STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVONTRAL JOSEPH COLEMAN,

Defendant-Appellant.

UNPUBLISHED
December 11, 2012

No. 306915
Saginaw Circuit Court
LC No. 09-033458-FJ

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of assault with intent to commit murder, MCL 750.83, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and one count of carrying a firearm with unlawful intent, MCL 750.226. Defendant was sentenced to 20 to 40 years' imprisonment for the assault with intent to commit murder convictions, 2-½ to 5 years' imprisonment for the carrying a firearm with unlawful intent conviction, and 2 years' imprisonment for the felony-firearm convictions. Because defendant was not denied the effective assistance of counsel and offense variable (OV) 13 was properly scored, we affirm.

Defendant's convictions stem from a shooting that occurred in front of Jennifer McReynolds's Saginaw residence on September 5, 2009. A group of approximately 25 or 30 people had gathered in the yard in front of the residence. Witnesses testified that they suddenly heard what sounded like firecrackers and realized that someone was firing bullets into the crowd. Jewel Lee, who was 12 years old at the time of trial, suffered a nonfatal gunshot wound to the head.

Luven West lived in a home separated from McReynolds's residence by a vacant field and a chain link fence. West heard the gunshots and thought that they were coming from behind her house. She looked out her front door and saw two young men at the end of her driveway. One of the men "walked off real fast, looking back," while the other man, who West identified as defendant, rode away on a bicycle. A police investigation revealed that the gunshots were fired from the vacant field. The police recovered eight .22 caliber shell casings along the fence line that separated West's yard from the field. Officers also found a .22 caliber rifle underneath West's vehicle parked in her driveway. A latent finger print on the rifle matched defendant's left, little finger. The rifle also contained DNA evidence from at least three different people.

Defendant's DNA was consistent with a sample taken from the rifle. Expert testimony established that the probability of a person's DNA matching the sample on the rifle was one in 791 Caucasians, one in 419 Hispanics, and one in 381 African Americans. Defendant was not the main contributor of the DNA evidence on the rifle. The jury convicted defendant as charged.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel. Although defendant filed a motion to remand this case to the trial court in order to conduct a *Ginther*[1] hearing, this Court denied the motion and no hearing was held. Accordingly, our "review is limited to errors apparent on the record." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In order to establish ineffective assistance of counsel, a defendant must show that "(1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600.

Defense counsel generally has a duty to advocate the defendant's cause, consult with the defendant regarding important decisions, keep the defendant informed of significant developments in the case, and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 US at 688. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Trial strategy can involve the presentation of evidence, the examination of witnesses, and decisions regarding closing argument. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant contends that defense counsel rendered ineffective assistance by asserting during closing argument that defendant lied to the police and was present at the scene of the shooting. Defendant maintains that counsel's argument was tantamount to an admission of guilt. Defendant challenges the following argument, replicated in context below:

> So I would suggest to you that there are issues with each and every piece of evidence and testimony that the prosecutor has offered to you in order to prove this case, in order to keep the promise he made in his opening statement, issues which can leave you with a reasonable doubt as to [defendant's] guilt of these

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

charges. But here's the thing. They don't have to. Even if everything you heard, everything you've seen, you believe, and that you believe it to be accurate. And I'm not distinguishing here between truth and lie, I'm trying – I'm discussing or talking about accuracy versus error.

Even if Luven West sees [defendant] at the end of her driveway when she rushes to her front door, even if his fingerprint is the one that's found on that gun, even if his DNA is one of those three contributors, what does that prove? Well, it proves that [defendant] lied to the police when he spoke with Detective Ball and Detective Carlson.

I suggest to you that the proofs do establish he has touched that gun at some point in time, and that they do establish he's on a bike at the end of Luven West's driveway when she rushes to her front door. As he's being questioned by detectives about a gun he lies to avoid trouble. He knows he shouldn't have a gun.

He also, I would suggest, lies to avoid having to name who the real shooter is. He was out there, and he knows what happened. The second guy who leaves on foot in a hurry, looking nervously over his shoulder, given the shooting that's just taken place, doesn't [defendant] have a good reason to be afraid of naming that guy?

Luven West, the fingerprint, the DNA, they prove to you that [defendant] lied to the detectives when he spoke to them about the gun, but they do not get you beyond a reasonable doubt as to his guilt of [the] crimes of which he's charged. The DNA narrows it down to him being one of at least three, or 33 percent, at best. And remember, he's not the major contributor.

I would suggest to you that the fingerprint doesn't add anything, because if you – there's only one found. And the – Mr. Ginther explained that that doesn't mean other fingers didn't touch it. We have every reason to believe that somebody shooting that gun had nine or ten fingers on it, and there's no other fingerprint that's useable for comparison value. So we're still back at what the DNA tells us. He's one of three, 33 percent.

Luven West maybe narrows it down to one of two, she sees those two guys at the end of her driveway, although when she talked again with Officer Matthew Ward, she described it as several black males walking away from the area. But her testimony to you is that she sees two young men; one walking away on – on foot, the other one on a bicycle. And, again, that second guy is the one hurrying off, keeps looking over his shoulder. Who sounds more guilty, the guy walking off or the kid on the bike? But at that point we're down to one of two. 50/50 or a coin flip.

> Are you prepared to go into the deliberation room and find a then-16-year-old kid guilty of attempted murder based on a coin flip? I suggest to you that that's what the prosecutor is asking you to do with the evidence he's presented.

Defendant argues that the prosecution's evidence "left room" for defense counsel to plausibly argue that defendant was not present during the shooting and had never touched the firearm. Defendant contends that counsel was therefore ineffective for conceding those points. The record shows, however, that counsel did challenge the DNA evidence, the fingerprint evidence, and West's identification of defendant. Counsel also pointed out that nobody at the McReynolds residence saw defendant and highlighted the fact that defendant had no motive to fire into the crowd. Counsel's argument replicated above was made only in the alternative if the jury chose to believe that defendant was present at the scene and had touched the firearm. Thus, counsel did not concede those points.

Further, in making his alternative argument, counsel asserted that even if the jury believed that defendant had been present at the scene and touched the firearm, it could not convict defendant because the evidence did not show beyond a reasonable doubt that he was the shooter. Counsel argued that it was more likely that the other person who was present, who walked away quickly while looking behind him, was the shooter. Contrary to defendant's contention, defense counsel did not misunderstand the DNA evidence when he argued that defendant was one of three people who had touched the rifle. Rather, counsel was pointing out that the DNA of three people had been found on the weapon, and counsel emphasized that defendant was not the primary contributor. Counsel's decision to assert an alternative argument if the jury chose to believe the prosecution's evidence constituted reasonable trial strategy.

Defendant also asserts that counsel's willingness to concede that defendant had been present and held the rifle was based on a misunderstanding of the law on aiding and abetting. Defendant contends that counsel did not appreciate that the jury could convict him under an aiding and abetting theory if it did not believe that he was the shooter. Again, the record shows that counsel's argument constituted reasonable trial strategy. Defense counsel argued that it was more likely that the other person present at the scene was the shooter. That argument was made in response to the prosecution's argument that defendant was the shooter. The prosecution did not argue that defendant aided and abetted the other person in committing the shooting. Thus, although the jury could have convicted defendant under and aiding and abetting theory, because that was not the prosecution's theory of the case, defense counsel's argument was a reasonable strategy. Defense counsel does not render ineffective assistance of counsel simply because a particular strategy does not work. *Matuszak*, 263 Mich App at 61.

Defendant also asserts that he was denied the effective assistance of counsel because his attorney failed to object when the prosecution accidently played a portion of defendant's videotaped police interview in which defendant admitted that he was "caught with a gun" in 2006. Defendant has abandoned appellate review of this argument by failing to advance any reasoning regarding why counsel's failure to object constituted ineffective assistance of counsel. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority." *Id*. at 59 (quotation marks, citations, and brackets omitted). Accordingly, defendant has abandoned appellate review of this argument.

II. OV 13

Defendant next challenges the trial court's scoring of 25 points for OV 13. We review "a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted). A trial court abuses its discretion when it selects an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Pursuant to MCL 777.43(1)(c), a trial court should score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant argues that the trial court erroneously scored OV 13 because his crimes occurred during a single incident and thus did not constitute a "pattern" of criminal activity. Defendant's argument lacks merit. MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court recognized that scoring under OV 13 can be based on contemporaneous felonies. Further, although MCL 777.43(2)(e) states, "[d]o not count more than 1 controlled substance offense arising out of the criminal episode," the statute does not contain a similar provision with respect to assault with intent to commit murder. Therefore, the trial court properly scored 25 points for OV 13.

Defendant also contends that his assault with intent to commit murder convictions were improperly considered for the purpose of scoring OV 13 because they had already been counted in scoring prior record variable (PRV) 7, pertaining to "subsequent or concurrent felony convictions." See MCL 777.57. Again, defendant's argument lacks merit. "[W]ith regard to OV 13, a trial court may properly consider conduct that was already considered when scoring the defendant's PRVs." *People v Bemer*, 286 Mich App 26, 35; 777 NW2d 464 (2009). Moreover, a trial court may properly assess points under different variables when "[e]ach variable is directed toward a different purpose." *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). Because OV 13 concerns a "continuing pattern of criminal behavior," and PRV 7 pertains to "subsequent or concurrent felony convictions," the variables are directed toward different purposes. See MCL 777.43; MCL 777.57. Accordingly, the trial court's scoring of 25 points under OV 13 was proper.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio