

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW DALE OUVRY,

Defendant-Appellant.

UNPUBLISHED

May 8, 2012

No. 304218

Wexford Circuit Court

LC No. 2011-009682-FH

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Matthew Dale Ouvry of domestic assault in violation of MCL 750.81(2) for attacking his mother and her fiancé on the evening of December 17, 2010. The jury acquitted defendant of interfering with an electronic communication device, apparently accepting the defense claim that the mother's fiancé, and not defendant, tore the telephone off the home's wall during the melee. Defendant now claims that his trial counsel was ineffective for failing to challenge the admission of, and actually relying upon, evidence that defendant had previously been convicted of a crime and was being monitored with an electronic tether at the time of this incident. Because trial counsel used the challenged evidence to establish that defendant did not interfere with an electronic communications device, we decline to find counsel's performance deficient in this regard. We therefore affirm defendant's conviction and two- to four-year sentence.

At the time of the charged incident, defendant had been living with his mother, Susan Ouvry, and her fiancé, Efrain Rosalez, for approximately three months. Ouvry and Rosalez had permitted defendant to move into their home when he was released from an alternative sentencing program "boot camp." As a condition of his probation, defendant was required to wear an electronic tether that was monitored through the home's land-line telephone connection. On December 17, 2010, defendant brought his girlfriend, four-year-old daughter, and a friend to Ouvry's home. Defendant drank a significant quantity of vodka and became quite intoxicated. Ouvry and Rosalez testified that defendant became agitated and began insulting his mother. Defendant accused Rosalez of being a child molester and then he threatened to kill himself. As a result of defendant's insults, Ouvry told defendant that he would have to find a new place to live. Ouvry and Rosalez testified that defendant then physically assaulted them, punching Rosalez and slamming Ouvry into a wall before ramming his head into her face. They claimed that defendant

tore the home's phone off the wall when Ouvry tried to call 911. Ouvry was able to escape the home and summon police with her cell phone.

Defendant's girlfriend testified that she did not see the onset of the assault. She claimed that when she noticed the situation, Ouvry had defendant in a head lock, choking him. Defendant's father testified that he arrived at the home after the attack and heard Ouvry instruct defendant's girlfriend that they needed to coordinate their stories. Defendant's father also heard Rosalez explain that he had torn the phone from the wall, believing that it would trigger defendant's tether alarm and summon emergency assistance.

Two police officers testified that they found defendant wearing only boxer shorts and one sock. Defendant was initially cooperative and allowed the officers to handcuff him and place him in their patrol car's rear seat. Defendant then became agitated and slammed his head against the windows and glass partition inside the car's passenger compartment.

Defendant challenges trial counsel's failure to move for preclusion of evidence that defendant had previously been convicted of a criminal offense, sentenced to boot camp, and was thereafter required to wear an electronic tether. Defendant further challenges counsel's failure to object to the witnesses' citation of these facts during trial and counsel's direct elicitation of this testimony.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, mod 481 Mich 1201 (2008). *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), provides the clearly established test for considering whether counsel's performance was constitutionally deficient. To overcome the strong presumption that counsel acted competently, the defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances," and must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cullen v Pinholster*, ___ US ___; 131 S Ct 1388, 1403; 179 L Ed 2d 557 (2011), citing *Strickland*, 466 at 688-692.

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 Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions regarding what evidence to present, whether to call or question witnesses, and what evidence to highlight in closing argument are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Here, defendant's trial counsel actively used evidence of his status as a probationer with an electronic tether to defend against the interference with an electronic communication device charge. Relying on that evidence, defense counsel could explain to the jury why Rosalez would tear the telephone off the wall and thereby contradict Ouvry's testimony that defendant destroyed the phone to prevent her from calling 911. Defense counsel's strategy was actually successful as the jury acquitted him of that charge.

We will not find counsel ineffective simply because this defense strategy did not exonerate defendant of the domestic violence charge as well. Counsel is not ineffective simply because the chosen defense strategy is not completely successful. See *People v Petri*, 279 Mich

App 407, 412; 760 NW2d 882 (2008). Moreover, it is doubtful that defendant would have been acquitted of the domestic violence charge if the challenged evidence had been excluded. The jury was not apprised of the violent nature of defendant's prior offenses. Accordingly, the fact of defendant's prior conviction was not likely prejudicial. In the face of Ouvry's and Rosalez's testimony about defendant's erratic behavior before and during the assault and the responding officers' corroborating testimony about defendant's angry and violent actions, we cannot find that the challenged evidence tipped the scales against defendant.

We disagree, however, with the prosecution's contention that evidence of defendant's prior conviction and imprisonment and attendant electronic tether probation requirement was part of the *res gestae* of the charged offenses. *Res gestae* evidence is background evidence; it is "those other acts that are inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense." *United States v Hardy*, 228 F3d 745, 748 (CA 6, 2000). *Res gestae* evidence is "so blended or connected with" the charged offense "that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The evidence must have "a causal, temporal or spatial connection with the charged crime. Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Hardy*, 228 F3d at 748. See also *Delgado*, 404 Mich at 83 ("It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause."). The fact that defendant was on probation for an earlier convicted offense and was living in his mother's home to facilitate his electronic monitoring probation condition did not have the required connection with the charged crime. The prosecution had no need to explain to the jury why defendant was living in his mother's home at the time of the assault; the argument and ensuing attack could be explained without reference to the tether. The prosecution also could have explained the interference charge without reference to the electronic monitoring condition. In fact, the prosecution did try to prove that charge through Ouvry's testimony that defendant tore the phone from the wall to prevent her from summoning the police. Information regarding defendant's tether only became relevant as a result of defendant's chosen trial strategy.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher