

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 19, 2013

v

JONAS LEE MCDUGAL,

Defendant-Appellant.

No. 306464
Oakland Circuit Court
LC No. 2011-235404-FC

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a shooting incident in which defendant, who was armed with a pistol, and codefendant Carl Pearson, who was armed with a rifle, both fired gunshots at Kevin Garrison, Jr., on the morning of November 25, 2009. According to witnesses, the altercation began when Garrison accused defendant of stealing Garrison's gun, drugs, and money. Defendant testified that Garrison threatened to shoot defendant and others who were present, and began to walk upstairs to obtain a firearm. According to defendant, he and Pearson fired "warning shots" at Garrison to stop him. Garrison was struck by two bullets fired from Pearson's rifle. After the shooting, despite indications that Garrison was still alive, defendant dragged Garrison's body down some stairs and out a door, and left his body in a parking lot. Garrison died from his injuries.

Person pleaded guilty to second-degree murder pursuant to a plea agreement. Defendant was charged with assault with intent to commit murder, felon in possession of a firearm, and two counts of felony-firearm. At trial, defense counsel stipulated to the admission of a judgment of sentence showing that defendant had previously been convicted of assault with intent to do great bodily harm less than murder, which rendered him ineligible to possess a firearm. Defendant testified that he did not intend to kill Garrison, and that he only fired warning shots at Garrison in self-defense because he believed that Garrison was attempting to obtain a firearm.

In his sole issue on appeal, defendant argues that defense counsel was ineffective for agreeing to a stipulation that identified the nature of his prior felony conviction, rather than a stipulation that merely informed the jury that defendant had previously been convicted of an

unspecified felony. Defendant raised this issue in a motion for a new trial, which the trial court denied after conducting a *Ginther*¹ hearing. The trial court determined that defendant was not prejudiced by the stipulation.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and resulting prejudice. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish prejudice, defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* Defendant must also establish "that the result of the proceeding was fundamentally unfair or unreliable." *People v Powell*, 278 Mich App 318, 324-325; 750 NW2d 607 (2008), quoting *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

This Court has recognized that where a defendant is charged with felon in possession of a firearm, a stipulation advising the jury that the defendant was previously convicted of an unspecified felony and is ineligible to possess a firearm is appropriate to ensure that the defendant will not be unfairly prejudiced by the introduction of evidence identifying the nature of a prior conviction. *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). In this case, defense counsel did not request such a stipulation, but instead agreed to a stipulation that informed the jury that defendant had previously been convicted of assault with intent to do great bodily harm less than murder. In analyzing defendant's ineffective assistance of counsel claim, the trial court focused on the second prong of the test for ineffective assistance of counsel and concluded that defendant could not establish that he was prejudiced by defense counsel's stipulation. We agree with the trial court.

Defendant argues that the stipulation was inherently prejudicial because of the similarity between the prior disclosed felony, assault with intent to do great bodily harm, and the charged offense, assault with intent to commit murder. Defendant asserts that the evidence of his guilt was weak and that his claim of self-defense was strong, and that informing the jury that he had previously been convicted of assault with intent to do great bodily harm made it more likely that the jury would find him guilty because it believed he was a violent person with a propensity to act with an intent to kill, thereby undermining his defense theory that he only fired "warning shots" at Garrison in self-defense.

First, we disagree with defendant's characterization of the evidence of his guilt as weak and his characterization of his self-defense theory as strong. Defendant argues that the evidence that Garrison was not struck by any shots fired from defendant's weapon, despite being at close range and an easy target, shows that he did not intend to kill Garrison, and instead strongly supports his claim that he only wanted to stop Garrison from obtaining a firearm. However, it was undisputed that, after Garrison was shot and rendered helpless, and thus no longer a threat,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant dragged Garrison's body down a flight of stairs and out the door, and left his body in a parking lot outside, despite indications that Garrison was still alive. Defendant did not make any effort to obtain assistance for Garrison, who eventually died from his injuries. Defendant's actions after the shooting support the jury's determination that defendant intended to kill Garrison, and was not acting in self-defense.

Second, we also agree with the trial court that it is not reasonably probable that the jury was influenced by the disclosure that defendant had previously been convicted of assault with intent to do great bodily harm. The prejudicial aspect of the stipulation, identifying the nature of defendant's prior conviction, was its tendency to portray defendant as a violent, assaultive individual, and thus more likely to have intended to assault Garrison. As the trial court observed, however, there was already ample evidence that defendant lived a violent lifestyle. Defendant admitted that he sold drugs and carried a gun on drug runs, and that he was with Garrison when Garrison was involved in a shootout. Defendant also was a gunshot victim himself, having been shot in the hand approximately two weeks before the charged offense. Pearson testified that shortly before the offense, defendant fired all of the ammunition for Pearson's .40 caliber handgun, and that defendant stole Garrison's revolver and removed it from his pocket when the altercation with Garrison escalated. Defendant also admitted that several "house guns" were kept in the house as part of the residents' drug dealing businesses.

Considering the circumstances surrounding the offense and the evidence of defendant's own violent history, the trial court did not clearly err in finding that there was no reasonable probability that the stipulation identifying the nature of defendant's prior conviction affected the jury's verdict. Further, the result of the proceeding was not fundamentally unfair or unreliable. Accordingly, defendant was not denied the effective assistance of counsel and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad