

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEO DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 8, 2005

No. 252145

Wayne Circuit Court

LC No. 03-004967-01

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of carjacking, MCL 750.529a, felonious assault, MCL 750.82, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 270 to 414 months' imprisonment for the carjacking conviction, one to four years' imprisonment for the felonious assault conviction, one to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and one to five years' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts and Procedure

At approximately 4:00 or 5:00 p.m. on April 6, 2003, Adrian Hanceri was driving his car when he saw defendant outside of a parked blue car talking to somebody in the car. When the driver of the blue car suddenly accelerated the car and began driving away, defendant shot a gun three times at the back of the car and pursued on foot. Defendant then looked toward Hanceri and shot at him, hitting him in the arm. Defendant then continued running after the driver of the blue car and shot at the blue car several more times.

Defendant made his way to a gas station, where he saw an occupied car. Hazel DeLong was outside the car to pump the gas while David Holesh and their eleven-month-old daughter were in the car. Defendant approached the car and told Holesh to get out. As Holesh was climbing out of the car, defendant shot into the car three or four times, hitting Holesh once on his left side. DeLong quickly retrieved her baby from the car while defendant got into the car. Once the baby was out of the car, defendant drove away.

Later that day, when defendant allegedly entered a house while pointing a gun at a child's head, and the occupants of the house beat defendant into submission and called the police. While defendant was in the hospital recovering from his wounds, a police officer interviewed defendant. Defendant told the officer that he and his friend Darren were driving around smoking marijuana in defendant's rental car when Darren dropped defendant off in a gang neighborhood. Defendant stated that after Darren drove away with the car, some men started shooting their guns at defendant. Defendant then ran to a gas station for help, where he saw a man, a woman, and a baby in a car. When defendant approached the man and asked for help, the two began fighting over control of the man's gun and one or two shots went off. Defendant got into the car and drove away after the woman retrieved her baby from the back of the car. After making his statement, defendant refused to sign the written statement.

At the preliminary examination, defendant was identified by Hanceri and Holesh. Defendant filed a motion to suppress the identifications, arguing that the identifications were unduly suggestive because he was wearing a prison jumpsuit at the time. Defendant also filed a motion for a *Walker*¹ hearing, arguing that his statements to police were not voluntarily given. At the *Walker* hearing, defendant testified that he never made a statement to police. The trial court determined that because defendant denied actually making the statement, it was not required to decide the voluntariness of defendant's statement to police. The trial court denied defendant's motion to suppress his statement to police and defendant's motion to suppress identification.

At the bench trial, the trial court found defendant guilty of felonious assault for the shooting of Hanceri, assault with intent to do great bodily harm less than murder for the shooting of Holesh, carjacking for the taking of Holesh's car, felon in possession of a firearm, and felony-firearm.

II. Analysis

A. The Trial Judge's Exposure to the Preliminary Examination Transcript

Defendant argues that he is entitled to a new trial because the trial judge who presided over the bench trial read the preliminary examination transcript. This Court reviews this unpreserved issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In *People v Ramsey*, 385 Mich 221, 225-226; 187 NW2d 887 (1971), our Supreme Court held:

There is no way to determine whether or not the trial court was prejudiced by "glancing" at the [preliminary examination] transcript. In fact, it is difficult to determine precisely how much, if any, of the transcript was read by the court, or for what purpose. Therefore, in order to avoid problems of proof on this issue, we hold that as an absolute rule it is reversible error for the trial court sitting without a jury to refer to the transcript of testimony taken at the preliminary examination

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

except under the exceptions provided by statute. A jury, if impaneled, would not be aware of the testimony taken at a preliminary examination except under the provisions of the statute. A trial judge, sitting as the trier of the facts, can assume no greater prerogatives than a jury if a jury were impaneled to determine the facts.

However, the rule in *Ramsey* does not govern in cases where the judge did not read or refer to the preliminary examination transcript while sitting as trier of fact at trial. *People v Dixon*, 403 Mich 106, 109; 267 NW2d 423 (1978). As long as the judge does not read or refer to the preliminary examination transcript at a bench trial, he may sometimes sit as a trier of fact even when he was required to previously read the preliminary examination transcript in order to rule on a pretrial motion. *Id.*²

Here, even assuming that the trial judge read the preliminary examination transcript in order to rule on defendant's pretrial motion to suppress identification, *Ramsey* does not apply because the trial judge did not read or refer to the preliminary examination transcript while sitting as trier of fact in the bench trial. *Dixon, supra* at 109. Defendant waived his right to a jury trial *after* the trial court ruled on defendant's motion and with full knowledge that the judge apparently read the transcript. See *id.*

B. Voluntariness of Defendant's Statement to Police

Next, defendant argues that the trial court reversibly erred in determining that it was not required to decide the voluntariness of defendant's statement to police. However, defense counsel's express acquiescence to the trial court's determination constituted a waiver of the issue. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (explaining that waiver is the intentional relinquishment or abandonment of a known right). " 'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.' " *Id.* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Therefore, our review of the issue is limited to the question whether defense counsel was ineffective.

In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Here, defendant failed to move for an evidentiary hearing or a new trial in the trial court. Because an evidentiary hearing

² Since *Ramsey*, our Supreme Court has severely limited the instances in which courts may reverse criminal convictions without undertaking a harmless error analysis. *People v Cornell*, 466 Mich 335, 363; 646 NW2d 127 (2002); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Because we conclude *Ramsey* is inapplicable to this case, we need not determine whether the error per se analysis in *Ramsey* remains viable.

was not conducted, our review is limited to the mistakes apparent on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel’s deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland, supra* at 694.

Defendant argues that his counsel was ineffective for acquiescing to the trial court’s determination that it was not required to decide the voluntariness of defendant’s statement to police where defendant denied making the statement.

In *People v Neal*, 182 Mich App 368, 372; 451 NW2d 639 (1990), this Court held:

[W]here . . . a defendant claims that he involuntarily signed a statement and that the statement was fabricated by police, the trial court must hold a *Walker* hearing prior to introduction of the statement at trial. At the hearing the trial court must determine, assuming the defendant made the statement, whether he did so voluntarily. If it is found that the defendant voluntarily made the statement, the defendant is free to argue to the jury that the police fabricated it. However, if the trial court at the hearing finds the statement was involuntarily made, the statement is inadmissible, regardless of the defendant’s claim that he never actually made it.³

In *People v Tate*, ___ Mich ___; ___ NW2d ___ (2005), decided January 21, 2005 (Docket No. 123641), our Supreme Court held that under *Boles v Stevenson*, 379 US 43; 85 S Ct 174; 13 L Ed 2d 109 (1964), and *Lee v Mississippi*, 332 US 742; 68 S Ct 300; 92 L Ed 330 (1948), a defendant has the right to challenge both the authenticity and the voluntary nature of his confession.

³ In *Neal, supra* at 373-374, this Court concluded that, although the trial court erred in refusing to decide the issue of voluntariness, the admission of the defendant’s confession was harmless error in light of the overwhelming evidence of his guilt.

Under *Neal* and *Tate*, the trial court erred in refusing to rule on the voluntariness of defendant's statement to police. We conclude that defense counsel was deficient in acquiescing to the trial court's erroneous ruling. However, defendant has not shown that he was prejudiced by defense counsel's error. The evidence of defendant's guilt independent of his statement was overwhelming. Three eyewitnesses directly implicated defendant in the criminal activity. Defendant did not present any evidence contradicting this testimony other than his statement to police, where he denied committing the shootings. Thus, the use of defendant's statement at trial did not adversely prejudice him in that it did not affect the outcome of the proceedings.⁴

C. Suggestiveness of Preliminary Examination Identification Procedure

Next, defendant argues that the trial court should have excluded Hanceri and Holesh's in-court identifications because defendant was subjected to an improperly suggestive preliminary examination identification procedure. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. . . . Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Defendant argues that the preliminary examination identifications were impermissibly suggestive because it was obvious that he was the accused, as he was wearing a prison jumpsuit, he was sitting at defense counsel's table, and he is African-American (as was the person who committed the crime). "The fact that the prior confrontation occurred during the preliminary examination, as opposed to a pretrial lineup or showup, does not necessarily mean that it cannot be considered unduly suggestive." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In order to sustain a due process challenge to a pretrial identification procedure, a defendant must show that the identification was so impermissibly suggestive in light of the totality of the circumstances that it gave rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Harris*, *supra* at 51. However, "[s]imply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective." *Harris*, *supra* at 51.

If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*Kurylczyk*, *supra* at 303.]

When determining if an independent basis exists for the admission of an in-court identification, relevant factors include:

⁴ If anything, the statement helped defendant, as the trial court accepted portions of defendant's statement and consequently found defendant guilty of lesser offenses (e.g., the trial court believed the portion of defendant's statement that defendant shot Holesh because he believed that Holesh was reaching for a gun. Because of this finding, the trial court convicted defendant of assault with intent to do great bodily harm less than murder rather than assault with intent to commit murder).

(1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000), citing *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).]

Here, defendant was not identified at a live or photographic lineup, but was identified by Hanceri and Holesh at the preliminary examination. Because defendant was wearing a prison jumpsuit in the courtroom and was sitting with defense counsel, we conclude that the trial court erred in determining that the preliminary examination identifications were not unduly suggestive. See *Colon*, *supra* at 305 (“there is no question that the preliminary examination was a suggestive atmosphere in that defendant was placed in the courtroom in prison garb.”)

However, despite the suggestiveness of the preliminary examination identifications, the evidence at trial sufficiently demonstrated independent bases for the identifications. Hanceri testified that he was driving slowly and was close to the perpetrator when the perpetrator turned his head toward him and looked at him. Holesh saw the perpetrator as the perpetrator approached his car and the perpetrator talked to Holesh from a short distance. After the perpetrator shot Holesh, Holesh saw the perpetrator get into his car and sit there while DeLong retrieved the baby from the car. Holesh testified that the encounter lasted about five minutes and that he got a good look at the perpetrator. Holesh testified that he had no doubt that defendant was the perpetrator.

Both Hanceri and Holesh identified defendant at the preliminary examination, which was seventeen days after they witnessed defendant commit the crimes. This is “a ‘relatively short span of time,’ that ‘does not reduce the reliability’ ” of the identification. *Colon*, *supra* at 305, quoting *Kurylczyk*, *supra* at 308.⁵ Both witnesses again positively identified defendant at trial. Neither witness ever misidentified defendant at any time, and neither had doubts about

⁵ *Colon* and *Kurylczyk* involved situations where the witnesses identified the defendants within two weeks of the crimes. Although the present case involves a seventeen-day span, we conclude that this may also be considered a “relatively short span of time.”

defendant's identity.⁶ Under the totality of the circumstances, we conclude that there is substantial reliable testimony that constitutes an independent basis for identifying defendant.⁷

Defendant also argues that his trial counsel was ineffective for failing to orally argue the merits of defendant's motion to suppress identification. However, because the trial court did not err in denying defendant's motion to suppress identification, defendant was not prejudiced by trial counsel's failure to give oral support for the motion.

D. Guilt Beyond a Reasonable Doubt

Finally, defendant argues that the trial court erred by convicting defendant under a standard of proof less than beyond a reasonable doubt. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *Carines, supra* at 774.

The right to a jury trial in a criminal felony prosecution is fundamental. *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968). The fundamental nature of the right to a jury trial is reflected in both the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20. Interrelated with the right to a jury trial is the requirement that the prosecutor prove guilt beyond a reasonable doubt. *Sullivan v Louisiana*, 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993). [*People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002).]

Here, in finding defendant guilty of assault with intent to do great bodily harm less than murder, the trial court found that defendant intentionally shot at Holesh. In reaching this conclusion, the court stated, "Whether it's a struggle over a gun or not or whether Mr. Davis brought the gun, I think it's more likely that he brought the gun to the scene." We conclude that the trial court's statement did not violate defendant's right to be convicted of the crime beyond a reasonable doubt. First, a finding that defendant brought the gun with him to the scene is not an essential element of assault with intent to do great bodily harm less than murder. See *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922) (the elements of assault with intent to do great bodily harm less than murder are "(1) an assault, i.e., 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder.") Thus, the trial court did not need to find this fact beyond a reasonable doubt to convict defendant. Second, the trial court's use of the words "more likely"

⁶ Shortly after seeing the perpetrator, Hanceri described the perpetrator as an overweight black male about thirty-five to forty years old. Holesh described the perpetrator as an overweight black male with a moustache and hair that was "kind of long a little bit on the top." The lower court record indicates that defendant was a thirty-year-old black male, but does not provide a more detailed description of defendant. Because of the vagueness of the description of defendant in the lower court file, we assign little weight to this factor in our analysis.

⁷ Although defendant's statement of questions presented seems to suggest that he would argue that he was entitled to a lineup and a hearing under *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), he does not advance these arguments in his brief on appeal.

does not plainly demonstrate that the court used a “preponderance of the evidence” standard, as opposed to a “beyond a reasonable doubt” standard, in finding defendant’s guilt.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh