

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK RICHARD KABBASH,

Defendant-Appellant.

UNPUBLISHED

March 8, 2007

No. 266209

Ingham Circuit Court

LC No. 05-000296-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant to serve sixty months' probation, beginning with eight months' jail incarceration. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

This case arises from a domestic incident. According to the incident report, defendant and complainant, husband and wife, were arguing when defendant, while heavily intoxicated, retrieved a large kitchen knife, grabbed complainant by the hair, chased complainant, then kicked holes in the wall and door when complainant secluded herself in the bedroom.

Defendant admitted to a misunderstanding, but denied the use of a knife. Defendant stated that he left the residence in the morning to go to work, returned at noon, and then after waiting for 15 minutes for complainant to open the door, went to visit a friend and have drinks, where he was arrested at 3:00 or 3:30 that afternoon. Asked on cross-examination to name the friend, defendant was unable to do so.

I. Evidentiary Challenges

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Review is de novo. *Id.* However, a trial court's decision on a motion for a new trial predicated on the great weight of the evidence is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

Conviction of assault with a dangerous weapon requires proof that the actor: (1) assaulted the victim, (2) with a dangerous weapon, and (3) with intent to injure the victim, or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Defendant raises his evidentiary challenges in connection with the third element only.

Complainant testified that she had many fights with defendant before this incident, and that on the occasion in question she expected another because defendant was drinking. She asserted that defendant grabbed a knife in the kitchen, elaborating, “he just have the knife and I get like really scary . . .”. According to complainant, she ran up some stairs, during which she heard defendant say “I’m going to kill you today.” Complainant reported that defendant said that this would be her last day to live, and that she believed him, “because I see the knife in his hand, I never see it before,” and thus was “[v]ery afraid.” Complainant identified the knife used by defendant, and, when asked if defendant had hit her with it, stated, “No, he try to.” Complainant stated that she locked herself in a room, but defendant continued to say he was going to kill her. Complainant identified photographs showing how defendant was “just trying to push with the knife in the door” and “pushed the bathroom wall.”

Complainant called 911. A recording of that call was played to the jury, and in it the victim reported, “he just come in the house and broke the door today and told me, I have to kill you today, he have a knife in his hand.” A police officer responding to the scene testified that the main course of the incident occurred in the upstairs bedroom, and that “[t]here was quite a bit of damage to one particular door, including holes that appear to have been made by a knife.”

Defendant argues that he had no ability to assault complainant, and that she had no reason to fear immediate danger, because he was not in a position to throw the knife, and because testimony indicated that he did not always have clear access to her. We disagree. Defendant cites no authority for the proposition that an armed person cannot, as a matter of fact or law, assault a person without unimpeded access to that person.

“An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). In the instant case, the evidence that defendant gave chase when complainant ran from him, explicitly and repeatedly threatened to kill her, and attacked the door behind which she took refuge, supported the conclusion that defendant intended to harm the complainant, or cause her to suffer reasonable apprehension of an immediate battery.

At the close of the prosecutor’s proofs, defense counsel protested that there were some inconsistencies in the testimony, impliedly asking the court to conclude that the prosecution’s theory of the case was against the great weight of the evidence. But that cursory argument, made without specifying the alleged inconsistencies, did not persuade the trial court, and on appeal defendant presents no argument regarding inconsistencies in the testimony. Accordingly, the trial court properly refrained from taking the case away from the jury at trial on the basis of its own credibility determinations, see *Lemmon, supra* at 627, 639, and defendant gives this Court no reason to revisit the question on appeal.

For these reasons, defendant’s evidentiary challenges must fail.

II. Assistance of Counsel

“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant asserts that defense counsel was ineffective for failing to object to use of the 911 recording, and emphasizes that the jury heard it four times. Notably, counsel did initially object to introduction of that recording, on the grounds that it was produced in violation of discovery requirements, and that its potential for prejudice outweighed its probative value. On appeal, defendant concedes that the recording was admissible, but argues that defense counsel should have endeavored to avoid having the recording repeatedly played for the jury. However, defense counsel himself played the tape during closing argument, to demonstrate the lack of responses to the operator’s inquiries whether the caller needed the police, an ambulance, or the fire department, whether the assailant was armed, and whether the caller had been injured. A defendant raising a claim of ineffective assistance of counsel must overcome a strong presumption that counsel’s tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Because the prosecutor and defense counsel each separately chose to play the tape, the question becomes whether defendant suffered some great disadvantage from having the jury hear it four times instead of two. Because the defense ultimately saw some advantage in also using the recording, we cannot conclude that defendant suffered serious prejudice from the cumulative presentation of that piece of evidence.

Defendant next argues that defense counsel was ineffective for failing to object to the following portion of the prosecutor’s closing argument:

You have to judge credibility. . . . And I would ask you today . . . who you believe is lying, and I want you to think or focus now on [defendant]’s testimony. You heard that he said he was at another person’s house He didn’t know the[] name of this friend. Apparently, he knows this friend for at least a month or a period of time but can’t remember her name. He never could remember the name. But I think more importantly . . . , this person would have been important. Who is this person? If this person came here to testify, they’d be able to tell you what [defendant] did when he came over there. That’s his defense . . . but he can’t even remember her name.

Defendant cites *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989), for the proposition that the prosecutor may not comment on a defendant’s failure to produce an alibi witness. But “once the defendant presents such a defense, the prosecution is permitted to attack the alibi by commenting on the weakness of the alibi testimony.” *Id.* at 191. To the extent that defendant testified that he was elsewhere at the time of the alleged incident, he opened the door to prosecutorial argument exposing the weaknesses of his position. Moreover, we think it incongruous for defendant to have failed to provide this potential witness’s name when asked at trial, but then to argue on appeal that defense counsel was ineffective for failing to produce that unidentified person in the flesh. Even accepting defendant’s account of his time spent elsewhere, the possibility exists that events happened as complainant said they did, during the time in the

early afternoon that defendant admitted being at the house. For these reasons, we conclude that defense counsel missed no opportunity to produce a valuable alibi witness.

Defendant additionally asserts that defense counsel was ineffective for failing to shepherd defendant to completion of an abortive attempt to plead guilty to operating under the influence of liquor as an alternative to trial on the more serious charge of assault with a dangerous weapon. Defendant concedes that at trial he “could or would not state facts to support a guilty plea,” but argues on appeal that he could have pleaded no contest. Defendant, who is not a citizen of the United States, additionally states that a successful plea would have spared him from the risk of deportation. However, the deal actually presented was that defendant would, in connection with his plea to OUIL, provide the facts attendant to the assault charge as well. The prosecutor described “a legal fiction” to accommodate defendant’s “deportation issues.” Because the OUIL charge was offered as an alternative means of establishing the facts behind the assault charge, defendant’s inability or refusal to provide the facts defeated the deal. Defendant does not allege that defense counsel failed to apprise him of his opportunities, potential consequences or to act in furtherance of any decision defendant made. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). For these reasons, we cannot conclude that defense counsel was ineffective in handling that aspect of the proceedings.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette