

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 10, 2011

v

LEONARDROW LEWIS SMITH,

Defendant-Appellant.

No. 297164
Wayne Circuit Court
LC No. 09-027517-FC

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of assault with intent to commit great bodily harm, MCL 750.84, resisting or obstructing a police officer causing bodily injury requiring medical attention, MCL 750.81d(2), resisting or obstructing a police officer causing a serious impairment of a body function, MCL 750.81d(3), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 10 to 25 years' imprisonment for the assault convictions, 15 to 25 years' imprisonment for the resisting or obstructing a police officer causing bodily injury conviction, 5 to 15 years' imprisonment for the resisting or obstructing a police officer causing serious impairment conviction, 1 to 5 years' imprisonment for the felon in possession conviction, and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from his contact with two Detroit police officers. On September 9, 2009, police officers Heather Hale and Michael Sova were on routine patrol at 5:00 p.m. in a marked police vehicle traveling on a one-way street, Northfield Avenue. Two occupants were traveling in a red Pontiac in front of the squad car. Suddenly, the vehicle pulled to the side and parked, leaving the rear of the vehicle protruding into the street. Defendant exited the driver's door and began to walk on the sidewalk while talking on a cellular telephone. The police officers testified that they attempted to make contact with defendant, but he initially ignored them. Officer Sova called defendant over to the vehicle, and both officers began to exit the vehicle to speak to defendant. Defendant approached Officer Sova, pulled a gun from his right side, and began firing at the officers. Officer Sova was struck and fell to the ground, but he managed to pull his gun from the holster and return fire. Defendant began to retreat, but continued to fire the weapon. Officer Hale was grazed on her left thigh and shot in her right calf. A fragment or bullet casing was still present in her calf. She received medical treatment for her

injuries and continued to see a psychiatrist once a week. Officer Sova was shot in his upper right thigh and his lower left leg. The bullet travelled through his right leg and became lodged in his leg. The bullet had to be surgically removed and caused the destruction of muscle tissue. At the time of trial, Officer Sova was still under a doctor's care and participated in counseling and physical therapy.

Defendant proceeded to the home of his relatives, located approximately one block east of the shooting. Defendant's cousin, Shaquita Roy, testified that he came to her home and admitted to shooting a police officer. Defendant told her that he screwed up and shot a police officer because he had an outstanding warrant. He began to pace when police sirens became audible. The special response team of the police department arrested defendant at the residence.

Once in custody, Sergeant Kenneth Gardner interviewed defendant after he waived his constitutional rights. The sergeant testified that it was not standard procedure to videotape interrogations. Rather, he wrote the questions he presented and defendant's answers. Defendant asserted that Officer Sova saw the butt of defendant's gun and shot at defendant. In response, defendant merely shot at the ground to prevent the officer from chasing him. Defendant also claimed that there was a third person in the vehicle known as "Little Marcus."

Bullet casings were retrieved from the scene. Although Officer Sova testified that defendant fired his weapon at the officers from ten feet away, the nearest non-police fired casings were found 54 feet away. Two additional casings were approximately 85 feet away.

The passenger of defendant's vehicle, Mead Sterling, testified that he was traveling with defendant. Defendant displayed a gun to Sterling and told him to take it, but Sterling refused. Defendant exited the vehicle and began to walk, and Sterling exited the passenger seat. However, Sterling then gave conflicting testimony regarding who fired shots first, defendant or the police officers.

Ultimately, the trial court found the testimony of Officer Sova's identification of defendant as the shooter credible despite the disparity in the testimony regarding the distance of the shooting. The trial court also noted the testimony of defendant's cousin and that defendant was found in his relatives' home after the shooting. Defendant was acquitted of two counts of assault with intent to commit murder, but convicted of two counts of assault with intent to commit great bodily harm. In all other respects, defendant was convicted as charged.

First, defendant contends that there was insufficient evidence to support the convictions. We disagree. A challenge to the sufficiency of the evidence presented at a bench trial is reviewed de novo on appeal. *People v Lanzo Constr Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008). The elements of the crime may be proven by circumstantial evidence and reasonable inferences that arise from such evidence. *Id.* at 619. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). We resolve

conflicts in the evidence in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). If the resolution of a disputed factual question is contingent on the credibility of the witnesses, we defer to the trier court's superior ability to evaluate matters of credibility. *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Defendant does not address the elements of the convicted offenses. Rather, he asserts that there was a third person in the vehicle, Little Marcus, who committed the shooting. Defendant contends that he ran when Officer Sova asked for his driver's license, and Marcus committed the shooting from further down the street in accordance with the physical evidence, the gun casings. A review of the record reveals that there was sufficient evidence of defendant's identification as the shooter to support his convictions. *Kanaan*, 278 Mich App at 618-619. Officers Hale and Sova testified that they attempted to stop defendant after he parked his vehicle in a manner that protruded into the street. Although Officer Hale did not see the shooting, she identified defendant from a photographic array as the person who drove the vehicle. Additionally, Officer Sova identified defendant as the person he attempted to speak with, but defendant pulled a gun and fired at the officers. Despite Officer Sova's mistake regarding the distance between him and the shooter, the trial court nonetheless found that this identification testimony was credible. Defendant's passenger, Sterling, did not testify that there was a third occupant in the vehicle. Defendant's cousin testified that defendant admitted to shooting a police officer, and his admission did not blame a third-party named Marcus. In his unsigned statement to police, defendant mentioned a third individual named Marcus, but never accused Marcus of being the shooter. Accordingly, the record does not support defendant's challenge to the sufficiency of the evidence of identification.¹

Next, defendant contends that trial counsel was ineffective for waiving defendant's right to a jury trial, failing to interview and call witnesses, and failing to present a defense. We disagree. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that the performance of his attorney was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the errors of counsel, a different outcome reasonably would have resulted. *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010). "[A] defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). When the record does not contain sufficient detail to support defendant's claim of ineffective assistance, the issue is effectively waived. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Id.* Ineffective assistance of counsel premised on the failure to call witnesses is established only if the defendant is deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). It is the responsibility of trial counsel to present all substantial defenses, and a defense is

¹ The only evidence that Marcus shot at the officers was an unsigned affidavit filed by defendant attached to his brief on appeal.

substantial if it might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The defendant bears the heavy burden of proving the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant concludes that trial counsel was ineffective for waiving the right to a jury trial. First, a review of the record reveals that defendant responded affirmatively to the trial court's advice of rights and questioning regarding the voluntary waiver of the right to a jury trial. Additionally, on the record, defendant stated his concern that the jury would be inflamed in light of the fact that the victims were police officers. The record does not support a challenge to the waiver of the right to a jury trial. *Davis*, 250 Mich App at 368. Further, defendant failed to meet his burden of proving the factual predicate for his claim regarding the presentation of witnesses and a defense. *Hoag*, 460 Mich at 6. Defendant failed to present documentary evidence regarding the names and addresses of witnesses that would have testified on behalf of defendant. Therefore, this claim is waived. *Davis*, 250 Mich App at 368.

Defendant also asserts that trial counsel was ineffective for failing to request a jury instruction regarding defendant's right to resist excessive force. We disagree. "In a bench trial, the trial court is presumed to know the applicable law." *Lanzo Constr Co*, 272 Mich App at 484. Jury instructions must include all elements of the charged offense and must not exclude defenses and the defense theory if supported by the evidence. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). An examination of the record reveals that this claim of error is without merit. Defense counsel argued to the trial court that Officer Sova exceeded his lawful authority. The factual predicate for defendant's claim was the testimony of Sterling. However, the trial court noted that Sterling's testimony conflicted and provided differing accounts regarding actually observing the shooting and identifying the first shooter. In light of this conflict, the trial court relied on other witness accounts to render its decision, and we cannot conclude that the trial court erred in its assessment of the credibility of the witnesses. *Sexton*, 461 Mich at 752.

Next, defendant contends that there was insufficient evidence of a serious impairment of a body function suffered by Officer Sova as that term is defined in MCL 257.58c. We disagree. The listing of injuries contained within MCL 257.58c is not exhaustive, and therefore, other injuries not contained within the list may qualify as a serious impairment of a body function. *People v Thomas*, 263 Mich App 70, 75-76; 687 NW2d 598 (2004). Moreover, an injury need not be long-lasting or permanent to constitute a serious impairment. *Id.* at 76. An officer's loss of the use of a limb because he was on crutches for several weeks and unable to return to work for several months constitutes a serious impairment of a body function for purposes of MCL 257.58c. *Id.* at 77.

In the present case, Officer Sova testified that the bullet travelled through his right leg and became lodged. He underwent surgery and suffered a substantial muscle loss as a result of the shooting injury. Six months after the shooting, Officer Sova was still receiving medical

treatment and physical therapy although his prognosis was good. Under the circumstances, the evidence was sufficient to support a serious impairment of a body function. *Thomas*, 263 Mich App at 77.²

Lastly, defendant challenges the scoring of prior record variables (PRV) 4 and 6 and offense variables (OV) 3 and 19 as improper. We disagree. The interpretation and application of the legislative sentencing guidelines are questions of law subject to review de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). At sentencing, the trial court has the discretion to determine the number of points scored if there is evidence of record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If there is any evidence to support the scoring, the trial court's decision will be upheld. *Id.*

With regard to PRV 4 and 6, defendant presents a conclusive argument, and the presentence investigative report was not submitted with the lower court record. Consequently, we cannot address this claim. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). The challenge to OVs 3 and 19 are contrary to the trial court's factual findings and are simply without merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

² Defendant also asserts that application of Michigan's no-fault insurance law is appropriate. The *Thomas* Court rejected that assertion and limited the serious impairment analysis to MCL 257.58c. *Thomas*, 263 Mich App at 74-75.