S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMMITT GLOVER,

Defendant-Appellant.

UNPUBLISHED
June 21, 2005

No. 254928
Wayne Circuit Court
LC No. 03-000955

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to seven to fifteen years in prison for the assault with intent to rob while armed conviction, two to five years in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

The victim was driving his vehicle in Detroit on November 30, 2003. While the victim's vehicle was stopped, waiting to make a turn, defendant approached the front driver side window of the victim's vehicle. Defendant held a gun in his hand, tapped the gun on the window, and stated, "give it up, give it up." The victim, an off-duty Detroit police officer, grabbed his service revolver and fired a number of shots through the driver side window at defendant. Defendant sustained gunshot wounds and fell to the ground.

Defendant argues that there was insufficient evidence of specific intent to rob because he was intoxicated and could not form the requisite intent. When reviewing a claim of insufficient evidence, we review the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) intent to rob or steal; and (3) the defendant was armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Assault with intent to rob is a specific intent crime, so there must be evidence that the defendant intended to rob. *Id*.

MCL 768.37 governs intoxication as a defense and provides:

> (1) Except as provided in subsection (2), *it is not a defense* to any crime that the defendant was, at that time, under the influence of or impaired by *a voluntarily and knowingly consumed alcoholic liquor*, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
>
> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed *a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated* or impaired. [Emphases added.]

This statute became effective, as amended, on September 1, 2002. MCL 768.37. Because the crime at issue occurred on November 30, 2002, the amended statute applies. The amendment added subsection (1), which prohibits the defense of voluntary intoxication, subject to the exception outlined in subsection (2). Defendant does not contradict, or cite authority to contradict, the prosecution's contention that this statute bars the intoxication defense. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959).

When interpreting a statute, our goal is to ascertain and give effect to the intent of the Legislature. *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003). We begin by reviewing the plain language of the statute. If the language is clear and unambiguous, the statute is enforced as written. *Id.* Under MCL 768.37(1), the plain language indicates that defendant is prohibited from offering intoxication as a defense where such defense is based on voluntary intoxication with alcohol, drugs or controlled substances. Under subsection (2), a defendant *may* offer intoxication as a defense to a specific intent crime, but he must show that it was because of a "legally obtained and properly used medication or other substance," and that he "did not know and reasonably should not have known that he or she would become intoxicated" as a result. MCL 768.37(2). In addition, the defendant has the burden of proof of the defense. MCL 768.37(2).

In this case, defendant presented no proof that his intoxication resulted from the use of a legally obtained and properly used medication or other substance. Likewise, he offered no proof that he did not know and reasonably should not have known that he would become intoxicated. Therefore, defendant has no valid intoxication defense under subsection (2).

Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Defendant approached the victim's vehicle with a gun in hand, tapped the gun on the window, and asserted, "give it up, give it up." A rational trier of fact, examining this evidence, could find beyond a reasonable doubt that defendant had the required

intent to rob. Therefore, there was sufficient evidence to support the verdict of guilty on the count of assault with intent to rob while armed. *Akins, supra* at 554.

Defendant's second argument is that he was denied the effective assistance of counsel because his attorney failed to investigate or call two alibi witnesses. Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's finding of facts for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that the counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone,* 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective, and he must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand),* 468 Mich 135, 140; 659 NW2d 611 (2003)*; LeBlanc, supra* at 578; *People v Solmonson,* 261 Mich App 657, 663; 683 NW2d 761 (2004).

The issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Where a defendant fails to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim, appellate review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant did not move for a new trial or a *Ginther* hearing, our review is limited to the existing record. *Id*. at 659.

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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Counsel's determinations of which witnesses to call, and how to present them, are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Garza, supra* at 255. Defendant claims that his attorney failed to investigate and call two alibi witnesses. In support of this position, defendant presents three affidavits. These affidavits are dated from January and February 2005, and are not part of the lower court record. Because these affidavits were not part of a motion for a new trial or a *Ginther* hearing in the lower court, we are not required to review them. *Sabin, supra* at 659. Furthermore, defendant has failed to demonstrate that there is a reasonable probability that the testimony of these potential witnesses would have resulted in a different outcome at trial.

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad