

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE SMITH,

Defendant-Appellant.

UNPUBLISHED

August 30, 2007

No. 270761

Gratiot Circuit Court

LC No. 05-005019-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of felonious assault, MCL 750.82, for which the trial court sentenced him to serve a term of imprisonment of 14 months to four years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.2149(E).

I. Facts

Defendant's wife, the victim, testified that she and defendant had been staying at a Comfort Inn, where she had parked a van, defendant parked a Blazer, and where the two had left a camper trailer the night before. Their plan was to check out that day and begin living in the trailer due to financial difficulties. When she and defendant began arguing while hooking up the trailer, defendant left in the Blazer to visit a casino. The victim checked out of the Comfort Inn and took her van to the casino and met defendant, but the two continued arguing. The victim then removed the trailer's hitch and license plate from defendant's Blazer and drove her van back to the Comfort Inn, intending to hook the trailer up to her vehicle.

The victim spoke with defendant by phone on the way. Defendant said that he had retrieved the trailer, but when she arrived at the Comfort Inn she found the trailer where they had left it. She pulled her van near the trailer, but did not know how to use the hitch. Defendant telephoned, and, according to the victim, "I told him that I was at the trailer, . . . that I was going to hook the trailer up, that when he got straight he could get a hold of me . . . and I would let him know where I was going to be at, and then we could talk again."

The victim further testified that she asked defendant to stay away from her, but that he "went into a rage because he was mad that I was already there," and hurled profanity at her and said, "I'm going to kill you." The victim stated that defendant entered the parking lot "driving

fast,” and that his “tires were squealing when he was trying to stop and . . . his vehicle went into the trailer.” According to the victim, she locked herself in her van, and defendant pounded on the window. Asked if she was frightened, the victim replied, “Yes, because I didn’t want, you know, I was scared because he was raging, so.” The victim telephoned the police for assistance.

II. Directed Verdict

On appeal, defendant argues that the trial court erred in denying his motion for a directed verdict predicated on the lack of evidence to prove his criminal intent, and that his trial counsel was ineffective for bringing character witnesses which resulted in the disclosure of earlier assault convictions on defendant’s part. In denying the motion for a directed verdict, the trial court stated that the evidence presented by the prosecutor left it to the jury “to decide whether or not the defendant, in fact, was either trying to hit his wife with the van or intending to frighten her by driving the van . . . quickly in her direction.”

When reviewing a trial court’s decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

The elements of felonious assault are an assault, with a dangerous weapon, with 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); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Only the last of these is at issue in this appeal. “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).

Defendant’s wife testified that, after defendant struck the trailer, she was more in fear of further confrontation than of injury, but, when asked if she had believed that defendant might hurt her, she replied, “I wasn’t going to take a chance.” The latter statement, considered along with her account of defendant’s being enraged, and speaking of killing her, since before the collision with the trailer, indicates that she felt some danger that defendant would hurt her in that situation generally. Further, another eyewitness testified to noticing defendant’s squealing tires and excessive speed in the parking lot, and stated, “I thought she was going to get hit,” adding, “[a]nd the truck just like sped up and then it’s like she no sooner jumped into the van and he veered and just hit the trailer.”

After reviewing the record, we conclude that the evidence of defendant’s hostile mood, threatening statements, and aggressive driving in the parking lot causing the victim to jump into her van while defendant veered and hit the trailer, considered in the light most favorable to the prosecution, was sufficient to persuade a reasonable trier of fact that defendant intended to cause his wife to fear that he was targeting her with his Blazer. The trial court properly denied defendant’s motion for a directed verdict.

III. Assistance of Counsel

When defense counsel expressed the intention to bring some character witnesses on defendant's behalf, the trial court cautioned that "the prosecutor may cross-examine character witness concerning alleged prior violent acts to show that their standards or knowledge in saying the defendant is nonviolent are mistaken." See MRE 405(a). Defense counsel called two such witnesses, who each testified to defendant's character and reputation for nonviolence, even when angered. The prosecutor in turn cross-examined each with references to several earlier instances of violent conduct on defendant's part, some of which resulted in convictions. Defendant argues that this strategy rendered defense counsel's performance constitutionally deficient.

"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). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance, the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

A defendant pressing 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). This case presented defense counsel with the crucial strategic decision whether the benefits of bringing witnesses to speak to defendant's character and reputation for peacefulness were worth the risk of the damaging effects of inviting the prosecutor to bring out through cross-examination defendant's history of violent conduct. But we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). That defense counsel's gamble apparently did not pay off did not render the decision to try ineffective assistance.

Moreover, the trial court instructed the jury to decide the case solely on the basis of the evidence, and that the statements, questions, arguments, and remarks of the attorneys were not evidence. The court additionally advised the jury that the prosecutor cross-examined the character witnesses with "certain prior events or convictions" of defendant "not to prove that he is guilty of the crime because he has prior convictions, but instead . . . to impeach the character witnesses," and also "to argue that they didn't know very much about the defendant's character or if they knew that much, their standards weren't too high as to what a nonviolent person is." The jury thus should not have given too much weight to the prosecutor's references to those earlier incidents. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant thus fails to show an error in counsel's performance, or that but for the challenged tactic the outcome would have been different. *Rocky, supra; Messenger, supra*. For

these reasons, we must reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto