

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 21, 2011

v

DEJOHN MICHAEL SUTTON,

Defendant-Appellant.

No. 296144
Wayne Circuit Court
LC No. 09-011637-FC

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of four counts of assault with intent to do great bodily harm, MCL 750.84 and one count of felony firearm, MCL 750.227b following a bench trial. Defendant was sentenced to 2 ½ to 10 years in prison for each count of assault with intent to do great bodily harm, to be served concurrently, and to two years in prison for felony firearm, to be served consecutively. We affirm, but remand for correction of the inaccuracies in the presentence investigation report (PSIR) and in the judgment of sentence.

Defendant's convictions resulted from a gang fight that broke out at a party held at the Disabled American Veterans Hall in Detroit in April 2009. Defendant was a member of one of the two gangs involved in the fight. Security guards at the hall maneuvered the two groups out of the building and gunshots were fired just outside of the hall striking Kenneth and Kyle Jemison, Terrance Matheney, Larren Inge, and Tyishaque Frazier. Defendant was identified by several witnesses as the shooter.

Defendant first argues that the trial court erred when it found independent bases for the identification testimony of several witnesses. We disagree.

A trial court's decision to admit an in-court identification is reviewed for clear error. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998), lv den 459 Mich 1004 (1999).

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303, lv den 484 Mich 869 (2009). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness's in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that there is an independent basis for the

in-court identification sufficient to purge the taint of the illegal identification. *Colon*, 233 Mich App at 304; see also *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993), cert den sub nom *Kurylczyk v Michigan*, 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994).

In *Colon*, 233 Mich App at 305, this Court found that there was “no question that the preliminary examination was a suggestive atmosphere in that defendant was placed in the courtroom in prison garb.” However, the Court held that the witness had a sufficiently independent basis for identifying the defendant where the witness gave an accurate description of the defendant, the witness observed the defendant for at least five minutes, and the preliminary examination at which the identification was made was only two weeks after the incident. *Id.* at 305.

In *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998), despite finding an impermissibly suggestive identification procedure, the Supreme Court went on to deny relief because there was an independent basis for the complainant’s identification. The Supreme Court applied the eight-part test set forth in the plurality opinion in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977):

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification....
4. Accuracy or discrepancies in the pre-lineup or showup description and defendant’s actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or showup of another person as defendant.
7. [T]he nature of the alleged offense and the physical and psychological state of the victim. “In *critical situations* perception will become distorted and any *strong* emotion (as opposed to mildly emotional experiences) will affect not only what and how much we *perceive*, but also will affect our *memory* of what occurred.

Factors such as “*fatigue, nervous exhaustion, alcohol and drugs*” and age and intelligence of the witness are obviously relevant.

8. Any idiosyncratic or special features of defendant. [*Gray*, 457 Mich at 116 (citations omitted); see also *People v Davis*, 241 Mich App 697; 617 NW2d 381 (2000).]

The *Gray* Court placed greater emphasis on factor two and factor five, and noted that this list is not exhaustive. It also noted that because this is a factual inquiry, not all factors may be relevant in every case. *Gray*, 457 Mich at 117, n 12. Applying the above principles to the

present case, we conclude that there were independent bases for each witnesses' testimony in this case.

Only six or seven months elapsed between the time of the shooting and the trial; the shooting occurred on April 17, 2009, and the trial took place at the end of October and beginning of November of 2009. Moreover, Kyle Jemison's testimony at the suppression hearing revealed that there was a significant prior relationship between defendant and Jemison. Jemison knew defendant prior to the shooting and remembered his face. He believed he had seen defendant in "elementary school or when I was a little younger." To Jemison, defendant "look[ed] the same but different." In addition, Jemison had ample opportunity to observe defendant during the crime. Jemison was at the party for about an hour and a half before a fight broke out involving two gangs, with Jemison and defendant on opposing sides. Jemison saw defendant inside the hall during the verbal altercation that preceded the physical fight and between the time of the verbal fight and the physical fight. He observed defendant's face and white shirt. During the physical fight between defendant's group and Jemison's group, Jemison and defendant exchanged blows. After the physical fight, the two groups were escorted out. Once outside, defendant punched Jemison's brother Kenneth, passing within a foot or two of Jemison. Jemison saw defendant's face and noted that defendant was not wearing a shirt at that point.

Jemison then saw defendant pull a weapon and fire it; Jemison started running and was shot. Although Jemison's description of the shooter to the police was somewhat different than defendant's description (Jemison apparently described to police the person who punched his brother as five feet, four inches tall), he nonetheless described defendant as wearing a white shirt at first, having no shirt on outside, and being about 17 years old.

Jemison had not been drinking that night and there is no indication that his psychological or physical state impaired his ability to identify defendant. The trial court found that Kyle Jemison had the opportunity to observe defendant in close proximity during the shooting, he saw and recognized defendant inside the hall during the high school party before the shooting, he fought with defendant inside the hall, and he may have previously attended school with defendant. Under the circumstances, the trial court's findings were not clearly erroneous.

Regarding Darnell Hughley's identification of defendant, the trial court found that Hughley saw defendant for a short time during the shooting and he recognized defendant as someone he had seen at numerous prior parties at the hall. This finding was not clearly erroneous. Hughley had an opportunity to view the crime and defendant. Hughley testified that he was a security guard at the party and had seen defendant before the night of the shooting at "a lot of the high school parties" at the hall; defendant came with a group of his friends called "Stack Boys."

He saw defendant at about four previous parties; he recognized his face and the group he usually came with. Hughley was able to identify defendant in the district court and remembered him based on the night of the incident, not the lineup. He was looking out of the main door when the shooting started, and "[w]hen I looked, I seen [sic] [defense counsel's] client shooting"; defendant was in front of the door under the awning firing a handgun. He only saw defendant's face for a split second; he could not describe what defendant wore. Hughley, however, also saw defendant's face as defendant was escorted out of the building before the shooting. There was

no indication that Hughley ever falsely identified anyone else or that his physical or mental state prevented him from accurately observing what occurred. In fact, he accurately described defendant as a black male, 18 or 19 years old, medium brown complexion, with a short haircut, and noted a distinct characteristic (the tattoos on defendant's body).

With respect to Terrence Matheney and Darren Inge, the trial court concluded that they had independent bases for their identifications because they were "security guards who worked at this same location, and worked numerous parties. Mr. Inge in particular said he recognized defendant because defendant had been put out the week before and recognized him from that particular encounter and recognized him again at the event." These findings were not clearly erroneous.

There was an independent basis for Matheney's identification because of his prior relationship to defendant. Matheney believed he had seen defendant at previous parties when Matheney worked as a security guard. As noted by the trial court, Matheney had ample opportunity to observe the crime and defendant on the night in question. Matheney, who was stationed at the door of the hall, saw defendant escorted to the exit with his group of friends after the fight. Defendant was wearing a white T-shirt.

During the subsequent shooting, Matheney and defendant "were like right in front of each other[,] about four to eight feet apart. Matheney saw defendant's face and remembered him. Matheney never identified any other individual as the shooter. There is no indication that Matheney was overcome with emotion or suffering from a physical ailment that would have prevented him from correctly observing and identifying defendant. Notably, on the third day of the suppression hearing, Matheney's memory suddenly became cloudy after his personal information was mistakenly given to defendant; he then saw two men associated with defendant near his house, and one man tried to follow Matheney but the other man stated, "don't worry about it. We'll get him." Matheney admitted that he was scared, but conceded that he had identified defendant as the shooter in the pretrial proceedings.

Further, Larry Inge had an independent basis for identification. Inge had a prior relationship with defendant; he indicated that defendant's face was familiar from other parties. Inge recalled previously testifying that he saw defendant at the hall for a party the week before the shooting when defendant had been similarly escorted out by security. At the party in question, Inge had the opportunity to observe defendant and the crime; he saw defendant near the dance floor and outside in front of the building. Although Inge described the shooter as being about five feet, six inches tall, he nonetheless also described the shooter as a black male, 18 years old, 165 pounds, medium to dark complexion, short hair, thin mustache, no scars, and a tattoo across his chest. Inge never identified any other individual as the shooter. And there is no indication that Inge was under psychological or physical stress at the times he observed defendant in the past or on the night of the shooting.

Therefore, the trial court's factual findings on this matter were not clearly erroneous, but were, in fact, well supported by the record. As a result, there was no error in the admission of these witnesses' in-court identification testimony.

Next, defendant argues that defense counsel was ineffective for failing to address one of the discrepancies in a witness's testimony. We disagree.

A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial level; therefore, review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *US v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052, 2064-2065, 2068; 80 L Ed 2d 674, 693-694, 698 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009).

The following exchange occurred on cross examination:

Q (by defense trial counsel): Where did the gun come from?

A. What? I don't know where it came from. I just know he had it in his hand.

Q. Well, let me ask you something. Was it in his right or left hand?

A. Was it the right? The right.

Q. What hand did he punch your brother with?

A. The right.

At the preliminary examination, the following exchange occurred on re-direct examination:

Q (*by prosecutor*): For the record, your Honor, which hand did he have the gun in?

A. The left hand.

Q. Pardon?

A. I think the left hand, like this.

Defense counsel cross-examined Jemison extensively about several inconsistencies and weaknesses in his testimony. This included the discrepancy in Jemison's description of the shooter, how he knew defendant from the past, the fact that Jemison and his brother were in a gang and would protect themselves if confronted by someone, whether he wanted to get even with defendant for punching his brother, from where defendant pulled out the gun, and what defendant was wearing. In his closing argument, defense counsel presented the defense that this was a case of mistaken identity given the discrepancy between witnesses' initial descriptions of the gunman and defendant's actual description. In particular, counsel argued that Jemison initially described the gunman as five feet, four inches tall, but changed his trial testimony after viewing the "suggestive" lineup. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions as to what evidence to present, or how to question a witness, are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The fact that counsel did not further question Jemison about one detail out of the many details counsel covered in Jemison's cross-examination did not render his performance deficient. Therefore, counsel's representation was not ineffective.

Moreover, even if trial counsel's performance had fallen below an objective standard of professional reasonableness, defendant has not demonstrated a reasonable probability that, had counsel cross-examined Jemison concerning which hand defendant used to hold the gun, the outcome of the trial would have been different. Kyle Jemison identified defendant as the shooter. He also testified that defendant's group of friends and Jemison's group of friends got into a fight at the party. Jemison recognized defendant from when he was younger and saw defendant punch his brother as he stood next to him. Jemison saw defendant back away with a gun in his hand and then start shooting. Jemison testified that he was shot in the foot, and defendant was not wearing a shirt when he was shooting. Moreover, as detailed in Issue I, *supra*, several other witnesses also identified defendant as the shooter.

In addition to the eyewitnesses' testimony, seven nine-millimeter casings and three live nine-millimeter rounds were found in the street near the shooting, spent .45-caliber casings were found near the door, and there was what looked to be three bullet-impact marks on the concrete portion of the building that housed the party. Based on this strong identification evidence, defendant cannot show that there was a reasonable probability that, but for counsel's alleged error, he would have been acquitted at trial.

Finally, defendant argues that this case should be remanded for a correction of the judgment of sentence and the PSIR. We agree.

The interpretation and application of statutory sentencing guidelines involve questions of law and are reviewed de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). This Court reviews OV scoring for an abuse of discretion to determine whether the evidence supports a particular score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

The Due Process Clause of US Const, Am XIV requires that a trial court impose a sentence based on accurate information. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). See also, Const 1963, art 1, § 17. If a sentencing court either disregards the allegations of inaccurate information or determines that the information was in fact inaccurate, it must strike the disputed or incorrect information before sending the PSIR to the Department of Corrections. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003); MCL 771.14(6). If a sentencing court fails to address disputed information, it must indicate that it did not consider that information in making a sentencing determination. *Id.*

As a corollary, MCR 6.425(E)(2) provides:

If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

- (a) correct or delete the challenged information in the report, whichever is appropriate, and
- (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

See also, *People v Austin*, 455 Mich 439, 452, 477; 566 NW2d 547 (1997). MCR 6.435(A) further provides, in pertinent part: "Clerical mistakes in judgments ... may be corrected by the court at any time on its own initiative...." See also, *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991). "It is important that a PSIR be accurate because it follows the defendant to the Department of Corrections and serves as a basis for decisions about parole and how the defendant will be classified in the system." *People v Taylor*, 146 Mich App 203, 205-206, 380 NW2d 47 (1985).

The judgment of sentence incorrectly cites MCL 750.83, which is assault with intent to murder; rather than assault with intent to do great bodily harm, MCL 750.84. The Department of Corrections also incorrectly lists defendant's convictions as assault with intent to murder. Furthermore, defendant's PSIR incorrectly lists defendant as having been convicted of assault with intent to murder. As a result, we remand this case to the trial court for the ministerial task of correcting the inaccuracies in the PSIR and in the judgment of sentence.

Affirmed as to defendant's convictions, but remanded for the ministerial task of correcting the inaccuracies in the PSIR and in the judgment of sentence.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Donald S. Owens