STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER COOK,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 192372
Barry Circuit Court
LC No. 95000146-

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon, MCL 750.82; MSA 28.277, attempted assault with a dangerous weapon, MCL 750.92; MSA 28.287, and malicious destruction of personal property over $100, MCL 750.377a; MSA 28.609(1).[1] He was sentenced to a three-year term of probation, with the first nine months served in jail. Defendant appeals as of right. We affirm.

This case arises from an altercation between three male victims and defendant and his family on the street where defendant resides with his family. During trial, different versions of the events were presented. Of the three alleged victims, Robert Hudson, Mark Van Volkinburg, and Matthew Lindgren, only Hudson and Lindgren testified at trial. They testified that Hudson and Van Volkinburg were passengers in the car that Lindgren was driving on a residential street in Yankee Springs Township. On this two-lane road, they drove around defendant and another individual who were standing in the middle of the road near a parked car. After passing the individuals, Lindgren stopped the car because the two individuals held up their hands as if they knew the victims or wanted something. Lindgren testified that he thought something was thrown at his car, so he exited the car to ask the individuals "what was [going] on."

Hudson testified that before Lindgren stopped speaking, three, four or five people, whom they did not know, attacked them with hammers or other weapons, while shouting racial epithets. The victims were unarmed. When Lindgren tried to return to the car, he was "tugged back by his neck" and

dragged to a ditch where the attackers hit him with either tire irons or hammers. Lindgren testified that he received a blow on his head that left him unconscious. When Lindgren regained consciousness, he was being strangled from behind by his shirt collar and struck from all angles with different objects. Lindgren did not see who struck his head but testified that defendant was the only person that he saw with a tire iron. Hudson also identified defendant as one of Lindgren's attackers, although he was unsure of the weapon defendant was holding. Upon exiting the car to help Lindgren, Hudson was struck on his arm and the back of his head by an attacker holding a shovel. A neighbor stopped the attack and the victims remained at the scene until the police arrived.

In contrast, the witnesses for defendant, who included defendant's parents, defendant's younger brother and his girlfriend, and defendant's friend, testified to a different version of events. According to defendant's family members, defendant had returned home earlier and was very upset because someone had run him off the road and damaged his car in the process. When the defense witnesses were outside examining the car for damage, they noticed a car being driven by Lindgren. Lindgren yelled from the car window to defendant and his brother. Lindgren allegedly recognized defendant's brother from high school. Defendant's brother and Lindgren subsequently began fist-fighting in a nearby field, and Lindgren put defendant's brother in a chokehold or headlock. Defendant's parents were allegedly attacked by Lindgren when they tried to intervene. Defendant, meanwhile, was lying on the ground being beaten by a wooden pole by someone. According to the defense witnesses, defendant did not strike anyone or anything.

The responding state trooper observed that Lindgren and Hudson suffered "fairly serious" injuries, both bleeding from their heads. Lindgren had bite marks on his neck and Hudson had bruised ribs. Van Volkinburg was without visible injury. No member of defendant's family was injured. The trooper also indicated that Lindgren's rear windshield was shattered. There were also several weapons on the ground, including a tire iron, shovel, and a board with screws or nails on the end of it.

Defendant first argues that the trial court erred in denying him a directed verdict on the charge relating to Van Volkinburg, who did not testify at trial. Defendant purports that "it is a basic legal principle that if a victim does not appear in court to testify, then the charges against him as to the victim must be dismissed." We disagree. A directed verdict is inappropriate if, considering the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

Here, defendant argues without citation to authority that a victim must testify or the related charges must be dismissed. Because defendant failed to cite supporting authority for his claim, he has effectively abandoned this issue. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 513; 556 NW2d 528 (1996). Moreover, defendant failed to demonstrate how he was prejudiced by Van Volkinburg's absence since the jury did not convict defendant of assaulting this victim.

Defendant next argues that the evidence was insufficient for the jury to conclude that he committed either the assault or the attempted assault for which he was convicted. Defendant does not

take issue with any of the specific elements of these two crimes but disputes whether he was correctly identified as the person who assaulted either of the two victims. Specifically, defendant argues that the testimony at trial revealed only that defendant was one person in a group of people who was assaulting the victims, but that defendant was not singled out as an attacker.

When reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A prosecutor need not negate every reasonable theory of innocence, but must prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466, 502 NW2d 177 (1993); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). A court must not weigh the evidence or assess the credibility of the witnesses. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993).

While it is true that neither victim could positively identify defendant as the attacker, the record contains ample circumstantial evidence from which the jury could infer that defendant was the person who committed the offenses. Most important, as evidenced by the initial version of events told to the investigating officer by both defendant and defendant's father, defendant apparently did not deny taking part in the altercation in which the two victims were injured, nor of carrying a tire iron. In addition, it was well established that both victims suffered fairly serious head injuries, which were inflicted by someone standing behind them. Both victims identified defendant as one of the two initial attackers who were in the street, and Hudson specifically testified that he saw defendant strike Lindgren. Hudson did not see the person who struck his head, but testified that defendant was the only person he saw with a tire iron. The credibility of this testimony was a matter for the jury, as the trier of fact, to decide and will not be resolved anew on appeal. *Id.* We therefore conclude that there was sufficient evidence to find that defendant was guilty beyond a reasonable doubt of the crimes.

Defendant also raises several instances of ineffective assistance of counsel. Although this issue is preserved because defendant moved for a new trial and an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), the trial court denied both motions; therefore, our review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption

that the challenged action or inaction was trial strategy. *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; ___ NW2d ___ (1997).

Defendant contends that trial counsel was ineffective for failing to request a jury instruction on self-defense even though trial counsel attempted to present a theory of self-defense through the testimony of defendant's mother. Defendant's mother testified that during much of the altercation, defendant was lying on the ground and being beaten with a wooden pole by a person whom she could not identify. Because defendant did not deny being at the scene and his witnesses all testified that he did not strike anyone or anything, defendant's primary defense was apparently that the prosecution had charged the wrong person and not that defendant acted in self-defense. In any event, this claim does not overcome the strong presumption that defendant was afforded effective assistance of counsel. We are not convinced that, but for trial counsel's actions, the outcome of defendant's trial would have been different.

Defendant also claims that trial counsel was ineffective for failing to challenge the testimony of the investigating officer because the testimony was allegedly irrelevant and improperly bolstered the prosecution's case. We disagree. Even assuming that the investigating officer's testimony was irrelevant in this case, as a matter of trial strategy, trial counsel could properly have refrained from objecting to the testimony where an objection could have emphasized the testimony in the minds of the jurors. See, for example, *People v Lawless,* 136 Mich App 628, 635; 357 NW2d 724 (1984). This Court will not second-guess defense counsel's trial strategy. Moreover, defendant failed to allege or offer any evidence that, but for counsel's actions, there was a reasonable probability that the outcome of the trial would have been different.

Defendant further claims that trial counsel was ineffective because he moved for a directed verdict after presenting the testimony of defendant's first witness rather than at the close of the prosecution's case. The court rule governing directed verdicts, MCR 6.419(A), considers that a defendant may move for a directed verdict either "[a]fter the prosecution has rested the prosecution's case and before the defendant presents proofs" or "after the defendant presents proofs." Thus, there is no mandate that trial counsel move for a directed verdict after the close of the prosecution's case. More importantly, defendant failed to show how the timing of the motion affected the outcome of his trial.

Defendant next claims that trial counsel's improper and repeated references to Van Volkinburg, who did not testify at trial, constituted ineffective assistance of counsel. Defendant cites no specific passages of testimony regarding this allegation. A party may not merely announce his or her position and leave it to us to discover and rationalize the basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, our review of the transcripts reveals no remarks by trial counsel that are clearly prejudicial to defendant. In fact, trial counsel did not even mention Van Volkinburg during closing argument. Moreover, given that the jury did not convict

defendant of assaulting this victim, defendant could not have been prejudiced by trial counsel's actions. Defendant was not denied effective assistance of counsel during trial.

Affirmed.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy

[1] Defendant was originally charged with two counts of attempted assault with a dangerous weapon.