STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER LEWIS BRONSON, JR.,

Defendant-Appellant.

UNPUBLISHED
April 7, 1998

No. 194581
Montcalm Circuit Court
LC No. 95-000250 FC

Before: Saad, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right and we affirm.

Defendant's first argument is that he received ineffective assistance of counsel. Defendant asserts that even though his trial counsel objected twice to the investigating officer's qualifications to testify as an expert in ballistics, counsel's failure to limit the "expert-like" aspects of the officer's testimony (e.g., testimony regarding the location of bullet entrance and exit holes and the location of defendant at the time the shots were fired) constituted ineffective assistance. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was objectively deficient to an extent "'that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense.'" *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). When examining the record with the benefit of hindsight, this Court will not "second-guess or condemn . . . the decisions of defense counsel." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally

> based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Testimony of investigating police officers who have not been qualified as experts has been held to be properly admissible under MRE 701 if the testimony was based upon their observations and not overly dependent upon scientific expertise. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989) (observing that testimony by two police officers that dents in an automobile could have been caused by bullets was properly admitted under MRE 701); *Mitchell v Steward Oldford & Sons, Inc,* 163 Mich App 622, 629; 415 NW2d 224 (1987) (observing that testimony by an officer concerning the events surrounding an automobile accident "was proper under MRE 701").

We are satisfied that the investigating officer's testimony regarding the entrance and exit holes was based on the officer's personal observations rather than scientific expertise, and was therefore admissible under MRE 701. See *People v Smith*, 152 Mich App 756, 764; 394 NW2d 94 (1986). With regard to the testimony concerning defendant's location and the trajectory of bullets, while this testimony was not based on "given facts which people in general could make," *Mitchell*, *supra* at 629-630, we do not believe that defendant was prejudiced by its admission. In this regard, we note that defendant called an expert witness in the field of ballistics who testified that he arrived at different conclusions on these matters than did the investigating officer. Accordingly, we conclude that defendant has not overcome the presumption that he received the effective assistance of counsel.

Second, defendant argues that the trial court erred when it denied his motion for a directed verdict, asserting that the prosecution had failed to provide evidence of an intent to kill. We disagree. "When ruling on a motion for a directed verdict, [this Court] . . . must consider the evidence presented by the prosecutor, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt." *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). "The elements of the crime of assault with intent to commit murder are: (1) an assault; (2) with specific intent to murder; (3) and which, if successful[,] would make the killing murder." *People v Branner*, 53 Mich App 541, 544; 220 NW2d 183 (1974). In order to find an intent to kill, the prosecution is not required to establish the element "'by direct, positive or independent evidence.'" *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 415 (1870). Defendant's specific intent may be inferred from the facts and circumstances surrounding the event in question. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

As the *Taylor* Court noted, when considering whether a defendant had the intent to kill, a jury

> "may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." [*Taylor, supra* at 568, quoting *Roberts, supra* at 416.]

Although defendant never expressly verbalized an intent to kill, there was evidence on the record from which an intent to kill can be inferred. First and most obvious, there was the nature of the firearm that defendant fired into the woods. This weapon was a 7.62 caliber (39 mm) Chinese military carbine with a bayonet that was firing fully steel jacketed rounds. This military assault rifle and these armor piecing bullets are specifically designed to kill other human beings. Second, it is undisputed that defendant fired the weapon into a wooded area where he knew someone had been seen by his girlfriend. Third, subsequent to his arrest defendant told the investigating officer that in response to being attacked by three men in an unrelated incident, defendant had decided to "handle things from that point on in his own hands and in his own nature." When viewed in a light most favorable to the prosecution, this was sufficient evidence from which a reasonable jury could infer an intent to kill beyond a reasonable doubt.

Finally, defendant argues that the trial court erred when it denied his motion to quash the bindover on the charge of assault with intent to kill, asserting that there was a clear lack of the requisite specific intent to kill. Again, we disagree. "[T]his Court reviews the district court's decision [to bindover a defendant] de novo to determine whether it abused its discretion." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

If the district court finds probable cause to believe that the defendant committed the enumerated crime, then it must bind the defendant over for trial. *Id.* at 558. "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id.* See also MCL 766.13; MSA 28.931, MCR 6.110(E). "[T]he prosecution is not required to establish each element of an offense beyond a reasonable doubt. Rather, where there is presented credible evidence both to support and to negate the existence of an element of the crime, a factual question that exists should be left to the jury." *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). As previously discussed, defendant's specific intent can be inferred from the nature of defendant's acts. As at trial, the district court heard about the nature of the weapon and ammunition used, the fact that defendant fired three times into the woods where his girlfriend had previously seen someone standing, and that a round landed very near the victim. From this evidence, the district court could infer an intent to kill, and thus find probable cause to bind defendant over on the charge of assault with intent to kill. Therefore, because we find that the district court did not abuse its discretion in binding defendant over for trial, we conclude that the trial court did not error when denying defendant's motion to quash the bindover.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff