

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS ALBERT REESE,

Defendant-Appellant.

UNPUBLISHED
February 21, 2013

No. 307736
Wayne Circuit Court
LC No. 11-007505-FC

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 81 to 180 months' imprisonment for his assault with intent to murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm because there was sufficient evidence to support the convictions, the trial court's findings of fact were consistent with assault with intent to murder, and defendant received effective assistance of counsel.

SUFFICIENCY OF EVIDENCE

Defendant argues that the prosecution failed to prove beyond a reasonable doubt that he was guilty of assault with intent to murder. When reviewing a claim of insufficient evidence, this Court reviews the record de novo on appeal. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). Circumstantial evidence and reasonable inferences from that evidence may be sufficient to prove the elements of a crime. *Id.* at 622.

There was sufficient evidence for the trial court to convict defendant of assault with the intent to murder. The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. MCR 750.83; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). "An intent to kill for purposes of this offense may not be proven by an intent to inflict great bodily harm or a wanton and willful disregard of the likelihood that the natural tendency of the acts will likely cause death

or great bodily harm.” *Id.* at 150. However, an intent to kill can be inferred from the use of a dangerous weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

There is direct and circumstantial evidence that defendant had the intent to kill. First, Jalynn Brandywine testified that as he grabbed Christopher Taylor to get him away from the fight, he looked up to see defendant standing a few feet in front of him. Brandywine stated that defendant reached near his waistband and grabbed “something black.” Defendant then pulled out a gun from his waistband and pointed it at Brandywine and Taylor. Brandywine heard a shot several seconds after defendant pulled the gun from his waistband. Brandywine testified that he saw a flash and smoke come from defendant’s right-hand side. After running several blocks, Brandywine felt “something burning” on his left hip. He then showed a circular wound on his left hip to Bobby Gordon and said, “Doug shot me.” In addition, Brandywine testified that he did not see anyone else with a gun. This constitutes sufficient evidence for a rational trier of fact to find that defendant pulled out a gun and shot Brandywine. Based on the evidence, a rational trier of fact could also conclude that defendant intended to kill Brandywine, because defendant shot at him from close range with a deadly weapon. Therefore, there was sufficient evidence to support defendant’s conviction.

FINDINGS OF FACT

Defendant next argues that the trial court violated defendant’s right of due process by convicting him of assault with intent to murder based on findings of fact that indicated that he only had intent to inflict great bodily harm or was reckless. A trial court’s findings of fact may not be set aside unless they are clearly erroneous, and its conclusions of law are reviewed de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.*

The trial court found that defendant had intent to kill. The trial court stated:

The Court is convinced beyond a reasonable doubt that it was the defendant who shot at and hit Mr. Brandywine. This Court has considered the lesser charge of assault with intent to commit great bodily harm, but a gunshot wound to the pelvic area from two or three feet is overwhelmingly likely to cause very serious physical injuries which are likely to cause death.

Defendant argues that the trial court merely found that defendant acted recklessly, or with a willful or wanton disregard for the likelihood of death, which would only be sufficient to support the charge of assault with intent to commit great bodily harm. However, this misconstrues the trial court’s statement. While the court stated that firing a gun at someone from close range is likely to cause death, this is not the same as a finding of recklessness.

Instead, this is the factual predicate from which the court inferred that defendant intended to kill Brandywine—because defendant knew his actions were likely to kill Brandywine. The court specifically stated that it had considered the lesser charge of assault with intent to commit great bodily harm. While the trial court did not explicitly state that it found defendant intended to kill Brandywine, it found facts sufficient to support that inference and stated that it had

considered the lesser charge, but instead found defendant guilty of assault with intent to murder. There is no reason to think that the trial court was confused about the elements of assault with intent to murder, particularly given that the element at issue in this case is contained in the name of the offense and had been discussed during closing arguments. Further, in a bench trial, the trial court is presumed to know the applicable law. *Id* at 484.

Defendant's conviction was supported by sufficient factual findings.

PRIOR CONSISTENT STATEMENTS

Defendant argues that plain error occurred when Brandywine's prior consistent statements were erroneously introduced at trial. Defendant failed to object to Brandywine's testimony during the prosecution's questioning of Brandywine on redirect examination concerning his prior testimony. Therefore, the issue is unpreserved, and we will review for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear and obvious, and 3) the plain error affected substantial rights." *Id*. "The erroneous admission of evidence is harmless if it did not prejudice the defendant." *People v Rodriquez* (On Remand), 216 Mich App 329, 332; 549 NW2d 359 (1996).

The prosecution concedes that Brandywine's preliminary examination testimony should not have been read into the record because the testimony failed to meet the requirements of MRE 801(d)(1)(B). However, the admission of Brandywine's preliminary examination testimony did not affect defendant's substantial rights. As discussed above, Brandywine testified at trial that defendant removed a gun from his waistband and fired it at Brandywine, and that he did not see anyone else with a gun at the time. In addition, Gordon testified to hearing a gunshot in the area where Brandywine was located. Thus, there was direct and circumstantial evidence, aside from the preliminary examination testimony, that identified defendant as the shooter. As a result, defendant cannot establish that the exclusion of the preliminary examination testimony would have been likely to alter the trial court's factual findings in any way.

Given our conclusion that the introduction of the prior consistent statements was harmless, defendant's claim of ineffective assistance of counsel also fails because he cannot show that an objection to the inadmissible material would have been reasonably likely to alter the outcome of the trial. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause