score at 72 points, placing him in PRV Level E. After additional corrections, the court calculated defendant’s total offense variable (OV) score at 85 points, placing him in OV Level V. As a fourth habitual offender, defendant’s minimum sentencing guidelines range was 171 to 570 months, or 14-1/4 to 47-1/2 years. Defendant’s 20-year minimum sentence is well within the guidelines range and defendant raises no additional challenges to the scoring of his offense and prior record variables or the accuracy of the information upon which the sentencing court relied. Accordingly, we must affirm defendant’s sentences.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher