

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS TYRONE SMITH,

Defendant-Appellant.

UNPUBLISHED

August 18, 2011

No. 298699

Wayne Circuit Court

LC No. 07-023982-FH

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right following his jury trial convictions of armed robbery, MCL 750.529, felonious assault, MCL, 750.82, and domestic violence, MCL 750.81a(2). Defendant was sentenced to five to 15 years' imprisonment for the armed robbery conviction, one to four years' imprisonment for the felonious assault conviction, and 90 days' imprisonment for the domestic violence conviction. We affirm.

Defendant claims that he was deprived of his right to the effective assistance of counsel. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell 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 resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will not substitute its judgment for that of counsel in matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Odom*, 276 Mich App at 415.

During opening statements, defense counsel explained that the prosecutor had painted a gruesome picture of what happened on the night the incident occurred, "[b]ut what she's glossed over here in her presentation of what this case might show is the nature of this relationship that had apparently soured. And the nature of that relationship, you will learn, was quite abusive for quite a number of years on both sides of this particular relationship." Counsel stated that the victim was the aggressor and that she pulled a knife on defendant. His theory of the case, therefore, was that defendant acted in self-defense.

Defendant contends defense counsel was constitutionally ineffective because of testimony he elicited from the victim, her sister, and defendant. Specifically, defense counsel questioned the victim about her volatile relationship with defendant and elicited testimony that she had to call the police on defendant on previous occasions. According to defendant, counsel exacerbated the error by questioning the victim's sister about her knowledge that the victim once had a personal protection order against defendant. And counsel then elicited damaging testimony from defendant regarding the couple's violent history and also that defendant had a separate confrontation with the victim's sister following the incident. Defendant argues that, far from establishing a claim of self-defense, counsel highlighted defendant's prior violence, allowing the jury to infer that he was a violent and abusive boyfriend who was capable of attacking the victim, thus compromising his claim of self defense.

Contrary to defendant's argument, counsel's questioning of all three witnesses was in line with his reasonable trial strategy of presenting a theory of self-defense. During closing arguments, defense counsel argued: "And we know that's happened in the past. They both testified to the rocky relationship they had. That the police had been called in the past. We know this is volatile. So who sparks this volatile fire? Is it Mr. Smith trying to get his stuff, or is it [the victim]?" Defendant's theory was that the victim simply went berserk at the thought that he was leaving her. She became out of control and very aggressive. The testimony elicited by defense counsel during trial bolstered defendant's claim of self-defense because it showed that the couple had a volatile relationship with a history of physical confrontation and police involvement. The jury could have determined that the victim was the aggressor and that defendant was acting in self-defense. That the strategy failed does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defendant also argues that counsel failed to object to irrelevant and prejudicial "other acts" evidence. During his questioning of the victim, the prosecutor elicited a statement that defendant had taken \$1,000 from the victim on a previous occasion to "buy weed." Another reference was made to defendant's drug use when the arresting officer testified that defendant had six baggies of marijuana on his person when he was arrested for assaulting the victim. Finally, the prosecutor elicited testimony from the victim's sister that defendant broke her car window and attacked her following the assault on the victim.

Defendant is correct that evidence of defendant's possession of marijuana or of assaulting the victim's sister was prejudicial and, more importantly, irrelevant. The trial court immediately recognized that and properly instructed the jury to disregard it. Furthermore, while giving the jury its general instructions at the close of the case, the trial court also instructed the jury: "At times during the trial I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else." The jurors are presumed to have followed the judge's instructions. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009). In sum, it was unnecessary for defense counsel to object because the court had already taken it upon itself to correct the error and gave curative instructions.

Additionally, the evidence against defendant was so strong that, even if counsel were ineffective in failing to object, it is not likely that the outcome of trial would have been different. The victim testified that on the morning of the assault defendant walked into her home unannounced and unwelcome. He looked into the bedrooms as though he were looking for

someone, and he then descended upon her, choking her with both hands and striking her in the face. The victim attempted to fight back with a knife, but it was used against her and she was gashed in the forehead. The victim's sister telephoned during the altercation; defendant answered, and he told the sister that the victim was in the bathroom and would call her back. Defendant pulled out a gun and threatened to kill the victim. Defendant then went to the victim's bedroom and retrieved her purse from which he took \$600. Suspicious that defendant answered the victim's phone, her sister and niece came over to investigate. They found the victim beaten and dazed, cleaning up broken glass. The sister saw defendant with the victim's purse.

For his part, defendant testified that he, in fact, spent a great deal of time in the victim's home and kept a number of items there. He had spent the night before with the victim and was sleeping when she came into the room and began an argument about his philandering ways. Defendant was tired of the same argument and decided to pack up several of his items and call for a cab. When the cab arrived and demanded a deposit, defendant realized he had no money and went back into the house to retrieve some of his money from the victim. The victim refused to give him any money and then went into a rage, attacking him with a knife. It took several minutes for defendant to disarm the victim. The victim went into the bathroom and then came out into the living area and attacked him for a second time with a different knife. Upset, defendant admitted that he punched the victim in the face in an attempt to once again disarm her. The victim finally sat down on the couch and began to cry. At that point, her sister and niece arrived. Defendant simply left. Defendant testified that the victim had a history of attacking him with knives.

The jury was left with a simple credibility determination between the victim's and defendant's version of events. It is axiomatic that the believability of the prosecution's or defendant's theory of the case based on witness credibility is best left for the jury to decide. *People v Harrison*, 283 Mich App 374, 382; 768 NW2d 98 (2009). The jury clearly weighed the evidence carefully, as demonstrated by defendant's exoneration on all of the firearms charges. The jurors must not have believed the evidence sufficient to establish the victim's testimony that defendant pulled a gun on her during their struggle. Still, after hearing all of the evidence and viewing photographs taken of the victim at the police station, the jury believed that defendant assaulted the victim with a knife and left with cash and a cellular phone that was registered in her name. There was more than adequate evidence for the jury to conclude that defendant was guilty of armed robbery, felonious assault, and domestic violence. Even if counsel made errors, they were not outcome determinative and did not affect the fairness of the proceedings.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher