

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYWAN ANDRE BORTHWELL,

Defendant-Appellant.

UNPUBLISHED

July 22, 1997

No. 191852

Detroit Recorder's Court

LC No. 95-002472

Before: Gribbs, P.J., and Holbrook, Jr., and J.L. Martlew,* JJ.

PER CURIAM.

Defendant and a codefendant were charged with first degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a joint bench trial, defendant was found guilty of assault with intent to commit murder and felony-firearm. He appeals as of right and we affirm.

Defendant argues that the trial court's guilty verdict of assault with intent to commit murder was inconsistent with its finding that a prosecution witness was credible. We disagree. In a bench trial, the trial judge must make adequate and specific findings of fact and conclusions of law on contested matters, so as to facilitate appellate review. MCR 2.517(A)(1); MCR 6.403. *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989). In a bench trial, the court's verdict is presumed to be the result of a correct application of the law to the evidence presented. *People v Cazal*, 412 Mich 680, 689; 316 NW2d 705 (1982).

Here, the trial court found that the victim had died of multiple gunshot wounds to the head, and framed the critical question as follows: "The question here is who did it? And that's been the question right from the start of this case." The court went on to summarize the testimony regarding the shooting, noting that no one at the scene was immediately able to identify the perpetrators. A few days later, Maurice Gee, who had been present at the scene went to the police station to report that the word in the street was that defendant and his codefendant were the perpetrators. A few more days later, Gee again went to the police station and belatedly identified defendant and codefendant as the perpetrators. The court reviewed other witness testimony, concluding that "[t]hey really add little to the issue of

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

identification other than Mr. Waukeem Spraggins,” a fellow inmate of defendant’s at the Wayne County Jail. At trial, Spraggins had testified that defendant told him in detail how the shooting occurred, but did not specifically identify himself as the shooter. Based on the facts as told to Spraggins, the shooting was committed with premeditation and deliberation.

The court found Gee’s credibility to be suspect, but found Spraggins’ testimony corroborative of Gee’s identification of defendant and codefendant as the perpetrators. The court found:

So we have that corroborative testimony. And frankly I believe Spraggins. I believe that he did receive information from Mr. Borthwell about Borthwell’s participation in this incident and about the shooting and the description was very detailed as to shooting the person in the hand, in the fingers and things that would be know only to the perpetrator and certainly not Mr. Spraggins, if he was making that stuff up.

In looking at Spraggins testimony and reviewing my notes, *he was not necessarily precise as to who the trigger person was*, other than Borthwell’s admission he was part and parcel to this incident.

And I think on the strength of that testimony I believe beyond a reasonable doubt that the defendant Borthwell assaulted Mr. Eric Austin with the intent to commit murder. I’ll find him guilty of that charge. [Emphasis added.]

Defendant contends that the trial court’s finding that defendant was guilty of assault with intent to commit murder was inconsistent with Spraggins’ testimony, which the court found to be credible but which detailed a premeditated murder. Thus, defendant contends that the court’s theory “must rest on an unproven scenario that *someone else* is the killer” because defendant only assaulted the victim. We do not view the court’s findings in such a skewed manner. The court simply was unable to find beyond a reasonable doubt that defendant murdered the victim with premeditation, but did find based on the testimony of Spraggins and Gee that defendant had participated in the shooting sufficient to show assault with intent to commit murder.

Accordingly, given the court’s finding that identification of the shooter was the critical question, and that sufficient evidence was presented to establish that defendant participated in the offense, but not that he was the actual shooter, we conclude that the court’s findings were sufficient to support defendant’s conviction of assault with intent to commit murder. Moreover, while it is true that a trial judge, sitting as trier of fact, may not dispense “mercy” or engage in leniency in rendering a verdict, *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984), the judge’s findings in this case suggest that the verdict was a result of the evidence, not leniency or mercy.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew

