STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEWAYNE LASENBY,

Defendant-Appellant.

UNPUBLISHED
December 22, 2009

No. 284977
Kalamazoo Circuit Court
LC No. 2007-002014-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve consecutive terms of imprisonment of two years for felony-firearm, and 135 months to 30 years for assault with intent to commit murder. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecutor's theory of the case was that, on September 12, 2007, in an apartment building hallway, as a result of tensions over drug dealing, defendant produced a firearm and shot eight or more times at the victim, striking the victim twice in the thigh, and also striking a second person in the ankle. Both shooting victims identified defendant as the shooter, the latter only reluctantly.

Defendant's sole issue on appeal is that he was deprived of the effective assistance of defense counsel at trial.

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed

> 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, 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." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In this case, the trial court granted a posttrial motion for a *Ginther*[1] hearing to develop and decide defendant's theory of ineffective assistance. And after the hearing, the trial court concluded that defendant's trial attorney "provided Defendant with good counsel and an adequate defense," and added, "that the jury apparently chose to believe the overwhelming evidence of guilt does not prove otherwise."

Defendant points out that defense counsel initially told the jury that only one witness would identify defendant as the shooter, and he argues that counsel thus erred because she should have anticipated that two witnesses would ultimately identify defendant, thereby undercutting her attempts to instill doubts concerning defendant's identity as the shooter. However, the additional identifying witness did so only after much inveigling and answered in the affirmative when asked if this was the first time he had ever implicated defendant as the shooter. We conclude that it was sound strategy for defense counsel to proceed on the basis that the hesitant witness would persist in his resolve not to name the shooter, in hopes of leaving the jurors with only a single identification witness, whose veracity they might doubt.

Defendant asserts that defense counsel's initial expectation that this additional identification witness would not in fact identify defendant was the result of reliance on a police report that had indicated that this witness could not identify the shooter. Defendant argues that when the witness in question did in fact identify defendant at trial, counsel should have requested a mistrial on the grounds that the police report's alleged deception was attributable to the prosecution and that her strategy was thrown off by the surprise. However, defendant cites no part of the record to show that there was any deliberate deception on the part of the police and, as

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

noted, the witness in question agreed that his in-court identification of defendant as the shooter was the first time he had so identified defendant. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Defendant's unsupported theory of a detective's, and thus the prosecutor's, deception does not expose any such degree of irregularity.

Defendant additionally argues that counsel was ineffective for failing to more aggressively locate and interview that additional identification witness. However, as noted above, defense counsel had a tactical reason for maintaining that witness's hesitancy to cooperate in this matter, including by way of identifying defendant. Extensive pretrial discussions or interviews, however, might well have caused that witness to feel less inhibited about testifying at trial. Defense counsel thus had perhaps more to lose as to gain from expending great efforts to locate and interview that witness ahead of trial. Further, no error in this regard undermined the reliability of the verdict because that witness's identification of defendant was cumulative to the primary victim's testimony. See *Carbin*, 463 Mich at 599-600.

We likewise reject defendant's argument that defense counsel should have requested an evidentiary hearing to determine if that second identification witness had been intimidated into testifying as he did. The witness repeatedly made known at trial that he did not wish to participate in the case, but added that the police had insisted that he testify. The trial court admonished him, "You're under subpoena . . . and you're required by law to answer the questions, to the best of your ability, as truthfully as you can." Although there is abundant evidence that this witness was pressured to testify, there is no indication that he was pressured to testify other than truthfully, in the prosecution's favor or otherwise. Accordingly, defendant fails to show that an evidentiary hearing to determine intimidation would have been other than fruitless.

Defendant further argues that defense counsel failed to ensure that the jury understood that to find defendant guilty of assault with intent to commit murder it had to conclude that defendant had the specific intent to commit murder. We disagree.

Assault with intent to commit murder requires (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). To commit the crime, the assailant must act with the specific intent to kill the victim. *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985). Defendant argues that both the prosecuting attorney, in closing argument, and the trial court, in instructing the jury, invited conviction on a mere recklessness, or general intent, theory. Defendant further suggests that defense counsel was not familiar with the case law establishing specific intent as necessary for conviction of assault with intent to murder, and argues that this lack of knowledge caused counsel to leave those errors uncorrected. We do not agree that counsel showed any such lack of expertise.

Defendant attacks the prosecuting attorney's argument that the number of shots fired established the shooter's specific intent. We do not regard the prosecutor's argument as improper. A prosecuting attorney enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We regard the prosecutor's argument not as incorrectly suggesting that mere

recklessness, by way of shooting wantonly or haphazardly, establishes intent to kill, but instead as encouraging the jury to regard the number of shots fired, in light of all the evidence, as providing a basis for concluding, beyond a reasonable doubt, that defendant acted with the intent to kill. Defense counsel showed no lack of expertise in declining to object to this proper argument. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In instructing the jury in connection with assault with intent to commit murder, the trial court included that, to find defendant guilty, the jury must conclude beyond a reasonable doubt that defendant "intended to kill the person that he assaulted and the circumstances did not legally excuse or reduce the crime." We conclude that this well covered the specific intent element of the crimes. A lay juror would not normally be empirically familiar with the distinction between general and specific intent, but would logically interpret "intended to kill" as indicating the latter. The court did not speak of reckless endangerment, or causing a mere likelihood of great bodily injury, or anything else that might have invited a general intent interpretation. The wording "intended to kill" without "excuse" could hardly denote anything less than the actor's specific intent to commit murder. Accordingly, defense counsel's acceptance of the instruction as given was not error.

Defendant makes issue of a hooded sweater that was introduced into evidence, arguing that defense counsel was ineffective for failing to prevent its admission. We disagree. At trial, the primary victim produced the garment, testified that he was wearing it at the time of the shooting in question, suggested that two holes in the shirt resulted from that shooting, and reported that he had kept that garment in his car ever since. Defense counsel effectively cross-examined the witness in the matter, eliciting from him that because he was not shot in his upper body that the holes did not necessarily result from the shooting. Defense counsel additionally objected to admission of the sweater on the ground that the holes in it were in a location where the witness was not shot, and also that the witness, not the police, had retained possession the whole time, raising questions about what it had been subjected to in the interim. The trial court overruled the objection on the ground that the chain of custody goes to weight, not admissibility. On appeal, defendant argues that counsel tried to prevent admission of the garment on the ground that there was no evidence that the witness was wearing it at the time in question, and he asserts that an objection would have been sustained had counsel instead challenged the foundation of that evidence. In fact, counsel did not make the assertion defendant now attributes to her, and the witness's testimony about wearing and storing the item would have rendered any foundational challenge meritless. For these reasons, we conclude that defense counsel's handling of this matter did not constitute ineffective assistance.

Defendant points out that defense counsel elected to concede that defendant was involved in drug trafficking, for the legitimate strategic purpose of arguing that the shooting victim wished to see defendant behind bars in order to take over defendant's drug trafficking territory, but argues that this strategy backfired. The strategy, according to defendant, actually placed defendant in a bad light as a drug dealer, when a second witness, whom the record nowhere implicated in drug dealing, identified him as the shooter. We disagree, and recognize this argument as an invitation to engage in the kind of second-guessing of strategic decisions, with the benefit of hindsight, to which this Court is loathe to resort. See *Barnett*, 163 Mich App at

338 ("A court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired").

Defendant also argues that defense counsel could better have argued her motion for a directed verdict of acquittal. However, in light of the identification of defendant as the shooter, the evidence of animosity between defendant and the victim, and the evidence that defendant produced a gun and fired several times, and given that the trial court, for purposes of the motion for directed verdict, was obliged to view the evidence in the light most favorable to the prosecution, see *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992), we conclude that no argument defense counsel could have provided would have resulted in a proper directed verdict.

We have carefully examined all of defendant's arguments concerning the effectiveness of counsel and find that they do not warrant reversal.

For these reasons, we affirm the trial court's conclusion that defendant had competent legal representation at trial.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra