

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 27, 2014

v

ALGERNON MOORE, a/k/a ALGERON
MOORE,

No. 314869
Wayne Circuit Court
LC No. 12-005413-FH

Defendant-Appellant.

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1), and domestic violence, MCL 750.81(2). Defendant was sentenced to three years' probation for the felonious assault conviction, two years' imprisonment for the felony-firearm conviction, and five days, time served, for the domestic violence conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

First, defendant argues that the prosecution failed to present sufficient evidence for his convictions of felonious assault, felony-firearm, and domestic violence. We disagree.

A claim of insufficient evidence in a criminal trial is reviewed de novo on appeal. *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). In determining whether sufficient evidence was presented at trial to sustain defendant's conviction, this Court must consider the "evidence in the light most favorable to the prosecutor" and determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). For purposes of felonious assault, an assault occurs when a defendant "takes some unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013). Next, the elements of felony-firearm "are that the

defendant possessed a firearm during the commission of, or the attempt to commit, a felony. One must carry or possess the firearm when committing or attempting to commit a felony. Possession of a firearm can be actual or constructive, joint or exclusive.” *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (footnotes omitted). “[I]dentity is an element of every offense.” *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (internal citations omitted).

Defendant argues that he established reasonable doubt regarding these offenses, and thus, his convictions were based on insufficient evidence. However, his argument necessarily implicates the victim, Tonya McCallum’s, credibility. This Court has stated that “positive identification by witnesses may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). McCallum positively identified defendant as the individual who assaulted her by pointing a weapon and shooting at her while she drove away from him in a vehicle. Thus, that testimony alone is sufficient to prove, beyond a reasonable doubt, that defendant assaulted McCallum with a dangerous weapon. Any question regarding McCallum’s credibility remains an issue for the trier of fact and is not an issue for this Court to resolve. *Davis*, 241 Mich App at 700.

Defendant also argues that the prosecution did not prove that he possessed a weapon. Although McCallum did not conclusively testify that she observed defendant holding a weapon as she was driving away from him, this Court has determined that “[c]ircumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime.” *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). There was sufficient circumstantial evidence to create a reasonable inference that defendant possessed a weapon. McCallum testified that she observed defendant “aiming,” she heard gun shots, and saw “orange sparks.” Additionally, Detroit Police Officer Frank Gregory recovered shell casings around an area in the street immediately outside defendant’s residence, consistent with where McCallum testified defendant was located at the time of the shooting. McCallum’s testimony, coupled with the location of the shell casings, was sufficient circumstantial evidence for the trier of fact to infer that defendant was in possession of a weapon. Thus, there was sufficient evidence to prove that defendant committed the felonious assault, based on McCallum’s testimony that she drove away in fear, and the circumstantial evidence regarding the weapon. The presence of the weapon was also enough to convict defendant of felony-firearm—because he possessed a firearm while committing the felonious assault.

Lastly, the prosecution also provided sufficient evidence to convict defendant of domestic violence. The elements of domestic violence “include (1) the commission of an assault or an assault and battery” and (2) either a dating relationship between the parties or if the parties have a child in common. *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011) (citing MCL 750.81(2)). Defendant does not deny that he had a child in common with McCallum. However, defendant denied hitting her, only testifying that she hit him. Defendant also denied shooting a weapon at McCallum. Contrarily, McCallum testified that she was “up in his face,” upset about the unclothed woman upstairs in defendant’s residence, when defendant hit her on the side of the head. McCallum also testified that defendant fired a weapon at her, approximately 10 times, while she drove away from him. This contradictory testimony creates a credibility issue and the trial court found McCallum to be a very credible witness, and thus, believed her testimony regarding the incident. Again, this determination of credibility by the

trial court should remain undisturbed by this Court. *Davis*, 241 Mich App at 700. In *Cameron*, the victim's testimony that the assault and battery occurred, regardless of the defendant disputing that fact, was sufficient to convict the defendant beyond a reasonable doubt. *Cameron*, 291 Mich App at 616. Thus, McCallum's testimony alone was sufficient to convict defendant of domestic violence beyond a reasonable doubt.

II. FINDINGS OF FACT

Next, defendant argues that the trial court erroneously determined that McCallum was a credible witness because she was clearly biased and the location of the shell casings was inconsistent with her testimony. Defendant further argues that the trial court was mistaken in finding facts to convict defendant of felonious assault and felony-firearm. We disagree.

“A trial court's findings of fact may not be set aside unless they are clearly erroneous.” *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). “A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.” *Id.* (internal citations omitted).

In convicting defendant for felonious assault, felony-firearm, and domestic violence, the trial court stated:

The complainant in this case, Tonya McCullum (sic), makes on face [sic] of it a very credible witness. She, she testified apparently without contradiction to any prior statement. She said what happened and what happened if, if she is to be believed, at 4 or 4:30 in the morning obviously makes out a case for felonious assault, felony[-]firearm, and perhaps also the domestic violence count.

The defendant, of course, his two friends who were in the home with him and then, and then also in the home without him later in the morning have a completely different version of what happened. I, I think it's – I think what tips the scales in this case frankly is the police testimony that they found 12 shell casings out in front of the house when they went over to investigate the shooting around 4:30 in the morning.

It's also, I think, very pervasive [sic] that Tonya McCullum's (sic) testimony about calling the police immediately after she got home to report the shooting coincides squarely with Officer Gregory's testimony about when they got the run. And he explained the rendezvous that they had not far from where the location where the shooting occurred and that they found these 12 shell casings more or less exactly where the defendant (sic) reported they would be. That's very persuasive evidence that the shooting occurred. That is, that the complainant is telling the truth about what happened and when it happened.

I found the testimony of Baker and Phillips to be not very credible, particularly with respect to the sort of alibi that they provide quasi alibi. That is, there was indeed a confrontation between the complainant and the defendant around eight o'clock that evening, and that may have happened, but that the

defendant was nowhere near the house at four o'clock in the morning when, when this shooting is reported by the complainant to have taken place.

It is just sort of implausible to me that, that the defendant would have left the house on Stoepel, as he says he did, at eight o'clock after the confrontation with Tonya and then never returned that day, but left Baker and Phillips there at the house and that they were up all night working in the kitchen; that there were gunshots coincidentally around four o'clock in the morning but they don't know where the shots came from, or, or why. And what a remarkable coincidence that Tonya reports such gunshots to the police and then tells them where the defendant was standing and then the police find those shell casings out in the middle of the street which makes you – one wonder how would she know that there had been 12 rounds fired off out in front of Stoepel if she hadn't been there at four o'clock in the morning and who produced those shell casings if not the defendant.

I don't find the defense witnesses in this case to have credibility. I find Ms. McCallum to be infinitely more credible. And the physical evidence squares more or is more consistent with her version of what happened than the defendant's witnesses or the defendant himself.

Another point that I think it important to make here is if one of the things that, that frankly bolsters McCullum's or McCallum's testimony or credibility is that she admits to certain acts of wrongdoing on her part. For one thing she admits that she drove over the grass at the defendant when she was leaving the house at 1:30 or 4:30 in the morning. I mean that's a crime in itself that could have been charged with [sic]. She admits doing that.

She also admits sort of busting into the house after, after the door was opened and running upstairs to see what was going on upstairs in a fit of what could only be described as jealous rage. So her state of mind wasn't exactly perfect.

And, you know, it is ironic that she would even have jealous rage over a relationship she has with a man that she knows to be married, but that's, you know, that's her business.

The fact that she was in a jealous rage more or less by her own admission, the fact that she drove over to [sic] grass towards the defendant by her own admission establishes a state of mind on her part, which if the defendant had admitted that he fired off several rounds at her car in an act of self-defense, I might have almost buy [sic] it. I mean I come buy [sic] it or maybe I could buy it. Buy it a lot more than I bought his side of this today.

But he chose another defense. He chose the defense which is inconsistent with the physical evidence and inconsistent with Tonya McCallum's testimony which frankly I find vastly more credible than, than the defense witnesses.

Defendant fails to present any valid argument regarding how the trial court's findings of fact were clearly erroneous. The trial court relied primarily on the credibility of McCallum as compared to defendant's alibi witnesses, Sidney Baker and Maurice Phillips, and the fact that physical evidence corroborated McCallum's testimony. Contrary to defendant's argument, this Court defers "to the trial court's special opportunity to determine the credibility of witnesses appearing before it," *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005), and this Court "may not substitute its judgment for that of the trial court," *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005). Further, our Supreme Court has held that the finder of fact is in a better position to determine credibility. *Reese*, 491 Mich at 159-160.

This Court will defer to the trial court's determination of credibility. The trial court properly determined that McCallum was credible due to her consistent testimony, her positive identification of defendant, admissions of wrongdoing, and the aspects of her testimony that were corroborated by physical evidence. Defendant focuses on the argument that the location of the shell casings was inconsistent with McCallum's testimony that defendant was in the middle of the street. However, McCallum specifically testified that defendant "came into the street," when he was shooting at her, but never indicated that he was in the middle of the street. Corroborating this testimony, Gregory testified that the shell casings were found in the street by a truck that was parked on the street right outside defendant's residence. This physical evidence is not inconsistent with McCallum's testimony. The court relied on this evidence in determining that defendant possessed a firearm and, even if he did not intend to harm McCallum, he at least intended to place her in reasonable apprehension of an immediate battery by shooting at her vehicle. The trial court stated a well-reasoned determination of credibility and there is no indication that the trial court clearly erred in its findings of fact.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that his convictions were against the great weight of the evidence because McCallum was not a credible witness, and instead, defendant, Phillips and Baker, should have been found to be credible. We disagree.

"We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A new trial should be granted based on the verdict being against the great weight of the evidence "only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 232.

Defendant argues solely that the trial court erroneously found McCallum's testimony to be credible, while simultaneously ignoring other evidence that established defendant's innocence. This Court has been clear that "issues of witness credibility are not sufficient grounds to find a verdict against the great weight of the evidence unless challenged testimony is almost completely unbelievable, for example because it was seriously impeached or clearly defied known physical possibilities." *People v Ratcliff*, 299 Mich App 625, 630; 831 NW2d 474 (2013), vacated in part on other grounds 495 Mich 876 (2013). In fact, "[a]bsent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232-233.

As previously held, this Court will defer to the trial court's determination of credibility. Additionally, defendant's mere insinuation that McCallum's testimony is incredible is not enough to find that his convictions were against the great weight of the evidence because McCallum's testimony was believable. As the trial court articulated, McCallum's testimony that defendant shot at her vehicle from the street was corroborated by Gregory's testimony that the shell casings were recovered on the street and on the curb beside and underneath a truck parked on the street outside defendant's residence. Specifically, the shell casings were recovered on the street near the "driver's side of the vehicle," underneath the truck, and on the curb. All the witnesses, except defendant, testified that a shooting occurred in the area outside defendant's residence around 4:00 a.m., which coincided with McCallum's account of the events. Lastly, McCallum testified regarding the timeline of the events following the incident—she called the police upon returning home, and shortly thereafter, Gregory and his partner responded to a call at defendant's residence and they first came into contact with McCallum near that residence. The trial court found McCallum to be a credible witness based on her consistent testimony. All of this evidence, taken with what the court determined to be incredible testimony by defendant, Phillips and Baker, led to the court ultimately convicting defendant of felonious assault, felony-firearm and domestic violence. Because McCallum's testimony was believable, and the evidence did not preponderate heavily against the verdict, defendant's convictions were not against the great weight of the evidence.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that his appointed counsel was ineffective for failing to introduce alibi witnesses who would have testified that defendant was at his mother's residence at the time of the shooting. Defendant also argues that his retained counsel failed to include alibi witness' affidavits with the motion for a new trial. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's "findings of fact are reviewed for clear error . . .," and questions of "constitutional law are reviewed by this Court de novo." *Id.* "A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes." *Id.* (internal citations omitted).

Both the United States Constitution and the Michigan Constitution provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v Spisak*, 558 US 139, 150; 130 S Ct 676; 175 L Ed 2d 595 (2010). See also *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Moreover, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600;

623 NW2d 884 (2001). In evaluating an ineffective assistance of counsel claim, this Court “will not substitute our judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel’s competence.” *Unger*, 278 Mich App at 242-243.

This Court has held that “[d]ecisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Further, any failure to call witnesses “only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.* (internal citations omitted). Defendant fails to overcome the presumption of trial strategy. As noted by the trial court, defendant’s trial counsel called two alibi witnesses, Baker and Phillips, who both testified that defendant was not at his residence at the time of the shooting. Defendant also testified on his own behalf that he was at his mother’s house at the time of the shooting. In fact, in his sufficiency of the evidence issue, *supra*, defendant states that the alibi evidence he presented was sufficient to provide the trial court with reasonable doubt. This Court notes the fallacy in defendant’s simultaneously arguing that he presented alibi evidence on one issue, but that his counsel failed to present alibi evidence for the purposes of his ineffective assistance of counsel claim. Furthermore, our Supreme Court has held that when an alibi defense has been presented, the failure to present additional alibi evidence does not constitute ineffective assistance of counsel. *Carbin*, 463 Mich at 601-602. Here, defendant’s trial counsel did present an alibi defense. Thus, defendant was not deprived of a substantial defense by either his appointed or retained counsel and he is unable to overcome the presumption of trial strategy.

Additionally, a defendant must establish a factual predicate for an ineffective assistance of counsel claim. *Carbin*, 463 Mich at 600. Defendant fails to state any factual predicate for his claim. He simply asserts that additional alibi witnesses should have been called by his trial counsel and that his retained counsel should have introduced alibi witness affidavits to supplement the motion for a new trial. However, defendant completely fails to articulate the identities of the witnesses who would have testified, and how the content of their testimony would have changed the outcome of his trial. Further, defendant mentions letters and text messages from McCallum that could have assisted his defense, but again fails to provide any details regarding the content of these alleged communications. Thus, defendant’s ineffective assistance of counsel claim against both appointed counsel and retained counsel is without merit.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder