

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LAMONT SHIVERS,

Defendant-Appellant.

UNPUBLISHED

July 23, 1996

No. 181170

LC No. 94-009239-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINSTON LEE CROSBY,

Defendant-Appellant.

No. 181171

LC No. 94-009240-FC

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant Shivers was convicted by a jury of conspiracy to commit assault with intent to commit murder, MCL 750.157a; MSA 28.354(1), assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Crosby was convicted by jury of conspiracy to commit assault with a dangerous weapon, MCL 750.157a; MSA 28.354(1), and felony-firearm, MCL 750.227b; MSA 28.424(2). Following trial, Crosby pleaded guilty to being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and to habitual offender second offense, MCL 769.10; MSA 28.1082. Shivers was

* Circuit judge, sitting on the Court of Appeals by assignment.

sentenced to concurrent terms of eight to twenty years' imprisonment on both his conspiracy and assault convictions, consecutive to a two-year sentence for felony-firearm. Crosby was sentenced to concurrent terms of two to four years' imprisonment on his conspiracy conviction and two to five years on his felon in possession of a firearm conviction, consecutive to a two-year sentence for felony-firearm. Both defendants appeal as of right. We affirm.

Testimony indicated that following an altercation, Shivers obtained a gun from defendant Crosby. Shivers shot at and missed a car containing the Tarvers and Jason's two-year old son. Although no one in the car was injured, Chris Wilson, was shot in the upper thigh.

Both defendants challenge the trial court's decision that Wilson was incompetent to testify at trial, but that his preliminary examination testimony would be admitted. The trial court did not err. Before a child under age ten may testify in a court proceeding, the court must determine to its own satisfaction that he or she may safely be admitted to testify. MCL 600.2163; MSA 27A.2163. The trial court did not abuse its discretion by excluding Wilson from testifying. Based on his answers to questioning, it was reasonable to conclude that he lacked sufficient understanding of the necessity of testifying truthfully. The district court did not abuse its discretion by permitting Wilson to testify at the preliminary examination because based on his answers to questioning at that proceeding, he recognized the difference between the truth and a lie. *People v Edgar*, 113 Mich App 528, 535-536; 317 NW2d 675 (1982). This Court declines to reexamine the merits of *Edgar* in this case where reconsideration of the *Edgar* result would be mere dicta because of the harmless error doctrine. In any event, any error regarding Wilson's testimony was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994); *People v Spinks*, 206 Mich App 488, 493; 522 NW2d 875 (1994). Wilson indicated in his preliminary examination testimony that he had not seen a gun being fired, never saw Shivers with a gun and did not know Crosby. Other witnesses indicated that Shivers fired a gun which was given to him by Crosby. Accordingly, there was no reasonable possibility that the jury grounded its convictions on Wilson's preliminary examination testimony. Likewise, there appears no substantial reason to conclude that had Wilson testified at trial, his testimony would have benefited either defendant. If Wilson had tried to claim that he knew pertinent details of the shooting, his testimony would have appeared incredible in light of his earlier denial of having seen the shooting.

Defendant Crosby has not established his claim of ineffective assistance of counsel. He challenges trial counsel's failure to object to certain testimony. However, the hearsay testimony by Reginald Tarver challenged by Crosby was admissible under the present sense exception, MRE 803(1); *People v Cross*, 202 Mich App 138, 142; 508 NW2d 144 (1993). Reginald Tarver's testimony describing Crosby's actions at the time of the incident was not improper lay opinion testimony, but was proper lay opinion testimony under MRE 701. *Richardson v Ryder Truck Rental Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995). As developed above, the admission of Wilson's preliminary examination testimony was not erroneous. Counsel was not required to make groundless objections. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Crosby asserts that trial counsel should have objected at an earlier point to certain testimony by Detective Brian Berg. However, he does not cite authority establishing why this testimony was assertedly improper. It is a

defendant's burden to prove an ineffective assistance claim. *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). Crosby has not met that burden.

We also reject defendant Crosby's argument based on the cumulative effect of errors in the trial court. See *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974); *People v Spencer*, 130 Mich App 527, 543; 343 NW2d 607 (1983). Because he has not established any error, he has not shown that he was denied a fair trial due to cumulative error.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak