

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY J. KINDER,

Defendant-Appellant.

UNPUBLISHED

August 22, 1997

No. 188633

Detroit Recorder's

LC No. 95-000511

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of felonious assault, MCL 750.82; MSA 28.277, discharge of a weapon at a building, MCL 750.234b; MSA 750.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to eight months to four years for both the felonious assault and discharge of a weapon convictions, and to a mandatory two year term for the felony-firearm conviction. We affirm in part, and remand for a *Ginther*¹ hearing and correction of the judgment of sentence.

On appeal, defendant makes four claims of ineffective assistance of counsel. We find that three have no merit, but remand for a hearing regarding the fourth.

Effective assistance of counsel is presumed. A defendant bears the burden of proving that counsel's assistance was ineffective. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance was deficient, falling below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to move for a continuance to procure a transcript from a related juvenile hearing. We disagree. Trial counsel extensively cross-examined the victim regarding the persons she saw standing across the street, their location across the street, the lighting at the scene, the type of guns used by the assailants, her relationship to defendant and defendant's family, and defendant's description at the time of the incident. Trial counsel specifically asked the victim about her testimony at the juvenile hearing, and her identification of another youth as the perpetrator. Trial counsel appeared quite familiar with the statements the victim made at the juvenile hearing, and cross-examination was conducted concerning those statements, as well as the specifics of the incident.

Defendant has failed to establish that more effective cross-examination would have been conducted had a copy of the transcript been obtained, or that the court would have found the victim's testimony less credible than the court ultimately concluded it was.

Defendant also argues that trial counsel failed to adequately cross-examine the victim regarding her relationship with David, a neighbor involved in the shooting. We disagree. Trial counsel specifically asked the victim about her relationship with defendant, defendant's family, and David, and about David's relationship with the victim's family. We conclude that trial counsel's decision how extensively to question the victim about her relationship with David could have been trial strategy, and defendant has failed to show that it was not sound trial strategy. *Tommolino, supra*.

Defendant next argues that trial counsel failed to effectively cross-examine the key eyewitness regarding her identification of defendant. We disagree. A review of the transcript shows that trial counsel asked this witness detailed and specific questions about defendant's clothing, hair, and eye color at the time of the incident. Trial counsel raised some deficiencies in her identification. Defendant has failed to show that trial counsel's cross-examination of this witness was not sound trial strategy, or that it fell below an objective standard of reasonableness.

Defendant next argues that he was denied the effective assistance of counsel by trial counsel's failure to move for a new trial based on newly discovered evidence. We remand on this issue.

After trial had concluded, but before sentencing, trial counsel received a copy of a letter from the U.S. Department of Justice/FBI to the prosecutor, which stated in pertinent part:

Some interviews have produced evidence that Tony Kinder committed the crime. Other interviews have produced evidence that someone other than Kinder committed the crime. This second group of interviews reveals what is believed to be "new evidence," not previously known to investigators.

Trial counsel mentioned the letter at sentencing, but did not pursue the matter with a motion for new trial.

On the record before us, we cannot determine whether counsel was ineffective in not bringing a motion for new trial because we cannot determine whether there was any probability of success. For a

new trial to be granted on the basis of newly discovered evidence, it must be shown that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. *People v Johnnie Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Because we do not know who the FBI investigators interviewed and what they said, we cannot address any of these factors, and must remand for a hearing.² Defendant must establish that counsel committed a serious error in failing to bring the motion, and that defendant was prejudiced by the failure, i.e., that defendant would have been able to demonstrate that a new trial is warranted.

Defendant also argues on appeal that insufficient evidence was presented to support his convictions. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, the Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). MCL 750.234b; MSA 28.431(2) punishes the intentional discharge of a firearm at a dwelling or occupied structure. *People v Guiles*, 199 Mich App 54, 59; 500 NW2d 757 (1993). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *Davis, supra*.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the evidence proved beyond a reasonable doubt that defendant assaulted the victim and her family, with a dangerous weapon, with the intent to injure or place the victim and her family in reasonable apprehension of an immediate battery. *Davis, supra*; *Malkowski, supra*. A rational trier of fact could also find beyond a reasonable doubt that defendant intentionally discharged a firearm at the victim's home. There was testimony that defendant was seen carrying a twelve gauge shotgun at the time of the shooting. A witness testified that she looked out the window of the victim's home and saw defendant shooting at the home, that she specifically saw defendant's face, and saw a light come from the end of the shotgun which defendant was holding. The victim testified that she saw defendant standing across the street from her home immediately before the shooting and saw defendant shoot his rifle once. Earlier that day, defendant had walked past the victim's home with a little gun, showed the gun to the victim's niece, and said, "pow pow" to her. Sufficient evidence was presented to the trier of fact to support defendant's convictions.

Finally, defendant asserts that he was improperly denied credit for time served. We agree. The trial court acknowledged that defendant was entitled to credit for seventy-one days served. However, a clerical error was made on the judgment of sentence. On remand, the trial court shall enter an amended judgment of sentence reflecting the proper credit for time served.

Affirmed in part, and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Helene N. White

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

² Defendant filled an untimely motion for a *Ginther* hearing in this Court, and the prosecutor responded that no remand was necessary because defendant relied on matters of record. This court denied the motion. We now conclude that the record is insufficient and a hearing is required.