

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN SALYER,

Defendant-Appellant.

UNPUBLISHED

November 14, 1997

No. 193584

Calhoun Circuit Court

LC No. 95-0001673-FC

Before: O’Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 29.279. He was sentenced to a prison term of 42 to 120 months. He appeals as of right. We affirm.

Defendant first argues that the circuit court erred in reversing the district court’s decision not to bind him over for trial on the charge of assault with intent to murder. The district court ruled that there was insufficient evidence to bind him over on that charge based on the lack of evidence of intent. We review de novo a district court’s decision whether to bind a defendant over for trial on a given charge to determine if the district court abused its discretion. *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991).

If at the end of the preliminary hearing, it appears to the district court that there is probable cause to believe that the crime has been committed and that the defendant committed it, the district court must bind the defendant over for trial. MCL 766.13; MSA 28.931; MCR 6.110(E); *People v Fiedler*, 194 Mich App 682, 689; 487 NW2d 831 (1992). Probable cause that the defendant has committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense charged. *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but he must present some evidence of each element. *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991). The elements of assault with intent to

murder are (1) an assault, (2) with an actual intent to murder, (3) which if successful would make the killing murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995); *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Circumstantial evidence and reasonable inferences arising therefrom can be sufficient. *Coddington, supra* at 591.

At the preliminary examination, the victim testified that a physical altercation had occurred which included defendant punching her face and body repeatedly, banging her head against the refrigerator several times, kicking her, holding her by the throat, and banging her head against the door jamb several times. The victim also testified that defendant repeatedly told her that he was going to kill her. There was no conflicting evidence presented regarding defendant's stated intent that he was going to kill the victim.

Based on this testimony, the district court abused its discretion in ruling that insufficient evidence had been presented on the element of intent. The prosecution presented direct evidence of defendant's intent to murder through the victim's testimony about defendant's statements to her and also presented circumstantial evidence of defendant's intent to murder through the victim's testimony of the length and severity of the physical altercation. Because the prosecution presented some evidence on each element of the crime, the district court should have bound defendant over for trial on assault with intent to murder. See *Coddington, supra* at 591. Therefore, the circuit court did not err in reversing the district court's ruling and binding defendant over for trial on the charge of assault with intent to murder.

Defendant next argues that there was insufficient evidence to sustain his conviction of assault with intent to do great bodily harm less than murder because his extreme intoxication made it impossible to form the specific intent to commit the crime. We review sufficiency of evidence claims to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). To negate the specific intent element of a crime, a defendant's degree of intoxication must be so great as to render the accused "incapable of entertaining intent." *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984). Simply being intoxicated does not negate intent. *Id.*

In this case, the evidence established that defendant had been drinking on the day of the assault. Defendant himself, however, testified that he was not intoxicated. Additionally, defendant's stepfather, who arrived at the scene immediately after the incident, testified that defendant did not appear intoxicated. Furthermore, both police officers who arrived at the scene immediately after the incident and then proceeded to arrest defendant and take him into custody, testified that defendant did not seem to be intoxicated. Although the victim testified that defendant appeared intoxicated, there was no indication that he was intoxicated to the degree of being incapable of entertaining intent.

Given the victim's account of a relatively lengthy physical encounter during which defendant pursued her repeatedly and during which defendant threatened her repeatedly, as well as defendant's own assessment that he was not intoxicated coupled with the observations of other witnesses that defendant did not appear intoxicated, sufficient evidence was presented to prove that defendant had the capacity to and did, in fact, have the intent to cause great bodily harm. Therefore, sufficient evidence

was presented to sustain defendant's conviction of assault with intent to do great bodily harm less than murder.

Last, defendant claims that he was denied effective assistance of counsel because his attorney failed to raise an intoxication defense or a "mutual fight" defense and also failed to interview exculpatory witnesses. Defendant did not move for an evidentiary hearing on this issue, so our review is limited to facts contained in the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1992).

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, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's claim that he was denied effective assistance of counsel because his attorney failed to raise an intoxication defense is without merit. As discussed above, defendant and several other witnesses, including his stepfather, testified that he did not appear to be intoxicated. For intoxication to be a successful defense, the intoxication must be so great as to render the defendant incapable of entertaining the requisite intent. *Savoie, supra*, at 134. Given defendant's own assessment that he was not intoxicated, the supporting testimony of the other witnesses, as well as the general nature of the incident -- a relatively extended physical encounter between defendant and the victim -- counsel's decision not to pursue an intoxication defense was reasonable. 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 Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant's claim that he was denied effective assistance of counsel because his attorney failed to raise a "mutual fight" defense is similarly without merit. "Mutual fight" is not a criminal defense typically used in Michigan. A claim of ineffective assistance of counsel cannot be premised upon the failure to present a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Consequently, defense counsel did not act unreasonably in failing to argue a "mutual fight" defense.

We also reject defendant's argument that he was denied the effective assistance of counsel because counsel failed to interview exculpatory witnesses. Defendant does not identify any exculpatory witnesses his attorney failed to interview. Nor is there any record of counsel's failure to interview witnesses. Our review of ineffective assistance of counsel claims is limited to the facts contained on the record. *Hedelsky, supra* at 387. Because there is no evidence on the record that counsel failed to interview witnesses, defendant's claim fails.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage