

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER LEE JONES,

Defendant-Appellant.

UNPUBLISHED

June 4, 1996

No. 172212

LC No. 93-000487-FC

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant Walter Lee Jones was charged with first-degree felony murder, MCL 750.316; MSA 28.548, felony-firearm, MCL 750.227b; MSA 28.424(2), assault with the intent to commit murder, MCL 750.83; MSA 28.278, possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), and possession of stolen property worth more than \$100, MCL 750.535; MSA 28.803. The jury convicted defendant of first-degree felony murder, felony-firearm, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, possession of a short-barreled shotgun, and possession of stolen property worth more than \$100. The trial court sentenced defendant to life imprisonment for the felony murder conviction, 7 $\frac{1}{2}$ to 15 years for the assault conviction, 5 to 7 $\frac{1}{2}$ years for the possession of a short-barreled shotgun conviction, 2 $\frac{1}{2}$ to 7 $\frac{1}{2}$ years for the stolen property conviction, all consecutive to the mandatory two-year felony firearm sentence. Defendant appeals as of right from his convictions. We affirm.

Defendant argues that his trial counsel's ineffective assistance, by failing to utilize an accident defense, infringed his right to a fair trial. We disagree. First, we note that we denied defendant's request for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Consequently, our review of this issue is limited to the record as it stands. *People v Johnson (On Reh)*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

To establish a claim that the assistance of one's counsel was ineffective, the defendant must first show that counsel's assistance fell below the objective standard of reasonableness. *People v Barclay*,

208 Mich App 670, 672; 528 NW2d 842 (1995). In other words, the defendant must overcome the presumption that his counsel's actions were the product of sound trial strategy. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Second, the defendant must establish that his counsel's representation prejudiced him so as to have deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). If this element cannot be established, the defendant's claim must fail. *Id.* at 333. As a general rule, an accidental shooting is a defense to felony murder. *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995). Nevertheless, defendant was charged with other crimes to which this defense does not apply. In this case, defendant's trial counsel put forth the defenses of misidentification and non-participation, which, if successful, would have exonerated defendant of all charges against him. Thus, defendant has failed to overcome the presumption that his counsel's tactics were sound trial strategy. *Hurst, supra* at 641. Moreover, defendant failed to show how his counsel's actions prejudiced him. Consequently, no violation of his right to a fair trial occurred.

Defendant also argues that his attorney's failure to raise the defense of accident violated his right to due process. We disagree. We find that this issue is unpreserved because defendant failed to raise it below. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Nevertheless, we may still review this issue because a constitutional issue was raised. *People v Heim*, 206 Mich App 439; 522 NW2d 675 (1994).

No person shall be deprived of liberty without due process of law. US Const, Am V; Const 1963, art 1, § 17. Encompassed within this due process requirement is the right to present a defense. *People v Lee*, 212 Mich App 228, 256; 537 NW2d 233 (1995). These due process protections apply to actions by a state entity and not private conduct. *Dearborn v Freeman-Darling, Inc.*, 119 Mich App 439, 442; 326 NW2d 831 (1982). However, defendant argues that the actions of his trial counsel violated his due process rights. A state-appointed attorney, such as defendant's trial counsel, does not act under color of state law because such an attorney is acting in the interest of his client, and not the state. *Polk Co v Dodson*, 454 US 312, 318-319; 102 S Ct 445, 450; 70 L Ed 2d 509, 516-517 (1981). Consequently, we find defendant's argument to be meritless.

Defendant argues next that the prosecution failed to introduce sufficient evidence to sustain his conviction for assault with the intent to cause great bodily harm. We disagree. The prosecution has a duty to introduce sufficient evidence concerning the charged offense that would allow a reasonable jury to decide that the accused is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). We examine the evidence in a light most favorable to the prosecution to determine whether a reasonable jury would be able to find that all the elements of the charged offense had been proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). The elements for assault with the intent to cause great bodily harm are (1) an attempt or offer with force or violence to do bodily harm to the victim, and (2) an intent that this bodily harm be less than murder itself. *People v Bailey*, 207 Mich App 8, 9; 523 NW2d 798 (1994). Defendant specifically contends that there was insufficient evidence that he intended to do great bodily harm because, he asserts, he fired the gun over the victim's head. The intent to cause bodily harm may be shown by evidence that a defendant fired a shot at the victim, even though the projectile missed the

victim *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Here, although most of the shotgun pellets struck a house, two pellets did strike the victim. We find that there was sufficient evidence of defendant's intent.

Defendant also argues that the prosecution failed to introduce sufficient evidence to sustain his conviction for first-degree felony murder. We disagree. The elements for first-degree felony murder are as follows:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, or attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

Our review of the record reveals that the prosecution introduced sufficient evidence to support all these elements. Specifically, we note that the intent element above was satisfied by the evidence that defendant utilized a shotgun during the armed robbery of the decedent and the assault on the other victim. Moreover, we find that defendant acted as both a principal and an aider-abettor during the armed robbery of the decedent as to justify his conviction of felony murder. *Id.* at 571.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald