

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD CARMONA,

Defendant-Appellant.

UNPUBLISHED

March 13, 2007

No. 266228

Wayne Circuit Court

LC No. 05-004100-01

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82, reckless driving, MCL 257.626, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a two-year prison term for the felony-firearm conviction, to be followed by a one-year probationary period for the two counts of felonious assault. Sentence was suspended for the reckless driving conviction. Defendant appeals as of right. We affirm.

I. Facts

Defendant's convictions arise from an incident that occurred while he was driving southbound on I-75 in Taylor. Defendant, a police officer, was on medical leave for treatment of a shoulder injury. On the day of the incident, defendant was driving his Lincoln Continental in the left lane of the freeway with his son, Carlos Carmona, beside him in the passenger seat. Edwin Vasquez pulled ahead of defendant in his Subaru from the middle lane. Vasquez and Loida Pagan, Vasquez's wife and passenger, both testified at trial that defendant was driving too fast and tailgating the Subaru. Defendant suddenly pulled onto the left shoulder of the freeway and drove alongside the Subaru. Defendant and Carlos both testified that Vasquez cut off the Lincoln when he changed lanes forcing defendant to drive onto the left shoulder to avoid a collision. They claimed that Vasquez then blocked defendant's reentry into the left lane by matching defendant's speed and driving directly beside the Lincoln.

Vasquez and Pagan testified that defendant pulled out a pistol and pointed it at the Subaru while the two cars were beside each other. They stated that Carlos leaned back in his seat and defendant stretched his arm in front of him to point the gun. Defendant then reentered the freeway and displayed his police badge. Defendant and Carlos testified that defendant first displayed his police badge and tried to inform Vasquez that he was a police officer so that

Vasquez would allow him to reenter the freeway. Vasquez did not do so, however, so defendant displayed his service firearm. Defendant and Carlos averred that defendant held the gun upside down, and did not point the gun. Carlos testified that if defendant had pointed the gun at the Subaru, he also would have been pointing it at Carlos, which was something that defendant would not do. Defendant testified that he believed he was in danger because the left shoulder was about to end, and he was still trapped between the median and the Subaru. He explained that he could not stop because it is dangerous to stop on the left side of the freeway, and his shoulder injury would prevent him from defending himself if Vasquez attacked him after he stopped.

Defendant exited the freeway and Vasquez followed him while Pagan called the police. The police stopped both cars in a parking lot and arrested defendant. Defendant did not comply with the arresting officer's instructions to place his hands on his head. Consequently, defendant was charged with resisting or obstructing a police officer, MCL 750.81d, in addition to felony-firearm, reckless driving, and two counts of felonious assault. At trial, defendant's physical therapist, Peter Orawiec, testified that defendant was unable to raise his hands to his head. Defendant was acquitted of the resisting a police officer charge.

II. Analysis

Defendant argues that the felony-firearm statute does not apply to him, pursuant to MCL 750.227b(4), because it is undisputed that he was a police officer who was required to carry a firearm at all times, including while on medical leave.

MCL 750.227b provides, in pertinent part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony

* * *

(4) This section does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her duties, *and who is in the performance of those duties*. As used in this subsection, "law enforcement officer" means a person who is regularly employed as a member of a duly authorized police agency [Emphasis added.]

The statutory language exempts law enforcement officers from the ambit of the felony-firearm statute under certain circumstances. For the exemption to apply, two requirements must be met: (1) the officer must be authorized to carry a firearm while in the official performance of his duties, *and* (2) the officer must be acting in the performance of his duties as an officer. In this case, defendant clearly was not in the performance of his duties as a police officer when he became involved in the altercation with Vasquez. Not only was defendant off duty and on

medical leave, he was engaged in a purely personal confrontation. Accordingly, the exemption in MCL 750.227b(4) does not apply.¹

Defendant raises several claims of ineffective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing this Court's review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant contends that trial counsel was ineffective for failing to request a jury instruction on the lesser offense of aggravated assault. Our Supreme Court has held that, under MCL 768.32, a lesser offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). A necessarily included lesser offense is an offense in which the elements of the lesser offense are completely subsumed in the greater offense. *Id.* Accordingly, an instruction on a lesser offense is proper if “ ‘all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction.’ ” *Id.*, quoting *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

Aggravated assault is not a necessarily included lesser offense of felonious assault. The elements of felonious assault are “(1) an assault, (2) with a dangerous weapon, (3) committed with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Aggravated assault is a misdemeanor defined as an assault without a weapon, which inflicts serious or aggravated injury upon the victim, and where the actor does not intend to commit murder or great bodily harm less than murder. MCL 750.81a(1). The elements of aggravated assault are not subsumed within the elements of felonious assault because aggravated assault requires that the victim sustain a serious or aggravated injury and that the defendant not use a weapon. Accordingly, an instruction on aggravated assault was not permitted and a request for it would have been futile. Failure to advocate a meritless position does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

¹ Defendant relies on *People v Khoury*, 437 Mich 954; 467 NW2d 810 (1991), in which our Supreme Court reversed a felony-firearm conviction of a police officer convicted of manslaughter. The defendant in *Khoury* was convicted under an earlier version of MCL 750.227b, which did not include subsection (4). The Court held that the Legislature did not intend that the felony-firearm statute “apply to an on-duty police officer in the performance of his duties as a police officer.” Because *Khoury* was decided before subsection (4) was enacted, and because this case does not involve a police officer acting in the performance of his duties as a police officer, *Khoury* does not aid defendant's argument.

Defendant also argues that trial counsel was ineffective in failing to move for a directed verdict. A directed verdict is proper where the evidence, viewed in the light most favorable to the prosecution, could not persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Defendant argues that he was entitled to a directed verdict because there was no evidence that he actually pointed a gun at Vasquez or Pagan, or that they were placed in fear of an imminent battery. Defendant contends that Vasquez only testified that defendant pointed the gun at the mirror of the Subaru, rather than directly at him. Contrary to what defendant argues, Vasquez testified that defendant pointed the gun “to the mirror, to the glass, to the door,” which he then explained was in the direction where he was seated. Pagan testified that the gun was pointed “towards me.” Defendant also contends that Vasquez and Pagan could not have feared an imminent shooting if they followed him off the freeway. Vasquez and Pagan both testified that they were scared for their life. Vasquez explained that he followed defendant off the freeway, but was cautious and kept his distance. Viewed in a light most favorable to the prosecution, Vasquez’s and Pagan’s testimony did not preclude reasonable jurors from finding that defendant placed them in reasonable apprehension of an imminent battery when he pointed a gun in their direction. *Avant, supra* at 505. Therefore, defense counsel was not ineffective by failing to move for a directed verdict.

Defendant also argues that trial counsel was ineffective for failing to subpoena character witnesses, and failing to prepare and submit a witness list pursuant to the court rules. Counsel acknowledged that he failed to submit a witness list. The trial court admonished counsel for this failure, but indicated that he could call the witnesses if they appeared to testify. The court stated that it would not delay the trial to wait for witnesses. The only witnesses defense counsel called were defendant, Carlos, defendant’s physical therapist, and Officer Don Farago, the officer in charge of the case. Although trial counsel indicated that he planned to call character witnesses, none were called.

Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, it appears that trial counsel did not make a strategic decision not to call character witnesses, but rather failed to coordinate their appearance. Nonetheless, the failure to call a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* A defense is substantial if it might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Neither the identity of defendant’s character witnesses, nor the substance of their testimony is apparent from the record. Without a record of these witnesses, or how they would have testified, there is no basis for concluding that their testimony might have altered the outcome of defendant’s trial. Accordingly, defendant has failed to establish that he was prejudiced by counsel’s allegedly deficient conduct.

Defendant also argues that counsel failed to properly prepare for Peter Orawiec’s testimony. Orawiec testified that he was defendant’s physical therapist in January 2005. He stated that defendant was receiving physical therapy to rehabilitate his left shoulder following surgery. He stated that both of defendant’s shoulders were impaired, which limited how high he could raise his arms. Orawiec demonstrated how high defendant would have been able to raise his arms on the day of the incident. On cross-examination, Orawiec admitted that he did not

have defendant's chart with him, so he could not testify how recently before the incident he saw defendant. He stated, however, that he was seeing defendant for physical therapy sessions three times a week in January 2005. The following exchange ensued:

Q. But you're here to tell us that you know exactly how far he could raise his left arm on the date of January 15th, 2005?

A. Yes. I can deduct it from the fact that having seen him so many times this condition doesn't change within days, it changes within multiple months, say six months.

Orawiec admitted, on cross-examination, that he did not think that defendant's condition would have prevented him from holding his right arm out at a right angle from his body (i.e., to point a gun).

We disagree with defendant's claim that trial counsel undermined the value of Orawiec's testimony by inadequate preparation. Orawiec's testimony was evidently successful in persuading the jury that defendant did not intentionally resist a police officer when he failed to raise his arms as instructed by the officer. Defendant suggests that, with better preparation, Orawiec might also have established that defendant could not have held the gun out as the prosecution witnesses described. But Orawiec's testimony did not reflect a lack of information on this point; rather, he admitted that he did not believe defendant's right arm was too impaired to do this. There is nothing on the record to suggest that better preparation would have led to a different opinion. Accordingly, there is no basis for defendant's claim that but for defense counsel's allegedly inadequate preparation, Orawiec would have exculpated defendant of the felonious assault and felony-firearm charges.

Defendant also argues that he was prejudiced by defense counsel's discourteous and insubordinate conduct with the trial court. Defendant refers to a discourse between defense counsel and the trial court after the court overruled the prosecutor's objection to defense counsel's cross-examination of Pagan, in which defense counsel complained that he did not hear the trial court's ruling because the court spoke at the same time as the witness. On another occasion, defense counsel interrupted the proceedings to ask the court a question about trial exhibits. Later, defense counsel persisted in arguing with the court about an evidentiary ruling. The court excused the jury from the courtroom and warned defense counsel that he would be held in contempt if he continued to defy the court's authority by arguing about settled matters. Before the jury returned, the court informed defense counsel that he would be "summarily held in contempt" if he did not abide by the court's rulings.

Only the first incident occurred in the jury's presence. Therefore, the remaining incidents could not have prejudiced defendant in the eyes of the jury. The first incident was relatively minor, and it is not apparent from the record whether trial counsel appeared rude or disrespectful. Even if he did, there is no basis for concluding that counsel's conduct was so unprofessional or uncivil that it affected the outcome of the trial.

Defendant also argues that counsel was ineffective for calling defendant and Carlos as witnesses. Defendant argues that his own testimony and Carlos's testimony was more damaging than helpful because both witnesses admitted that defendant displayed the gun during the

incident, and Carlos was an inherently biased witness. Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Dixon, supra* at 398. Although defendant's and Carlos's testimony was not completely exculpatory, it provided a less incriminating and mitigating version of events than otherwise would have been available to the jury. Defendant has not overcome the presumption of sound trial strategy.

Defendant also argues that counsel was ineffective for making the "absurd" request for a self-defense instruction. The trial court agreed to give CJI2d 7.22, use of non-deadly force in self-defense or defense of others, "if you want to argue that absurdity to the jury." CJI2d 7.22 states that a person is justified in using non-deadly force against another in self-defense if he is free from fault and, under all the circumstances, honestly and reasonably believes it is necessary to use force to prevent bodily harm to himself or another. The degree of force used in self-defense must be in proportion to the attack made and must depend upon the circumstances as they appeared to him.

Even if the probable success of this defense was dubious, the decision to request instruction on the defense was a matter of trial strategy, and it was not entirely unreasonable for counsel to attempt to raise it. It comported with defendant's testimony that he believed he was endangered by Vasquez's allegedly hostile, aggressive driving, and that he believed stopping the car on the left shoulder would increase the risk to himself. Accordingly, we cannot conclude that defense counsel was ineffective for requesting the instruction.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly