

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JUSTIN RAY FINLEY, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

JUSTIN RAY FINLEY,

Respondent-Appellant.

UNPUBLISHED
December 10, 2002

No. 233968
Macomb Circuit Court
Family Division
LC No. 00-049650

Before: Bandstra, P.J., and Zahra and Meter, J.J.

PER CURIAM.

Respondent was charged with assault and battery, MCL 750.81(1), and following a bench trial, respondent was adjudicated guilty. Immediately following the adjudication, the court accepted respondent's plea of no contest on a separate petition of possession of a BB gun by a minor, MCL 752.891. The order of disposition made respondent a temporary ward of the court to remain in the care and custody of his mother, and placed respondent on probation. Further, the order of disposition required respondent to follow the rules and regulations of probation, follow guidelines of behavior, pay reimbursement pursuant to MCL 712A.18(2), and adhere to an 8:00 p.m. daily curfew. This Court granted respondent's application to take a delayed appeal. We affirm.

I. Facts and Procedure

The victim, respondent and respondent's stepbrother were acquaintances. The victim's testimony indicated that he encountered respondent and his stepbrother on the way home from a convenience store. Respondent asked the victim whether he could borrow the victim's bicycle, however, the victim refused. Respondent then grabbed the victim by the back of his shirt and pulled him off the bicycle. Respondent pinned him to the ground and with a closed fist, punched the victim several times in the head, face, knee, and abdomen. The stepbrother helped hold the victim down on the ground while respondent was beating the victim.

Respondent and his stepbrother admitted that respondent repeatedly asked the victim to borrow his bicycle so that respondent could go home and get a shirt. Respondent and his stepbrother testified that the victim repeatedly refused respondent's request to borrow the

bicycle, and consequently, respondent, without the bicycle, ran home to get a shirt. Respondent and his stepbrother further testified that when respondent returned from home, they all wrestled. Respondent denied punching the victim. The stepbrother denied holding the victim down while respondent punched the victim.

Respondent and his stepbrother were tried together. The trial court found that the victim was more credible, and therefore, found respondent guilty of assault and battery. The trial court also found that the victim's testimony was inconclusive with respect to whether the stepbrother was directly involved in the physical assault.

During the adjudication, respondent was charged with malicious destruction of property and the possession of a BB gun by a minor. At the conclusion of the instant adjudication for assault and battery, the trial court accepted respondent's plea of no contest of the charge of possession of a BB gun by a minor, in exchange for a dismissal of the charge of malicious prosecution.

II. Analysis

A. Great Weight of the Evidence

Respondent first claims that the verdict was against the great weight of the evidence because the testimonies of his witnesses were consistent, while the testimony of the prosecutor's witnesses should have been discredited. We disagree. Defendant failed to preserve this issue for our review by failing to move for a new trial below. Therefore, this Court's review is limited to determining whether respondent has demonstrated a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our review of the record shows that this case presented a credibility contest. The issue of credibility is a matter for the trier of fact to ascertain and this Court will not resolve credibility issues anew on appeal. *People v Sexton*, 250 Mich App 211, 220 n 3; 646 NW2d 875 (2002). The prosecutor's theory of the case was that respondent and his stepbrother beat the victim because the victim refused to lend his bicycle to respondent. Respondent's theory of the case was that any injuries the victim sustained were a result of his willing participation in a wrestling match with respondent, his stepbrother and another person, but that the victim fabricated the events out of fear of being punished by his parents because his medical condition, hemophilia, prohibited him from participating in any contact sports. While the testimony of the victim conflicted with the testimony of respondent and his stepbrother, the trial court was in a superior position to judge the credibility of these witnesses and assess the evidence. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). On this record, there is nothing to show that the trial court's finding that the victim's testimony was more credible than that of respondent and his stepbrother constituted clear error.

B. Sufficiency of the Evidence

Next, respondent claims that the evidence was insufficient to sustain his conviction because the only evidence that the prosecutor offered was the testimony of the victim. Specifically, respondent contends that the prosecutor failed to show, beyond a reasonable doubt, that respondent intended to harm the victim or to cause an offensive touching. We disagree.

This Court reviews claims of sufficiency of the evidence by considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the charged offense were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of an offense. *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

An assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998). A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person. *Id.* at 240 n 4. A battery is the consummation of an assault. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996).

The victim's testimony, which conflicted with the testimony of respondent and the stepbrother, created a question of fact and a question of witness' credibility. Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[T]he trial court sitting as a finder of fact must make fine-line judgments about credibility, reliability, and probative value concerning the conflicting evidence to determine what actually occurred in a given case, i.e., the facts." *People v Thenghkam*, 240 Mich App 29, 46; 610 NW2d 571 (2000). Here, the trial court found the victim's testimony to be credible and the trial court stated that it believed the event occurred as testified to by the victim. The victim testified that respondent pulled him off his bicycle, pinned him to the ground and punched him several times, with a closed fist, on the head, the knee and the abdomen. Therefore, the evidence was sufficient to support the conviction that respondent committed an assault and battery beyond a reasonable doubt.

C. Judicial Impartiality

Finally, respondent contends that the trial court improperly considered evidence of a subsequent bad act that denied respondent a fair and impartial adjudication, prejudiced the verdict and created judicial bias. We disagree. Respondent failed to preserve this issue for review by moving for disqualification of the trial judge. MCR 2.003(A); *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Therefore, this Court's review is limited to determining whether respondent established plain error that affected his substantial rights. *Carines, supra*, 460 Mich 763-764.

A party claiming judicial bias must overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Respondent asserts that evidence of the trial court's bias from the charges in Petition B, which was issued during the proceedings in the instant case, are grounded in the fact that the trial court, in rendering adjudication, relied solely on the victim's testimony and, yet, adjudicated respondent guilty but dismissed the charge against his stepbrother, the co-respondent. A review of the trial court's decision shows that the stepbrother pinned down the victim as respondent battered the victim. Therefore, it may be concluded that the stepbrother, in fact, committed an assault and battery. *Reeves, supra*, 458 Mich 240; *Terry, supra*, 217 Mich App 662. However, even if the

trial court operated under a misunderstanding of the law, there is nothing to show that the trial court's knowledge of the new charges against respondent created in the trial court any partiality or bias. Therefore, contrary to respondent's contention, the trial court did not demonstrate judicial bias in relation to its adjudication on the assault and battery charge with respect to respondent.

III. Conclusion

In sum, respondent has not demonstrated that the trial court's finding that the victim's testimony was more credible than that of respondent and his stepbrother constituted clear error. Further, the evidence, when viewed in a light most favorable to the prosecution, was sufficient to convict respondent of assault and battery. Finally, respondent has failed to overcome the heavy presumption of judicial impartiality.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter