STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 1, 2013
v	No. 310135 Wayne Circuit Court
ANTHONY ELIJAH RHODES, Defendant-Appellant.	LC No. 11-011532-FC

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right from his convictions of assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to five and one-half years to ten years' incarceration for the assault conviction and to a consecutive sentence of two years for the felony firearm conviction. Defendant contended that he was not present and did not commit any of the charged offenses, and on appeal he primarily argues that the evidence did not support his convictions. We affirm.

This case arises out of a shooting in Detroit. The victim testified that he made a purchase at a gas station store while walking home from a bar. Afterwards, a car pulled up to him, and two men, one of whom had previously been at the store and the other of whom had a gun, got out and approached him. The man from the store, later identified as Terence Adams,[1] demanded to know what the victim had been laughing about. The men told the victim to get down on the ground and struck him. The man with the gun shot the victim in the leg; the victim, who explained that he knew little about and hated guns, "guess[ed]" that it had been a "warning shot." The victim was unaware at that time that he had been shot, and scuffled with the two men for a few seconds before running away. Three or four more shots were fired. The victim made it to a bar, where other patrons advised him that he had been shot.

[1] Adams was initially charged along with defendant, but after jury selection pleaded guilty to a reduced charge of assault with intent to do great bodily harm in exchange for his testimony against defendant in this matter.

The victim described the men and the car to the police, who located the car later the same night. A high-speed chase ensued, during which the vehicle blew a tire and eventually lost control and crashed, sustaining extensive damage. Adams got out of the car and ran, but was quickly apprehended by pursuing police officers. The three other passengers, the driver and two women in the back, were badly injured. The officers did not see defendant at the accident. However, Adams and both women testified that defendant was present before the accident. Adams testified that defendant had shot the victim, one of the women recalled Adams and Defendant having an argument with a man after the gas station stop and a gun being fired during that argument, and the other woman apparently sustained a concussion and did not recall anything other than defendant and Adams getting out of the car and back in at some point after stopping at the gas station.

As noted, defendant's primary argument on appeal is that the evidence did not support a finding that he committed assault with intent to commit great bodily harm or felony firearm. We review de novo challenges to the sufficiency of the evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). The evidence is reviewed in a light most favorable to the prosecution to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Unpreserved claims that the verdict was against the great weight of the evidence are reviewed for plain error affecting substantial rights. *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012). A new trial should be granted only where the evidence preponderates heavily against the verdict and a miscarriage of justice would result otherwise. *Id*. Importantly, we do not substitute our judgment or assessment of the evidence for that of the fact finder, but rather evaluate whether the fact finder's findings are plausibly reasonable.

The elements of assault with intent to commit great bodily harm are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotation omitted). Intent to do great bodily harm is "an intent to do serious injury of an aggravated nature." *Id*. (internal quotation omitted). The intent may be inferred from the defendant's conduct before and during the assault, "whether the instrument and means used were naturally adapted to produce death," the defendant's conduct after the assault, and "all other circumstances" that "throw light upon the intention with which the assault was made." *Id.* at 149 n 5 (internal quotation omitted). We find the evidence sufficient to support the jury's verdicts, and, consequently, that the evidence does not preponderate so heavily against the verdicts to constitute a miscarriage of justice.

The victim could not identify defendant, and defendant was not found at the scene of the accident following the shooting. Nevertheless, Adams identified defendant as the gunman, and the testimony of one of the women at least partially corroborates Adams's version of events. The victim sustained a bullet wound, all of the witnesses indicated that a gun was fired, and a gun was found in the car. Although Adams testified pursuant to a plea agreement and the women did not have complete memories of the night, their testimony is not inherently unworthy of belief. Furthermore, we "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The evidence is sufficient to support the jury's finding that defendant possessed a handgun and shot the victim with that handgun. Additionally, "[a]n

actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty in proving the actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). Although the victim apparently did not believe that the gunman was trying to kill him, the fact that the gunman fired a gun at the victim at close range and while the victim was trying to escape is ample evidence to support an inferential finding that defendant had the intent to commit great bodily harm less than murder when he pulled the trigger. The evidence is sufficient and does not preponderate heavily against the verdict, and no miscarriage of justice would result by denying defendant a new trial.

Next, defendant argues that the trial court abused its discretion in denying a requested disputed accomplice instruction regarding the testimony of the two women. A trial court's decision to give or withhold a cautionary accomplice instruction is reviewed for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). We find that the trial court did not abuse its discretion in denying the cautionary instruction regarding accomplice testimony because the evidence and facts did not support the instruction.

Ordinarily, a trial court is required to give the cautionary instruction regarding accomplice testimony if requested. However, the trial court is required to give the instruction only where the evidence and facts of the case support the instruction. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). An accomplice is defined as "a 'person who knowingly helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.6. Defendant requested the disputed accomplice instruction regarding the two women. Although they were present at all relevant times, there was no evidence or argument that they helped, cooperated with, or participated in the assault in any way. They were both merely present. Because the evidence and facts of the case did not support the instruction, the trial court did not abuse its discretion in denying defendant's request for the cautionary instruction with regard to accomplice testimony.

Next, defendant argues that the trial court erred in scoring Offense Variable (OV) 14, which should only be scored where the defendant was "a leader in a multiple offender situation." MCL 777.44. This Court reviews the trial court's scoring of sentencing guideline variables for clear error, and no clear error exists where there is any evidence to support the decision. *People v Davis*, 300 Mich App 502, ___; ___ NW2d ___ (2013). In scoring OV 14, "the entire criminal transaction should be considered." MCL 777.44; *People v McGraw*, 484 Mich 120, 125; 771 NW2d 655 (2009). The evidence showing defendant to have been a leader was minimal, but the inquiry is whether *any* evidence supports the trial court's finding. *Davis*, 300 Mich App at ___ (emphasis in original). Although Adams was the one who saw the victim in the store and demanded to know what the victim had been laughing about, the fact that defendant was the only one with a weapon does constitute some evidence of leadership. We therefore cannot find that the trial court clearly erred in scoring OV 14.[2]

[2] We agree with our concurring colleague that the "any evidence" standard is anachronistic. That standard was first cited in 1985, under the now-obsolete judicial sentencing guidelines and in

Finally, defendant argues that he was denied the effective assistance of counsel. Because this issue is unpreserved, our review is limited to errors apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citations omitted). Defendant contends that counsel was ineffective for failing to investigate an alibi witness. A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

According to defendant, he was at home with his girlfriend, Desirae, or Desireé, Williams, on the night of the shooting. Defendant contends that he provided defense counsel with this information and with Williams's contact information. Trial counsel filed a notice of alibi naming Williams as a witness, but did not ultimately call her. The record does not reflect why Williams was not ultimately called as a witness. Defendant contends on appeal that trial counsel never even contacted Williams, and indeed, defendant wrote a letter to the trial judge after the preliminary examination and well before trial complaining that counsel had not yet followed through with "[his] witness in the case." Defendant did not otherwise provide an offer of proof on the record or make any statement on the record expressing dissatisfaction with trial counsel.

Significantly, nothing in the record shows what the alleged alibi witness's testimony might have been, or even whether the witness would have provided an alibi, so defendant cannot establish that he was denied a substantial defense. *Id*. The record does not reflect why counsel did not call the proposed witness, or even whether counsel interviewed the witness, but we have been provided with no affidavit from the proposed witness or even an offer of proof on the record. Although defendant stated in his supplemental Standard 4 brief that he had attached and

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reliance on the Sentence Review Committee Report. *People v Clark*, 147 Mich App 237, 242-243; 382 NW2d 759 (1985). Our Supreme Court affirmed that as the correct standard in 1993, still under the old guidelines. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The statutory guidelines went into effect in 1999. *People v Wilcox*, 486 Mich 60, 65; 781 NW2d 789 (2010). However, since then, our Supreme Court has not cited that particular standard, but it has also not explicitly held that it is wrong. This Court's subsequent citations of the "any evidence" standard trace back to *Clark*. Our Supreme Court in *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012) reversed a decision of this Court for the reasons stated in this Court's dissenting opinion and directed that review of a scoring decision "shall be for clear error." However, *Nelson* did not criticize this Court's long-standing definition of "clear error" as a lack of *any* evidence in the context of reviewing scoring decisions. Significantly, this Court's dissenting opinion, upon which our Supreme Court relied, likewise took no issue with the "any evidence" standard, but rather disputed whether the facts actually justified the scoring of two offense variables (*People v Nelson*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2011 (Docket No. 296932; SHAPIRO, J., dissenting). Consequently, until such time as our Supreme Court issues an opinion holding otherwise, binding case law continues to require us to uphold scoring decisions for which there is *any* evidence in support.

provided an affidavit from Williams, no such affidavit was actually filed here or in the lower court, despite our direction to provide a copy if one exists. Counsel is strongly presumed to have followed a sound trial strategy in the absence of evidence to the contrary. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant has simply not met his burden of establishing that counsel's decision not to call the proposed alibi witness at trial was not sound trial strategy. On the record before this Court, defendant did not establish ineffective assistance of counsel.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause

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K. F. KELLY, J. *(concurring).*

I concur in the result only.

/s/ Kirsten Frank Kelly