

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JUNIOR ROJAS, III,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 265161

Tuscola Circuit Court

LC No. 04-009276-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant's conviction arises from assault upon victim Rebecca McNiel after she had instituted eviction proceedings against defendant and confronted him at the subject property.

Defendant first argues that the prosecutor engaged in misconduct when he repeatedly alleged during opening, closing, and rebuttal arguments that defendant pointed a firearm at the victim's face. Defendant asserts that this was a mischaracterization of the evidence. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Defendant argues that there was no evidence presented at trial that defendant pointed the firearm at the victim's face. However, when asked where defendant pointed the firearm, the victim answered, "Anywhere from my chest above. It wasn't—it definitely was pointed at my chest." Based on the victim's assertion that the gun was pointed anywhere from her chest and above, the prosecutor's characterization of the evidence was reasonable.¹

¹ In any case, defendant has failed to show that these comments, if improper, could have affected the jury's decision. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

(continued...)

Defendant next argues that defendant was denied the affective assistance of counsel. We disagree. Because no *Ginther*² hearing was held, review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Specifically, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel was deficient because she failed to adequately meet with defendant prior to trial, and thus could not prepare a substantial defense. However, defendant does not specify what potential defense was lost, or how the defense presented was undermined by this alleged lack of contact. Defendant asserts that a statement by defendant on the record that he first heard of a plea bargain after the jury was impaneled demonstrates that defense counsel did not adequately meet with defendant. However, even if counsel actually did fail to inform defendant of the potential plea bargain until after trial began³ it is not clear that counsel must therefore have failed to adequately meet with defendant.

Defendant next argues that defense counsel was ineffective when she failed to object to plaintiff's repeated allegations that defendant pointed a firearm at the victim's face. As previously noted, however, the prosecutor's characterization of the evidence was reasonable. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Additionally, because pointing the gun at the victim's chest was sufficient to support the charge, there is no reasonable likelihood that objecting would have had any probable effect on the outcome of the trial. See *Rodgers*, *supra* at 714.

(...continued)

Defendant could be found guilty of felonious assault even if the jury believed that he pointed the firearm anywhere at her body other than her head. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The trial court appropriately instructed the jury on the elements of felonious assault, that it "must decide the case only on the evidence admitted during the trial," and that statements by the attorneys were not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

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

³ It is not clear from the record that trial counsel in fact failed to inform defendant of the plea offer before trial. Defendant stated on the first day of trial that he had not previously been informed of the plea offer. However, defendant then answered in the affirmative when counsel asked him the following: "I have explained to you that if you went to trial and you were convicted of the Felony Firearm, that is a two year consecutive, correct?" The use of the phrase "if you went to trial" implies that a plea offer, as an alternative to trial, had indeed been explained to defendant.

Defendant next argues that defense counsel was ineffective because she did not present evidence as allowed under MRE 404(a)(1) that the crimes charged “would be highly out-of-character for” defendant. Specifically, defendant argues that he “had no history of any similar or other assaultive behavior and would have no background to suggest that his would lie about . . . this incident.” Defendant asserts that these character traits would have been shown through evidence that defendant “was he a family man [and] a dedicated and diligent worker who caused no problems at his employment.” However, defendant does not explain how his alleged character traits for non-violence and truthfulness would be established through such evidence. And, if defense counsel had offered such evidence, she would have opened the door to rebuttal character evidence. MRE 404(a)(1). Under these circumstances, defendant has failed to rebut the presumption that defense counsel’s decision to not present character evidence constituted sound trial strategy. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant next argues that defense counsel was ineffective when it attempted to impeach the victim’s husband’s testimony with an alleged prior inconsistent statement to the police that was favorable to the prosecution. After Mr. McNiel testified that he did not see defendant point the gun directly at his wife but had seen it pointed in her direction, defense counsel produced a police report containing Mr. McNiel’s statement to police, in which Mr. McNiel told a police officer that he had seen defendant point a handgun at his wife. Although we note that it seems an odd choice to introduce a statement that suggests defendant did in fact point a gun in the victim’s face, still the apparent purpose of the question was to impeach the credibility of a prosecution witness. Given both the strong presumption that counsel’s acts are matters of sound trial strategy, and the probability that this testimony did not affect the outcome of the case, we find that defendant has failed to support this claim of ineffective assistance of counsel. We also note that the trial court properly instructed the jury that the out-of-court statement could only be used in assessing the credibility of the witness, and “[i]t is well established that jurors are presumed to follow their instructions.” *Graves, supra* at 486.

Defendant next argues that defense counsel should have requested that the jury be instructed on the elements of simple assault. “[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). “[A] simple criminal assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.” *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978) (internal quotation marks omitted).

Aside from testimony that defendant pointed a firearm at the victim, defendant cites no evidence that defendant otherwise assaulted her. Thus, defendant would not have been entitled to a lesser-included offense instruction even if defense counsel had requested it, see *People v McGhee*, 268 Mich App 600, 607-608; 709 NW2d 595 (2005), and defense counsel cannot be deemed ineffective for failing to make such a request, *Fike, supra* at 182.

Lastly, defendant argues that the cumulative effect of multiple errors would warrant reversal. To determine whether a criminal conviction should be reversed because of the effect of

cumulative errors, “only actual errors are aggregated to determine their cumulative effect.” *People v LeBlanc*, 465 Mich 575, 592; 640 NW2d 246 (2002). No error having been shown, defendant’s cumulative error argument necessarily fails.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper