

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOHAMMED HASSAN AL-KHALIL,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 266096

Saginaw Circuit Court

LC No. 04-024416-FC

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and mayhem, MCL 750.397. The trial court sentenced defendant to concurrently serve terms of 18 to 50 years' imprisonment for the kidnapping conviction, 4 to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, 2 to 4 years' imprisonment for the felonious assault conviction, and 4 to 10 years' imprisonment for the mayhem conviction. We affirm.

I. Basic Facts and Procedural History

Defendant and Hitmoi Kurochi met while students at Saginaw Valley State University (SVSU). While dining together at defendant's apartment one evening, Kurochi began feeling ill after drinking an alcoholic beverage prepared for her by defendant. Defendant, however, forcefully insisted that Kurochi continue to drink. After Kurochi vomited from the alcohol, defendant began to act "weird and scary," asking Kurochi where she wanted to be hit. When Kurochi protested being hit anywhere, defendant indicated that if she did not specify an area on which to be hit, he would make the choice himself. Kurochi finally indicated that defendant should hit the bottoms of her feet, after which defendant hit Kurochi's feet more than ten times with a sandal and at least three times with an aluminum pipe. When Kurochi screamed, defendant also hit her back with the pipe. Defendant then ordered Kurochi to his car, following closely behind her as she walked to the parking lot.

Once in the parking lot, Kurochi began to cry and begged a woman for help. After telling the woman not to listen to Kurochi because she was drunk, defendant became angry with Kurochi, stating that she did a "bad thing" by asking for help. Defendant then drove with Kurochi to a nearby gas station. Kurochi testified that she did not ask anyone at the gas station

for help because she was afraid that defendant would hurt her if she did so. After leaving the gas station, defendant drove for approximately ten minutes on a freeway. He then exited the freeway and parked in a dark area.

After defendant parked the car, he climbed on top of Kurochi, hit her several times in the head, and then choked her to the point of unconsciousness. When Kurochi awoke, defendant again hit her in the head, then poked her in the eye and burned her lips, hands, and hair with a lighter. Believing that defendant planned to kill her, Kurochi pretended she was dead. When Kurochi failed to respond to defendant's attempts to awaken her, defendant drove back to his apartment, carried her inside, and laid her on the floor. Defendant left the apartment after approximately two minutes. When Kurochi heard defendant's car start, she sought help from two of his neighbors.

Police officers arrived at the scene shortly thereafter. Defendant was arrested at the office of his SVSU student advisor approximately one hour later, after an SVSU employee spotted defendant's car on the campus. At the time of his arrest, defendant was very calm and did not appear intoxicated. Defendant informed the police that he and Kurochi had both been drinking and that when she passed out in his car, he tried to revive her by hitting and burning her. Defendant indicated that he went to the SVSU campus after the incident to seek help from his advisor.

Before trial, defendant filed a notice of intent to assert an insanity defense. Defendant was subsequently referred to the Forensic Center for psychological evaluation, and was ultimately found to be both competent to stand trial and criminally responsible for his conduct toward Kurochi. Defense counsel thereafter sought and secured public funds for an independent psychological evaluation. Counsel selected Dr. George Drozd to perform the evaluation of defendant. After completing the evaluation, Dr. Drozd also found defendant criminally responsible, prompting defense counsel to withdraw insanity as a defense.

In conjunction with his appeal to this Court, defendant filed a second motion for new trial and requested an evidentiary hearing on a claim of ineffective assistance counsel. Defendant argued that his trial counsel was ineffective for failing to thoroughly investigate Dr. Drozd's qualifications and religious bias against him, and for failing to provide Dr. Drozd with critical information. The trial court denied defendant's motion and request for an evidentiary hearing.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that his kidnapping conviction was not supported by the evidence at trial. We review sufficiency of the evidence claims *de novo*, determining whether the evidence, viewed in the light most favorable to the prosecution, would enable a rational trier of fact to find that all the elements of the charged crime have been proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

To establish the offense of kidnapping by forcible confinement with intent to secretly confine, the prosecution was required to show that defendant (1) forcibly seized, confined, inveigled or kidnapped Kurochi, and that he did so (2) willfully, maliciously and without lawful

authority, (3) with the intent to secretly confine or imprison her in this state against her will. See *People v Jaffray*, 445 Mich 287, 301-302; 519 NW2d 108 (1994). With regard to these elements, defendant argues that there was insufficient evidence to support that he forcibly confined Kurochi. Relying on *People v Walker*, 135 Mich App 311, 323-324; 355 NW2d 385 (1984), defendant argues that any coercion used in the instant case was merely mental and was, therefore, insufficient to constitute force. We disagree. The facts in the instant case are distinguishable from those in *Walker* in two respects: First, the defendant in *Walker* used no physical force; and second, he did not impede the victims from seeking outside help. *Id.* Here, however, defendant physically assaulted Kurochi before ordering her to his car, followed closely behind her while she walked to the car, and then thwarted her initial attempt at rescue. Clearly, the coercion in this case was more than merely mental. Considering defendant's earlier show of violence and his threatening behavior in the parking lot, it was reasonable for Kurochi to believe that defendant would physically harm her if she did not comply with his demands. Moreover, defendant physically restrained Kurochi once she was in the car by sitting on top of her and pinning back her arms. This evidence was sufficient to support that defendant forcibly confined Kurochi.

Defendant also argues that there was insufficient evidence that he intended to secretly confine Kurochi. Again, we disagree. Our Supreme Court has defined "secret confinement" as the "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Jaffray, supra* at 309. "'Secret confinement' is not predicated solely on the existence or nonexistence of a single factor." *Id.* "Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of the confinement was secret, thereby depriving the victim of the assistance of others." *Id.* Moreover, a defendant's intent to secretly confine the victim may be inferred from his conduct. *Id.* at 303.

In this case, defendant thwarted Kurochi's attempt to seek help and, although he may have left some limited avenues of communication available to her by stopping at a gas station and driving on a public freeway, he ultimately parked his car in a secluded area, where no lights, people, or buildings were visible to her. Given that, under these circumstances it was highly unlikely that any person would have seen what was happening inside defendant's car or heard any cries for help, we find this evidence sufficient to support that defendant intended to keep Kurochi's confinement a secret.

Although not raised in his statement of questions presented as required by MCR 7.212(5), defendant also claims that his kidnapping conviction was against the great weight of the evidence. However, because there was competent, sufficient evidence supporting defendant's kidnapping conviction, we cannot conclude that the conviction was against the great weight of the evidence. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (a "jury's verdict should not be set aside if there is competent evidence to support it"); see also *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003) (this Court may overturn a verdict only when it was "manifestly against the clear weight of the evidence").

B. Ineffective Assistance of Counsel

Defendant next argues that his trial counsel rendered ineffective assistance by failing to investigate Dr. Drozd's background and provide Dr. Drozd with information critical to his evaluation, thereby denying defendant a substantial defense at trial. We disagree.

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

A defense counsel's failure to investigate does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-641; 459 NW2d 80 (1990). In other words, failure to investigate can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); see also *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one which might have made a difference in the outcome of the trial." *Kelly, supra*. Moreover, decisions about which witnesses to call and what evidence to present are presumed to be matters of trial strategy, *Dixon, supra*, on which we defer to counsel without the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argues that his later investigation into Dr. Drozd's background reveals that he lacked the expertise necessary to render an opinion regarding criminal responsibility and that he was biased against defendant. We disagree with defendant's self-serving conclusions. The record reveals that Dr. Drozd holds a doctorate in clinical psychology and is a board certified forensic diplomate. The record further reveals that Dr. Drozd has evaluated hundreds of defendants for competency and criminal responsibility, has testified as an expert in at least six counties, and has been recommended by various circuit courts as an expert in forensic evaluations. There is really no question regarding Dr. Drozd's competence or expertise. Furthermore, there is no evidence that Dr. Drozd's personal religious beliefs or views on abortion rendered him unable to conduct objective forensic evaluations. Defendant's argument in this regard is based purely on speculation. There is no merit to the claim that Dr. Drozd was biased against defendant. We find that defense counsel made an objectively reasonable decision in utilizing Dr. Drozd's services, and declining to pursue an insanity defense based on his conclusions.

Defendant also argues that his trial counsel was ineffective for failing to provide Dr. Drozd with critical information during evaluation. Again, we disagree. There is no evidence that defense counsel knew, or should have known, that additional discovery was needed or even available. As argued by the prosecution, trial counsel was not required to turn over every piece of evidence that might conceivably help his client. See *Tucker v Ozmint*, 350 F3d 433, 442 (CA 4, 2003), cert den 541 US 1032; 124 S Ct 2100; 158 L Ed 2d 715 (2004). Furthermore, defendant failed to show that the additional information, specifically information from the Forensic Center, would have affected Dr. Drozd's evaluation. The fact that another expert concluded after the trial that defendant was legally insane does not mean that Dr. Drozd would have reached the same conclusion had he reviewed the additional records from the Forensic Center. As it was, in reaching his conclusion, Dr. Drozd interviewed defendant on more than one occasion, considered the results of several objective tests, and reviewed forensic records,

police records, and court files. Defendant has failed to overcome the presumption of effective assistance of counsel.

Defendant has similarly failed to show that he was denied a substantial defense because of the alleged error of his defense counsel and Dr. Drozd's purported incompetence and bias. While it is true that defense counsel withdrew defendant's notice of insanity after receiving Dr. Drozd's report, defendant has failed to establish that the absence of an insanity defense affected the outcome of this case. To the contrary, there was substantial and compelling evidence available to the prosecution to negate defendant's insanity claim. Bearing this evidence in mind, we do not find it likely that the jury would have acquitted him if presented with an insanity defense. A new trial is thus not warranted. Moreover, because defendant has failed to demonstrate that facts elicited during an evidentiary hearing would support his claim of ineffective assistance, we decline to order remand for that purpose. See MCR 7.211(C)(1)(a)(ii).

C. Instruction on Flight

Finally, defendant argues that, in light of the facts of this case, it was improper for the trial court to read a flight instruction to the jury. "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, in order for a trial court to give a particular jury instruction, it is necessary that there be evidence to support the giving of that instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). We review a trial court's determination that an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

It is well established that evidence of flight is admissible in Michigan. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although evidence of flight itself is not sufficient to sustain a conviction, such evidence is probative because it may indicate consciousness of guilt. *Id.* The term "flight" may be applied to fleeing the scene of the crime, leaving the jurisdiction, running from the police, and resisting arrest. *Id.* However, mere departure from a crime scene is generally insufficient to support a flight instruction. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

In the instant case, the evidence indicated that, although defendant returned home immediately after the offenses, he quickly left again, leaving a wounded victim behind and making himself unavailable to the police. Based on these facts, a reasonable juror could infer that defendant fled because he feared apprehension. The trial court did not abuse its discretion in concluding that the facts of this case supported a flight instruction. Moreover, the challenged instruction allowed the jury to decide whether defendant fled and, if he fled, whether defendant did so for innocent reasons or because of a guilty conscience. Thus, defendant was not prejudiced by the instruction. Therefore, reversal is not warranted. MCR 2.613(A).

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski