

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN D. REED,

Defendant-Appellant.

UNPUBLISHED

January 11, 2005

No. 240726

Wayne Circuit Court

LC No. 00-005090-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN REED,

Defendant-Appellant.

No. 251932

Wayne Circuit Court

LC No. 00-005090-01

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendants Marvin D. Reed and Deshawn Reed of one count each of assault with intent to commit murder,¹ and convicted Deshawn Reed of possession of a firearm during the commission of a felony.² The trial court sentenced Marvin Reed to a term of twenty to thirty years in prison, and sentenced Deshawn Reed to a term of eighteen to thirty years in prison for the assault conviction and a consecutive two-year term for the felony-firearm conviction. Defendants appeal their convictions and sentences, and we affirm.

I. FACTS

¹ MCL 750.83.

² MCL 750.227b.

Defendants, Deshawn Reed and Marvin Reed, the victim, Shannon Gholston, and many of the lay witnesses in this case lived in or near a housing development in Ecorse. The relationship between Gholston and Deshawn Reed had been hostile for six or seven years before the events of this case, but Gholston did not report any problem with Marvin Reed.

On March 12, 2000, Shannon Gholston was shot in the neck while he was turning his car through an intersection in Ecorse. The shooting left him a quadriplegic. Gholston has consistently maintained that Deshawn Reed shot him from a car driven by Marvin Reed. At trial, Gholston testified that Marvin Reed was driving behind him, with Deshawn Reed in the passenger seat, just before he stopped at a stop sign and made a left turn into the intersection. Marvin Reed also turned, drove his car beside Gholston's car, and Deshawn Reed shot him from the passenger side window. Garry Cooper and Robert Nelson both testified that they heard three shots, and Mario Jones testified that he heard "several" shots.

Gholston was paralyzed at the moment he was shot. He lost control of his car, which coasted and came to rest by a gate on a mound of snow and dirt. Mario Jones, Adolph Smith, and Raphael Parks approached Gholston's car and opened the door to speak to him. Gholston recalled that they advised him to stay awake, but he was unable to speak or gesture to them.

Ecorse Police Officer Narda Bruno was the first officer to arrive at the scene. Gholston lost consciousness shortly afterward, and was unconscious when EMS arrived at the scene. Officer Geoffrey Howard, Sergeant John Anderson, and other officers arrived at the scene after Gholston lost consciousness.

The officers tried to question Jones, Parks, Smith, and other bystanders who had gathered by Gholston's car. Most either denied seeing anything or declined to speak with the officers. Jones told the police that the shooter passed Gholston in a white vehicle. Jones did not identify the shooter.

Robert Nelson, who had been working outside a building at the intersection, left the scene before the officers could question him. Smith told Bruno that Nelson had seen the shooter, and Bruno questioned Nelson about an hour after the shooting. He told the police that a man he did not know shot Gholston from behind a pole outside a pool hall at the intersection. Nelson described the shooter as a black male dressed in a black hooded sweatshirt. However, Nelson's niece, Lynette Love, and her sister, Kimberly Love, informed the police that Nelson had talked to Lynette moments after the shooting, and told her that Marvin Reed shot Gholston while Deshawn Reed was driving. Lynette testified at trial that she made a mistake when she wrote out the statement to the police, and that Nelson told her that Deshawn Reed was the shooter and Marvin Reed was the driver. The police initially suspected that Marvin Reed was the shooter, based on the statements they received about what Nelson had said.

Gholston regained consciousness in the emergency room, but he could not move or speak, other than faintly mouthing words. Sgt. Anderson interviewed him in the emergency room. Sgt. Anderson had difficulty understanding Gholston when he mouthed words, so he asked Gholston to blink his eyes once for yes and twice for no to make certain that he understood Gholston correctly. Gholston told Sgt. Anderson by mouthing words that Deshawn Reed shot him, and Sgt. Anderson used the blinking method to verify this. Gholston also used this combination of communication methods to tell Sgt. Anderson that Marvin Reed was the driver.

Sgt. Anderson interviewed Gholston the following day. Again, Gholston orally told Sgt. Anderson that Deshawn Reed shot him from a car driven by Marvin Reed, and Sgt. Anderson used the blinking system to verify that he correctly understood Gholston. At trial, Sgt. Anderson described Gholston as “very determined” to communicate this information.

At the preliminary examination, Gholston still had great difficulty speaking clearly because he was on a ventilator. He testified from his hospital bed with a respiratory therapist and other hospital personnel on hand to care for him. Tina Croxton, a hospital social worker, acted as an interpreter by repeating Gholston’s answers. Gholston swore to testify truthfully, but Croxton was not sworn. Gholston testified that Deshawn Reed shot him while Marvin Reed drove past. The prosecutor and defendants stipulated that they would not use the preliminary examination transcript at trial.³ Gholston also testified at trial that Deshawn Reed shot him while Marvin Reed drove past.

At trial, defendants presented an “alternate shooter” theory that Gholston’s criminal confederate, Tyrone Allen, shot at Gholston’s car while standing beside a pool hall at the intersection. Allen was fatally shot seven months after Gholston was shot, but before the trial. Defendants tried to show that Allen and Gholston often stole car parts together, and that they had argued over the proceeds from the sale of stolen parts shortly before Gholston was shot. On cross-examination, Gholston denied any criminal activity or conflict with Allen. Defendants also questioned Gholston about his other possible enemies, including Brian Borders, the passenger in the back seat of Marvin Reed and Deshawn Reed’s car during the shooting.⁴

Mario Jones and Robert Nelson, the two crime scene witnesses who spoke to the police, were called as prosecution witnesses, but the trial court permitted the prosecutor to examine them as hostile witnesses when it became apparent that they intended to support the alternate shooter theory. Jones testified that he, Raphael Parks, and a third man approached Gholston’s car after it stopped on the curb. They asked Gholston if he knew who shot him. Gholston gestured by raising both hands and said he did not know.

Jones recanted the statement he gave police that he saw a white car pull alongside Gholston’s car. He claimed that he really meant to say that the white car made a U-turn away from Gholston’s car, and that he made an erroneous statement because the police harassed him and threatened to arrest him.

³ It is not clear from the record when this stipulation was made. The parties referred to the stipulation at sentencing, when defendants first moved to strike the preliminary examination. Defendants state in their briefs that it was made in court on June 28, 2001, but there is no transcript for that date. Defendants suggest that the parties agreed to the stipulation because Gholston’s interpreter had not been subject to an oath as required by MRE 604.

⁴ At a posttrial hearing, held pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), Deshawn Reed’s counsel testified that the original defense theory would have implicated Borders, and that he and Marvin Reed’s counsel decided to implicate Allen instead three weeks before the trial.

Jones testified that Allen shot Gholston from behind the pool hall. He stated that Allen was dressed all in black, including a black hood tied tightly around his face. Jones placed Allen at a different spot than the pole where Nelson had placed the shooter. Jones testified that he had heard Gholston and Allen arguing and threatening each other several weeks before the shooting. Jones explained that he never came forward with this information before the trial because Allen had threatened him and he was afraid Allen would kill him. Jones admitted that Deshawn Reed's brother, Tienail Reed, drove him to the courthouse to testify.

Nelson testified that he saw a man he did not know shoot Gholston from outside the pool hall. The shooter wore a black hood and other black clothing, and he stood beside a pole when he fired. Nelson also testified that he talked to Gholston before the police arrived at the scene, and that Gholston told him that he did not know who shot him. Nelson did not reveal this information when he talked to the police. Nelson denied telling Lynette Love that Deshawn Reed or Marvin Reed was the shooter. Nelson acknowledged that he would not have voluntarily gone to the police if Bruno had not contacted him.

The prosecution countered the alternate shooter theory with testimony from police officers that it would not have been possible for a shooter to hit Gholston from beside the pool hall. The shooters in Nelson's and Jones' scenarios would have stood 210 to 220 feet from the location where Gholston was shot. The firearm used in Gholston's shooting had not been found at the time of trial. A bullet was removed from Gholston's neck, but the caliber was not identified at trial. The parties implicitly agreed that the bullet had been fired from a handgun, and defendants did not attempt to show otherwise. There were no bullet casings found at the intersection, suggesting that the handgun was a revolver, which does not eject spent casings.

Howard testified that it would be extremely difficult to accurately hit a moving car from a distance of two hundred feet with a handgun. Sgt. Anderson concurred, and stated that the shot would be "[a]lmost impossible." Defendants objected to Howard's and Sgt. Anderson's testimony, contending that they had not been qualified to give expert testimony on shooting distances. Marvin Reed's counsel also stated for the record that "we weren't disputing the shot of 200 and 250 feet was either a lucky shot or a hell of a shot." The trial court overruled the objections, stating that Howard and Sgt. Anderson could testify based on their own experience in firing guns at a shooting range.

Both defendants presented alibi witnesses. Lataisha Stephens and Walter Hughley testified that Marvin Reed was in Stephens' home, three blocks away from the intersection, at the time of the shooting. Stephens testified that she heard the shot, and that Marvin Reed was still in her home when she heard it. Hughley testified that Marvin Reed was still in Stephens' home when Hughley left for an errand, and that he saw Gholston's car on the curb as he started on his errand. Robin Graves, Deshawn Reed's girlfriend, testified that she spent the night with Deshawn Reed at Deshawn Reed's home the night before the shooting, and that she and Deshawn Reed remained there together until 1:30 p.m. the next day. Defendant's housemates, Frederick Hopkins and Bennett Hopkins, corroborated Graves' testimony that Deshawn Reed was at home at the time of the shooting. Troy Cranford, Deshawn Reed's cousin, testified that he heard the gunshots when he was at his mother's house a block away from the intersection. About ten minutes later, he called Deshawn Reed at his home, and Deshawn Reed was there to take the call.

The trial court found Deshawn Reed guilty of assault with intent to commit murder and felony-firearm, and found Marvin Reed guilty as an aider and abettor of assault with intent to commit murder.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Defendants raise identical ineffective assistance of counsel claims. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

B. *Ginther* Hearing

Defendants moved in the trial court for a new trial on the basis of ineffective assistance of counsel. Defendants claimed that their trial attorneys were ineffective because they failed to call an expert witness to support the alternate shooter theory, failed to call three other witnesses who could testify to Allen's culpability, and stipulated that the preliminary examination trial would not be used at trial.

At defendants' *Ginther* hearing, defendants called David Townsend, a former firearms investigator for the Michigan State Police, as an expert witness on firearm trajectory and ballistics. Townsend testified that it was not difficult to shoot a target at seventy-five feet with a handgun. He also testified that it would have been possible to shoot Gholston in his car from a distance of 210 to 215 feet. He stated that the accuracy of the shot would depend on the skill of the shooter. He opined that the shooter in Nelson's scenario could have significantly improved his accuracy by bracing himself against the pole to stabilize the gun.

Douglas Hamel, Deshawn Reed's trial counsel, testified that his two defense theories were alibi and the alternative shooter. Hamel explained that he agreed with the prosecutor not to use the preliminary examination transcript at the trial so that the prosecutor would not be able to use the transcript in lieu of Gholston's testimony if Gholston was unable to testify. Gholston had failed to appear for other trial dates, and Hamel was concerned that the prosecution could use his preliminary examination testimony if the trial court found that he was unavailable. Hamel acknowledged that the preliminary examination testimony could have been used to impeach Gholston with a prior inconsistent statement, but he did not believe that there were any strong inconsistencies between Gholston's preliminary examination and trial testimony.

Hamel testified that Deshawn Reed told him that Anitra Dalton, Allen's girlfriend, said that Allen admitted to her that he shot Gholston. Hamel amended the witness list to endorse

Anitra, and he tried several times to contact her, but he did not talk to her until she arrived at the courthouse during trial. When Hamel talked to Dalton on one of the trial days, Dalton told him that Allen told her he shot Gholston, but she believed at the time he was joking. Hamel believed it would be too risky to present her as a witness.

Hamel testified that if the gun used in Gholston's shooting had been found before trial, he would have obtained ballistics testing to support the alternate shooter theory. Hamel acknowledged that he might have presented expert testimony on the trajectory distances of each of the six kinds of firearms that could have fired the bullet even if the correct gun had not been identified.

Anitra testified that Allen told her on the day of the shooting that he had shot Gholston. Anitra did not believe him. Anitra told her father, Alfred Dalton, about Allen's admission, and Alfred called his brother-in-law, Paul Jones, a lieutenant in the Wayne County Sheriff's Department. Jones notified the Ecorse police.

Anitra testified that Gholston and Allen stole car parts together, sold them, and split the proceeds. The day before Gholston was shot, Allen was angry because Gholston did not give him his share of the proceeds. Anitra explained that when Allen told her that he shot Gholston, he did not appear to be joking, but Anitra thought he was joking because she did not want to believe he had shot someone.

Anitra's father, Alfred Dalton, testified that he consulted his brother-in-law, Paul Jones, about Anitra's claim. Jones later told him that he notified the Ecorse police. Jones filed a memorandum in the Wayne County Sheriff's Department, dated March 3, 2001, wherein he stated that he notified Lieutenant Demming of the Ecorse Police Department detective bureau that Jones' brother-in-law, Alfred Dalton, told Jones that his daughter, Anitra Dalton, told Alfred that Allen admitted shooting Gholston on the day of the shooting. Demming responded "that he would look into the matter further, but felt that they had the right suspect and would continue looking towards prosecuting him."

Marvin Reed's counsel, Timothy Murphy, testified that he did not believe that he needed an expert witness to testify that the alternate shooter theory was plausible, notwithstanding the distance between the shooter and the target. He did not anticipate that Sgt. Anderson would testify as an expert witness and opine that the shot was not possible. Murphy did not believe that Sgt. Anderson's opinion was persuasive, because the testimony established that the shooter fired four or five shots, thus raising the odds that one shot would hit its mark. When asked whether he believed he had made any mistakes in handling Marvin Reed's defense, Murphy replied that he should have called a ballistics expert.

Murphy testified that he did not talk to Anitra Dalton until the trial. He observed that she was "an ambivalent, reluctant witness," and she insisted that she believed Allen had been joking. Murphy did not consider her to be a credible witness.

Sgt. Victor DeLeon of the Ecorse Police Department testified that he became the officer in charge of the case after Sgt. Anderson retired. He stated that Demming never told him about the information he received from Jones, and that there was no report of Jones' communication in the case file. DeLeon stated that department protocols would have required Demming to share

the information received with the officer in charge. When asked if Demming's failure to make a report on Jones' communication constituted a violation of police procedures, DeLeon replied, "I imagine it would be." Cameron, the prosecutor, testified that he first learned of Anitra Dalton from the defense attorneys. She was not mentioned in the police investigation file. Cameron approached Anitra and Alfred outside the courtroom during the trial and asked to speak with them. Both appeared very agitated and nervous, and they refused to speak with him.

The trial court ruled that defendants failed to establish ineffective assistance of counsel and denied their motions for a new trial.

C. Failure to Call an Expert Witness

Defendants claim that their attorneys were ineffective for failing to call a weapons expert to counter the prosecution's claim that a shooter could not have shot Gholston from the locations identified by Jones and Nelson. The failure to call a witness can constitute ineffective assistance only if it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Here, a firearms and trajectory expert might have made a difference if the contest between the prosecution and defense theories had turned on the likelihood of a shooter hitting Gholston from 210 to 215 feet away. This is not the situation here, where the trial court found a wide credibility gap between Gholston and the pro-defense witnesses, and the marksmanship question was just one of many factors creating that gap. On the one hand, the trial court found that Gholston credibly identified Deshawn Reed and Marvin Reed as his assailants. The trial court noted that Gholston identified his assailant within hours of the shooting, and that he was unequivocal and unwavering in his identification of his assailants.

In contrast, the trial court found that Nelson and Jones were not credible. The trial court also gave specific reasons for its disbelief in Nelson and Jones, and its finding that it was "virtually impossible" to hit a moving target from the pool hall location was only one of these reasons. The trial court also found it implausible that an "assassin" would have known in advance that Gholston would pass through the intersection at the appointed time. The court contemplated the possibility that Nelson and Jones had been coerced or bribed into giving exculpatory testimony. The trial court generally commented that Nelson and Jones were "pathetically incredible," "palpably false," and "lacking in any semblance of credibility," and the trial court remarked that their patent falsehoods tainted the credibility of all of the defense witnesses. Under these circumstances, the marksmanship question was a comparatively minor factor in the trial court's finding of guilt. Therefore, the failure to call an expert did not deprive defendants of a substantial defense.

Furthermore, both attorneys gave sound explanations for why they did not foresee a need to call an expert. Marvin Reed's counsel, Murphy, did not anticipate that Sgt. Anderson would testify that he believed the shot from the pool hall was virtually impossible. Murphy believed that Sgt. Anderson's belief that the shot was too difficult would be offset by the fact that the shooter made four or five attempts. Under these circumstances, we do not find Murphy's explanation to be objectively unreasonable. Hamel also gave a reasonable explanation for

omitting expert testimony. He believed that expert testimony would be of limited value where the type of firearm used in the shooting was undetermined. Although, in hindsight, Hamel agreed that an expert could have testified about each of the six kinds of guns that could have fired the bullet removed from Gholston's body, his prior decision was not unreasonable.

Additionally, Townsend stated that the accuracy of the shot would have depended on the shooter's skill. Without evidence that Allen was an experienced or skillful shooter, Townsend's testimony would establish little more than a theoretical possibility that he might have hit Gholston from his position by the pool hall.

Defendants have thus failed to establish either prong of the ineffective assistance of counsel test with respect to the failure to call an expert witness. The failure to call an expert witness was not unreasonable under the circumstances of this case, and an expert would not have provided a substantial defense in any event where the marksmanship evidence was a comparatively minor and non-determinative factor in the trial court's decision.

Defendants also claim that their attorneys were ineffective for failing to call Anitra Dalton and Alfred Dalton as witnesses. Trial counsel's decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.*

Hamel and Murphy both testified at the *Ginther* hearing that they did not believe that Anitra Dalton was a credible witness because she repeatedly maintained that Allen was only joking when he claimed he shot Gholston and she appeared unwilling to testify. The decision was thus one of strategy, which we will not second-guess.

Defendants present numerous arguments to counter the presumption that their trial attorneys exercised sound strategy with respect to Anitra. They argue that their attorneys could have bolstered Anitra's testimony by showing that Alfred repeated Allen's claim to Jones, who passed the information on to the Ecorse police, who ignored the information. Deshawn Reed adds to this argument by stating that Hamel's failure to fully uncover these matters constituted a failure to adequately investigate the case. Defendants' assertions that this additional information could have resolved Anitra's credibility problems are speculative, and fail to rebut the presumption of sound strategy.

Marvin Reed further argues that Murphy was ineffective for failing to call Raphael Parks to testify that he asked Gholston who shot him, and that Gholston told him that he did not know. He contends that this testimony would have bolstered Nelson's and Jones' testimony, and impeached Gholston's credibility. The trial court was plainly unconvinced by Nelson's and Jones' testimony that Gholston denied knowing who shot him, and there is no basis for Marvin Reed's assertion that Parks' cumulative testimony would have tipped the balance in defendants' favor. Consequently, failure to call Parks was neither error nor an outcome-determinative omission.

Defendants argue that the defense attorneys were ineffective when they stipulated that the preliminary examination testimony would not be used at trial, because this stipulation cost them

the opportunity to impeach Gholston with prior inconsistent statements. Hamel presented a reasonable and sound strategic reason for this stipulation: Gholston had failed to appear for two previous trial dates, and if he failed to appear a third time, Hamel did not want the prosecutor to have the opportunity to use his preliminary examination testimony in lieu of his trial testimony. This reason is firmly based on MRE 804(b)(1), which provides a hearsay exception for prior sworn testimony by an unavailable witness. Murphy did not testify about his reasons for agreeing to the stipulation, but Hamel's rationale and strategy applies to Murphy as well.

Defendants argue that the stipulation cost them the opportunity to impeach Gholston with prior inconsistent testimony, as permitted by MRE 801(d)(1)(A). Compared to the possible benefit of precluding Gholston's testimony in the event that Gholston again failed to appear, this cost was low. Under the circumstances, defendants have not overcome the presumption that this decision was sound trial strategy

Consequently, we hold that defendants were not denied the effective assistance of counsel.

III. PRELIMINARY EXAMINATION

Both defendants contend that their bindover was jurisdictionally defective because the interpreter at the preliminary examination was not sworn to make a true translation. They also argue that the omission of the oath was prejudicial because it denied them the opportunity to impeach Gholston with his preliminary examination testimony.

Defendants did not object to the omission of the oath, and they did not challenge the validity of the bindover until sentencing. We therefore consider this claim unpreserved. Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004).

MRE 604 provides that interpreters are subject to the administration of an oath or affirmation to make a true translation. The trial court therefore erred in permitting Croxton to act as an interpreter without first being sworn. However, defendants have failed to show that this error affected their substantial rights. Defendants' contention that this error cost them the opportunity to impeach Gholston with his preliminary examination testimony is factually and legally flawed. It was trial counsels' stipulation with the prosecutor, not the omission of an oath to the interpreter, that precluded defendants from using the preliminary examination testimony for impeachment. Without the stipulation, defendants could have used the preliminary examination testimony to impeach Gholston even if the omission of the interpreter's oath could somehow cause Gholston's testimony to be considered unsworn.

Additionally, the importance of the interpreter's oath must be assessed in the unique circumstances of this case. The interpreter was not translating a foreign language or specialized sign language. Gholston's speech was impaired, but he testified in ordinary spoken English, and the interpreter's role was to repeat his statements with clarity. Defendants could listen to and observe Gholston's efforts to communicate, and they could have objected if they disagreed with the interpreter. Defendants have not claimed that the interpreter misrepresented Gholston's

communications. We therefore conclude that the omission of the oath did not affect defendants' substantial rights.

Defendants contend that omission of an oath rendered the bindover jurisdictionally defective, and thus invalidated the entire proceedings. We acknowledge that personal jurisdiction over the defendant is vested in the circuit court upon the filing of a return of the magistrate "before whom the defendant had been examined." *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 119; 215 NW2d 145 (1974). It does not follow, however, that a defect in the preliminary examination invalidates subsequent proceedings. It is well established that an evidentiary deficiency at the preliminary examination is not itself a ground for vacating or reversing the defendant's conviction—although such deficiency could serve as a ground for the circuit court to dismiss the charges against a defendant. *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003); *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990); *Genesee Co Prosecutor, supra* at 119-120. This rule is consistent with the general principle that personal jurisdiction may be waived. *People v Phillips*, 383 Mich 464, 469-470; 175 NW2d 740 (1970). Defendants effectively acquiesced to the trial court's personal jurisdiction, despite the omission of the oath to the interpreter, when they failed to timely raise an objection or to move to quash the bindover for that reason. Accordingly, we hold that there was no jurisdictional error.

IV. EXPERT TESTIMONY

Defendants claim that the trial court improperly allowed Howard and Sgt. Anderson to give expert testimony regarding the likelihood of a shooter hitting Gholston from a distance of 210 to 220 feet. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

The prosecutor did not seek to qualify Howard as an expert witness, and the trial court did not treat him as such. When Marvin Reed argued that Howard could not give expert testimony on the effective range of a handgun, the trial court responded, "anybody who shoots a weapon occasionally I think can testify, you know, about the accuracy of shooting a target at certain distances."

Howard's testimony was admissible under MRE 602 and 701, and the trial court properly admitted the evidence even though he had not been offered as an expert under MRE 702. MRE 602 permits a lay witness to testify on matters of which he has personal knowledge. MRE 701 permits a lay witness to give opinion testimony if those opinions "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." Howard had personal knowledge of his shooting range experiences. His opinion that it is extraordinarily difficult to shoot a moving target with a handgun at two hundred feet was based on his perceptions, and it was helpful to the determination of whether defendants' alternate shooter theory was plausible. The trial court did not abuse its discretion in admitting the testimony.

The trial court stated that Sgt. Anderson "probably qualifies as an expert or as a lay person who can give an opinion on this topic." Assuming, *arguendo*, that Sgt. Anderson did not qualify as an expert, his testimony that he would find it very difficult to shoot a moving car with a handgun at two hundred feet, and "[a]lmost impossible" at 215 feet, was admissible for the same reasons that Howard's testimony was admissible. The trial court further pursued the matter

by questioning whether Sgt. Anderson knew the distance capacities and bullet trajectories of other kinds of firearms, but Sgt. Anderson disclaimed such expertise, responding, “I really would not want to get into that area.” Sgt. Anderson’s testimony was thus limited to areas in which he could properly give a lay opinion, and it did not extend into areas requiring expertise that he did not claim to have. Accordingly, we hold that the trial court did not abuse its discretion in allowing Sgt. Anderson’s testimony.

V. DISCOVERY VIOLATION

Defendants claim that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in failing to disclose Jones’ report to the Ecorse police. The United States Supreme Court held in *Brady* that a criminal defendant has a due process right of access to certain information possessed by the prosecution. *Id.* at 87. Accordingly, the prosecution must disclose to a criminal defendant evidence that could cause a jury to entertain reasonable doubt about the defendant’s guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The *Brady* rule covers both exculpatory evidence and impeachment evidence. *Id.* For a defendant to establish a *Brady* violation, he must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* at 281-282.

Defendants failed to show that the prosecution possessed Jones’ report, or any other information that Jones notified the Ecorse police of Anitra’s allegation about Allen. The prosecutor testified at the *Ginther* hearing that he never received information that anyone from the sheriff’s department had contacted the Ecorse police. Jones did not testify that he submitted his report to the prosecution. Having failed to show that the prosecution possessed the report, defendants are also unable to show that the prosecution suppressed the evidence.

Defendants also cannot show that they lacked other means to obtain the information. Defendants already had the information contained in Jones’ report. Defendants knew about Anitra and her claim, and, in fact, subpoenaed her to testify at trial. Although defendants were apparently unaware of the fact that Jones made the report to the Ecorse police, this, in itself, does not exculpate defendants, and it is unclear how it could be used to impeach any of the prosecution witnesses. Furthermore, there is no reasonable probability that the information could have led to a different outcome at trial. The trial court was clearly satisfied that Gholston was a highly credible witness, and that the alternate shooter theory was unbelievable. Third-hand evidence that Allen had admitted the shooting, or that the police did not thoroughly investigate Jones’ report, would not have altered the trial court’s findings.

VI. GREAT WEIGHT OF THE EVIDENCE

Marvin Reed contends that the verdict was against the great weight of the evidence. He asserts that the trial court erred in assuming that a paralyzed complainant who knew both defendants and who identified them as his assailants was a credible witness absent evidence of a motive to lie. He argues that this assumption caused the trial court to ignore evidence that would have dictated an acquittal.

Although Marvin Reed asserts otherwise, this argument attacks the trial court's findings that Gholston was credible and that the pro-defense witnesses were not. In *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998), our Supreme Court recognized only narrow exceptions to the general principle against granting a new trial based on questions of witness credibility: when the witnesses' testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *Id.* at 643-644. None of these exceptions apply to Gholston's testimony. Furthermore, contrary to Marvin Reed's claim that the trial court ignored contradictory evidence after assuming that a witness in Gholston's situation was credible, the trial court thoughtfully commented on each premise of the defense alternate shooter and alibi theories before rejecting them as implausible. We hold that Marvin Reed's conviction was not against the great weight of the evidence.

VII. SENTENCING

Deshawn Reed claims that the trial court erred in imposing a 216-month minimum sentence after stating that it would impose a 210-month minimum sentence, the highest permitted by the sentencing guidelines. The trial court noted at sentencing that the statutory guidelines range for Deshawn Reed's minimum sentence was 126 to 210 months. The prosecutor argued that the trial court should exceed this range, but the trial court replied that it did not have a sufficient basis for an upward departure from the guidelines. Nonetheless, the trial court sentenced Deshawn Reed to eighteen to thirty years for assault with intent to commit murder. The eighteen-year sentence, i.e., 216 months, is six months in excess of the guidelines, contrary to the trial court's clearly stated intent. The prosecutor concedes that Deshawn Reed's sentence is erroneous, and agrees that this matter should be remanded for correction of this error. We agree and, therefore, remand this case for correction of the judgment of sentence to reduce Deshawn Reed's minimum sentence to 210 months. MCR 7.216(A)(7).

Affirmed as modified and remanded for correction of defendant Deshawn Reed's judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot