

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 1, 2011

v

PATRICK WADE STEVENS,
Defendant-Appellant.

No. 299384
St. Joseph Circuit Court
LC No. 10-016276-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of, and sentences for, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and one count each of intentional discharge of a firearm from a motor vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth in this opinion, we affirm defendant’s convictions but vacate the sentences imposed for his assault with a dangerous weapon and intentional discharge of a firearm from a motor vehicle convictions and remand to the trial court for resentencing consistent with this opinion.

Defendant first argues that there was insufficient evidence to sustain his convictions. This Court reviews de novo defendant’s challenge to the sufficiency of the evidence presented at trial, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010); *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). For felonious assault, MCL 750.82 provides in relevant part that, “a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony” The elements of intentional discharge of a firearm from a motor vehicle are that the defendant “intentionally discharge[d] a firearm from a motor vehicle . . . in such a manner as to endanger the safety of another individual.” MCL 750.234a; *People v Cortez*, 206 Mich App 204, 205-206; 520 NW2d 693 (1994). “The elements of felony-firearm are that the

defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Avant*, 235 Mich App at 505.

Though there were some weaknesses in the prosecutor’s case against defendant, when determining whether sufficient evidence was presented to support the jury’s verdicts, this Court must view the evidence in the light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), and must make credibility choices in support of those verdicts, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The testimony at trial established that there was a confrontation between Sherry Hernandez’s boyfriend and Michelle Rutter at Kroger. After the confrontation, Hernandez trailed the Oldsmobile in which Rutter and defendant were riding for approximately 10 to 15 minutes. When Hernandez stopped the van behind the Oldsmobile at a stop sign, defendant leaned out of the automobile window, yelled “[t]his is what you’re gonna get . . . bitch,” and shot at the van with a small black handgun; the Oldsmobile then sped away. Both Hernandez and Rutter identified defendant as the shooter. Hernandez testified that she saw the tattoos on defendant’s face, neck and arms when he emerged from the automobile window to fire the gun at her van. Rutter, who was in the automobile with defendant at the time the gun was fired, testified that she saw defendant shoot the handgun and that defendant subsequently threatened her about testifying against him at trial. Finally, another witness, Roy Wood, testified that defendant asked him to testify falsely in order to provide defendant with an alibi for the time of the shooting. Based on this evidence, viewed most favorably to the prosecutor, a rational jury could infer that defendant intentionally discharged a firearm from a motor vehicle with the intent to injure or place the victims in reasonable apprehension of an immediate battery. See *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Hence, viewed in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant committed felonious assault, intentionally discharged a firearm from a motor vehicle and possessed a firearm during the commission of a felony.

Next, defendant argues that he was denied effective assistance of counsel based on defense counsel’s failure to call witnesses and present an alibi defense and his failure to object to impermissible evidence. Whether a person has been denied effective assistance of counsel is [generally] a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[A] trial court’s findings of fact are reviewed for clear error,” and questions of constitutional law are reviewed de novo. *Id.* In the absence of an evidentiary hearing regarding defendant’s claim of ineffective assistance of counsel, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). While there was no separate evidentiary hearing regarding defendant’s claim of ineffective assistance of counsel, we take note in reviewing this issue, that, during the trial, the trial court engaged defense counsel in a discussion, outside the presence of the jury, of perceived deficiencies in his representation of defendant, made pertinent findings of fact regarding the efficacy of that representation, and offered cautionary instructions to the jury regarding inadmissible hearsay testimony that it felt defense counsel had allowed the prosecutor to get in “through the back door.”

The denial of effective assistance of counsel violates a defendant’s constitutional rights. US Const, Am VI; Const 1963, art 1, § 20. To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel’s representation fell below an objective

standard of reasonableness and was so prejudicial that it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove that counsel's performance was deficient, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant demonstrates prejudice by showing "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* Trial counsel has "great discretion in the trying of a case-especially with regard to trial strategy and tactics." *Pickens*, 446 Mich at 330. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, 237 Mich App at 76-77. Finally, counsel is not required to advance meritless arguments or raise futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant first argues that his trial counsel was ineffective by abandoning an alibi defense and failing to call any witnesses on his behalf. However, Wood, who was listed as an alibi witness for defendant, was called by plaintiff and testified that defendant asked him to testify falsely that he and defendant were together in Indiana at the time of the shooting. Defense counsel advised the court that the appearance of a second alibi witness, defendant's girlfriend, could not be secured despite extensive efforts by counsel and by defendant to locate her. There was no evidence on the record, and defendant offers none on appeal, that the testimony of witnesses that were not called would have been beneficial to defendant. Defense counsel's decision as to what witnesses to call is presumed to be a matter of trial strategy, and defendant has failed to prove otherwise. *Rockey*, 237 Mich App at 76-77. On this record, defendant has not shown that defense counsel's performance fell below an objective standard of reasonableness in this regard. See *Strickland*, 466 US at 687.

We likewise conclude that defense counsel's failure to object to several evidentiary matters that defendant alleges were impermissible did not deny him effective assistance of counsel. For the most part, defense counsel's failure to object was not deficient because the evidence defendant argues should have been excluded was in fact proper and admissible. Defense counsel was not required to raise futile objections. *Snider*, 239 Mich App at 425.

More specifically, defendant argues that his counsel tendered deficient representation by failing to have defendant display his tattooed arms to the jury, after a witness testified that she saw the shooter's arm "vaguely . . . enough to see that there was an arm going out the window," but that she could not see whether there were any tattoos on that arm. Contrary to defendant's assertion, this witness did not testify that the shooter's arm did not have any such tattoos, only that she could not see whether it did. Thus, especially considering that Hernandez testified as to the presence of tattoos on the shooter's arm, counsel was not deficient in failing to have defendant display his arms at trial.

Defendant also argues that his trial counsel was ineffective for failing to object to testimony by Rutter that defendant threatened that she would "get [hers]" if she testified against him. However, "a defendant's threat against a witness is generally admissible. It is conduct that

can demonstrate consciousness of guilt.” *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Likewise, defendant’s conduct in asking Wood to testify falsely in order to provide defendant with an alibi was also properly admissible as evidence of guilt. See *People v Casper*, 25 Mich App 1, 7; 180 NW2d 906 (1970). Accordingly, defense counsel was not required to make a futile objection to its presentation. *Snider*, 239 Mich App at 425.

Defendant argues further that his counsel should not have stipulated to the addition of Wood to the prosecution’s witness list during the trial. However, considering that Wood was listed as a defense witness, there is no indication in the record that defense counsel knew that Wood’s testimony would be unfavorable. Further, a prosecutor “may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown” MCL 767.40a(4). There is nothing in the record to suggest that the prosecutor would not have been able to meet this burden here, regarding a witness listed by, and known to, the defendant, in which case any objection would have been futile. Moreover, even if the failure to object was deficient, considering Rutter’s unequivocal testimony that she witnessed defendant shoot at the van, defendant cannot establish that the outcome of the proceedings would have been different had Woods not been permitted to testify.

Additionally, defendant asserts that his counsel was ineffective in failing to object to the prosecutor’s failure to disclose that Rutter and Wood each had pending criminal charges dropped, and that Wood’s nolle prosequi, presented to the judge in the immediate aftermath of Wood’s testimony, stated that the dismissal of charges was in exchange for Wood’s truthful testimony at trial. The record indicates that Rutter’s charges were dismissed well before trial and there is nothing in the record to suggest that this dismissal was connected in any way to Rutter testifying in the instant matter. As for Wood, the trial court brought the content of the nolle prosequi to the attention of the prosecutor and defense counsel the morning of the second day of trial. Defense counsel indicated that he had no knowledge that Wood had any agreement with the prosecutor and the prosecutor denied that there was any agreement with Wood, explaining that the dismissal of the charges was not connected to Woods testimony, notwithstanding the representation that such was the case in the nolle prosequi. The trial court then conducted a brief hearing, outside the presence of the jury, to determine whether Wood had an expectation of leniency at the time he testified. Wood testified that he had no reason “at all” to believe that his charges would be dismissed as a result of his testimony; he denied having discussed his pending charges with the prosecutor before trial. Wood stated that, after he testified, he was told that that officers were worried about his safety because of his testimony and that, after he was told the pending charges had been dropped, he was placed in isolation. The trial court determined that it was satisfied that “no assurances” had been made to Wood to secure his testimony. Defense counsel then advised the court that he would not recall Wood in the presence of the jury. We will not second-guess this strategic decision in hindsight. *Carbin*, 463 Mich at 600; *Rockey*, 237 Mich App at 76. Considering Wood’s statements before the trial court, it is likely that, if recalled, Wood would have denied any expectation of leniency, would have reiterated that he was asked to tell, and was telling, the truth about defendant having asked him to lie to provide an alibi, and he also may have indicated that his safety was at risk as a result of that testimony. Therefore, defendant cannot establish that defense counsel’s decision not to recall Wood to question him about the dismissal of his charges was deficient.

Defendant next asserts that his counsel was ineffective in failing to object to the prosecutor's remark during closing argument suggesting that only defendant could explain his motivation for committing the charged offenses. However, contrary to defendant's suggestion, when read in context, the prosecutor's remark during closing argument that only defendant could tell the jury why he shot at the van, was not an improper comment on defendant's decision not to testify, but rather was responsive to defense counsel's argument that defendant had no motive to shoot at the van driven by Hernandez. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Thus, counsel was not deficient in failing to object to this remark. *Snider*, 239 Mich App at 425. Moreover, the trial court instructed the jury that the lawyer's statements and arguments were not evidence and were only to help it understand the evidence and legal theories, that it could not consider the fact that defendant did not testify and that the absence of defendant's testimony "must not affect [the] verdict in any way." We presume that the jury followed these instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also asserts that his counsel was ineffective in failing to object to the in-court identifications of defendant by Rutter and Hernandez, as well as to the presentation of hearsay testimony regarding comments purportedly made by Chris Harshbarger to the police.¹ As to these issues, we find that, even if deficient in some regard, defense counsel's conduct relative to these issues was not prejudicial.

Regarding the in-court identifications of defendant by Hernandez and Rutter, in *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998) (citations omitted) this Court provided:

If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification was based on a sufficiently independent basis to purge the taint of the illegal identification. The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective.

The relevant factors to consider when examining the totality of circumstances include: "The opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *Id.* at 305. Defendant asserts that the in-court identification of defendant by Rutter and Hernandez at the preliminary examination was impermissibly suggestive and, consequently, their in-court identifications of defendant should not have been permitted. We agree with defendant that the in-court identifications of defendant at the preliminary examination were made under suggestive

¹ Harshbarger was also present in the Oldsmobile, with Rutter, defendant and one other individual, at the time of the shooting. Despite the diligence of the prosecutor's office in attempting to secure his presence at trial, Harshbarger's appearance could not be secured.

circumstances because defendant was wearing jail clothes. *Id.* However, we conclude that defense counsel's failure to object to the subsequent in-court identifications of defendant at trial does not constitute ineffective assistance.

Rutter was in the vehicle with defendant at the time of the shooting, and she never wavered in her identification of him as the shooter. Rutter testified that she had been "hanging out" with defendant, Harshbarger and another individual on the day of the shooting, and that defendant was in the Oldsmobile, sitting on the passenger side of the vehicle, when the shot was fired. There was no dispute that a male riding in the Oldsmobile with Rutter shot at the van driven by Hernandez from a window on the passenger side of the vehicle. Rutter unequivocally identified defendant as the shooter, testifying that she directly witnessed defendant shoot at the van. Considering the totality of the circumstances, we find that Rutter had a sufficiently independent basis for her identification of defendant at trial. *Colon*, 233 Mich App at 304. Therefore, defense counsel's failure to object to this identification was not deficient.

While the same cannot be said of Hernandez's in-court identification of defendant, even if the failure to object to her in-court identification of defendant is deemed deficient, defendant cannot establish the existence of "a reasonable probability that, but for [defense counsel's failure to object to the in-court identifications of defendant at trial], the result of the proceeding would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Rutter's testimony that she was in the Oldsmobile with defendant and watched him shoot the handgun at the van was strong evidence of his guilt. And, Hernandez's testimony that the shooter had tattoos on his arm and neck corroborated Rutter's testimony that defendant was the shooter. Moreover, the jury was presented with evidence that Hernandez had not been able to identify defendant, and had wrongly identified another person as the shooter, during photographic lineups. Ultimately, the jury concluded that Rutter's unequivocal testimony that defendant was the shooter was credible. Thus, defendant cannot show that excluding Hernandez's identification of defendant at trial would have resulted in a different outcome.

The remaining issue raised by defendant centers around testimony elicited regarding statements purportedly made by Harshbarger to police officers during the course of the investigation. This testimony was offered to explain the actions taken by the officers during the investigation, and the trial court instructed the jury accordingly. The trial court further instructed the jury that it was to disregard any testimony regarding what Harshbarger may or may not have told police, that it could not "put any weight into" the fact that officers sought a warrant against defendant or that they searched for a certain type of gun after speaking to Harshbarger, and that testimony about statements made to police officers by persons who do not appear as witnesses cannot be considered in determining a verdict. We presume that the jury followed these instructions. *Graves*, 458 Mich at 486. Accordingly, defendant cannot establish any prejudice resulting from defense counsel's decision not to object to this testimony in the first instance.

Criminal defendants are entitled to fair trials, not to perfect trials. *People v Miller*, 482 Mich 540, 559-560; 759 NW2d 850 (2008). Having reviewed the record and carefully considered the issues raised on appeal, we conclude that while defendant's trial may not have been perfect, he was afforded a fair trial, effectively assisted by counsel. Therefore, we affirm his convictions.

Regarding the sentences imposed by the trial court, however, we agree with defendant that offense variable OV 14 was improperly scored at ten points because there was no evidence in the record to support a conclusion that defendant was a leader in a multiple-offender situation. MCL 777.44(1); *People v McGraw*, 484 Mich 120, 127; 771 NW2d 655 (2009). Though defendant claimed that someone else shot his handgun at Hernandez’s van, the evidence established that defendant was the shooter. The evidence presented at trial further established that Rutter initiated the confrontation with Hernandez’s boyfriend outside Kroger, and that before defendant shot at the van someone in the Oldsmobile commented, “[s]hoot the gun above the vehicle.” Plainly, this evidence is not sufficient to support a conclusion that defendant was the “leader” as required to score OV 14. *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Indeed, plaintiff agrees that OV 14 should not have been scored. Because the appropriate guidelines range for defendant’s sentences for felonious assault and intentional discharge of a firearm from a motor vehicle are altered by the scoring error, defendant is entitled to resentencing. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010) (emphasis in original); *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

Affirmed, but remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello