# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 18, 2012 |
| v | No. 304447<br>Wayne Circuit Court |
| JONATHAN RYAN BUTLER,<br><br>Defendant-Appellant. | LC No. 10-011416-FC |

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial convictions of assault with intent to commit murder, MCL 750.83; carjacking, MCL 750.529a; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 25 to 40 years in prison for assault with intent to commit murder, 25 to 40 years in prison for carjacking, three to five years in prison for felon in possession of a firearm, and two years in prison for felony-firearm. We affirm.

Defendant first contends that the trial court erred when it assessed him 50 points for offense variable (OV) 6 based on the finding that defendant had the premeditated intent to murder Marco Orlando Sewell when he carjacked Sewell. We disagree.

This Court reviews de novo the legal questions surrounding "[t]he interpretation and application of the legislative sentencing guidelines . . . ." *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). However, "[w]e review the trial court's scoring of a sentencing guidelines variable for clear error." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision." *Id*. (internal citation and quotation marks omitted). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.22(1) provides that the trial court must "[s]core offense variable[s] 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with the intent to commit murder." Because defendant was convicted of assault with intent to commit murder, the trial court properly evaluated and scored OV 6. MCL 777.36(1) provides that "[OV] 6 is the offender's intent to kill or injure another individual." MCL 777.36(1)(a) provides that 50

points must be assessed when "[t]he offender had [the] premeditated intent to kill or the killing was committed while committing or attempting to commit" various specific felonies. MCL 777.36(1)(a), in the context of this case, does not require that the victim actually die in order for 50 points to apply; rather, it requires that the defendant had the premeditated intent to kill, even if his victim survives.

This appeal raises the question regarding whether the trial court could infer from defendant's actions that he had the premeditated intent to kill Sewell. "Premeditation . . . requires sufficient time to permit the defendant to take a second look [and] may be inferred from the circumstances surrounding the killing." *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). Other factors to consider include (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances surrounding the crime, including the weapon used and the wounds inflicted. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

The trial court was presented with sufficient evidence to infer that defendant had the premeditated intent to kill Sewell. Defendant entered Sewell's Toyota Camry without Sewell's permission, and he did so while carrying a handgun. Thus, from the moment defendant entered Sewell's Camry, he was armed, which implies he had premeditated the use of the handgun. While seated in Sewell's backseat, defendant said either "Get out my sh--" or "Give me your sh--." Either way, defendant entered Sewell's vehicle demanding, most likely, Sewell's Camry. Sewell turned around and noticed that defendant had a handgun, and he was so frightened that he "went toward the gun to stop [defendant] from shooting me." Sewell explained that the handgun "was pointed at [his] head." At some point after Sewell lunged for the gun while the gun was pointed at his head, defendant pulled the trigger. Defendant's attempt to shoot Sewell in the head failed because the handgun did not go off, so defendant "pulled back – [and] ejected a cartridge . . . ." Following this, Sewell grabbed the gun and fought with defendant. During the scuffle, Sewell lost energy and his right hand released the handgun, and defendant "pointed the gun at [Sewell's] arm and fired and the bullet went in [Sewell's] arm."

From these facts, the trial court did not clearly err in inferring that defendant had the premeditated intent to kill Sewell. From the moment defendant entered Sewell's Camry, he possessed a handgun, which he aimed at Sewell's head. But for the fact that the gun did not fire the first time, Sewell would have been shot in the head. Defendant aimed his handgun at Sewell long enough for Sewell to turn around, become frightened, and lunge for the gun to protect himself. It is a reasonable inference that defendant had enough time to take a "second look" at what he was doing during the course of events and that he still proceeded. In addition, defendant aimed the gun at Sewell before the tussle *and* during the tussle and shot at Sewell twice. The fact that defendant did not give up and persisted in his attempts to shoot Sewell corroborates the trial court's finding that defendant had the premeditated intent to kill. The evidence adequately supports the trial court's score of 50 points for OV6 because "any evidence" is sufficient to support a trial court's scoring decision. *Hornsby*, 251 Mich App at 468.

Defendant contends in his Standard 4 brief that defense counsel was ineffective because defense counsel failed to object to or file a motion to suppress the pretrial photographic-array identification used by the Detroit Police. 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 judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011) (citation omitted).

"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." *Johnson*, 293 Mich App at 90. To establish a claim of ineffective assistance of counsel, "'the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment.'" *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Further, "whether defense counsel's performance was deficient is measured against an objective standard of reasonableness." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Thus, to prevail, a defendant must show that "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 US at 688, and he must show that he was prejudiced by counsel's performance, which can be shown by proving that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*. at 687, 694. The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

This Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). The defendant "bears the burden of demonstrating both deficient performance and prejudice[;] the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

On appeal defendant raises, for the first time, the argument that his trial counsel was ineffective because counsel failed to object to or file a motion to suppress the pretrial photographic-array identification during which Sewell identified defendant as the man who carjacked and shot him. "In order to sustain a due process challenge [in this context], a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification."[1] *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

[1] "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning the identification is inadmissible at trial." *Kurylczyk*, 443 Mich at 303. However, even if the trial court determines that the photographic array was impermissibly suggestive, "in-

Because defendant never moved for a *Ginther*[2] hearing at the trial-court level, we are, as noted, limited to review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). At trial, the topic of the alleged undue suggestiveness of the photographic array was never discussed. We conclude, in accordance with the strong presumption that defense counsel acted effectively and in the absence of any persuasive evidence to the contrary, that counsel's decision not to challenge the photographic-array identification was reasonable. This conclusion is bolstered by the fact that defense counsel specifically waived defendant's motion for a *Wade* hearing. See *United States v Wade*, 388 US 218, 224; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). We note that "[d]efense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel may have believed it best to leave this issue alone to avoid raising a futile motion or to avoid the possibility of further identification testimony. See footnote 1, *supra*.[3] Defendant has not met his burden of demonstrating an error requiring reversal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

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court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Id.*

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

[3] In addition, we note that defendant lost a baseball hat during the struggle between defendant and Sewell in the liquor-store parking lot. The hat was recovered by police and tested for DNA. The results of the test positively matched defendant, which led the police to defendant. Although defendant admitted to being at the location (he denied committing the crimes), there was no explanation for how his hat ended up in the parking lot. Scientific evidence, coupled with Sewell's description of defendant's baseball hat, led the police to defendant. Accordingly, the photographic-array evidence was not quite as crucial as defendant implies.