

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 12, 2012

V

GARY DALE RODDY,

Defendant-Appellant.

No. 299883
Wayne Circuit Court
LC No. 10-001161-FH

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to five years' probation for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the circuit court erred in denying his motions for a *Ginther*¹ hearing, a new trial based on the great weight of the evidence, and a post-judgment directed verdict. We disagree.

I. MOTION FOR A GINTHER HEARING

Defendant first asserts that the trial court erred in denying his motion for a *Ginther* hearing. We disagree. This Court reviews a circuit court's decision whether to conduct an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

While defendant characterizes his first issue as a challenge of the trial court's denial of his motion for a *Ginther* hearing, the corresponding portion of his argument appears to focus on whether his trial counsel was constitutionally effective. As this Court explained in *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007), a *Ginther* hearing is utilized to develop the factual record when such development is needed to ascertain whether counsel was

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

effective. In the present case, defendant is not truly arguing that a development of the record is needed. Rather, defendant explicitly argues that there can be no justification for the various acts of his trial counsel and that those various acts rendered counsel constitutionally ineffective. Additionally we find that the record is sufficiently developed to allow a thorough analysis of his arguments. Therefore, the trial court did not abuse its discretion in denying the motion for a *Ginther* hearing.

To the extent that defendant's first issue can be characterized as a challenge of his counsel's effectiveness, we conclude that defendant is not entitled to relief. When reviewing a claim of ineffective assistance of counsel, this Court is limited to the facts on the record.² *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The circuit court's findings of fact are reviewed under a clearly erroneous standard. MCR 2.613(C). Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that "'counsel's representation fell below an objective standard of reasonableness,'" and, "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Smith v Spisak*, __ US __; 130 S Ct 676, 685; 175 L Ed 2d 595 (2010), citing *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, a defense lawyer has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Counsel's failure to introduce certain evidence constitutes ineffective assistance of counsel only when the defendant is deprived of a substantial defense. *Id.*

Defendant's motion rested on three alleged errors made by his trial attorney. First, defendant argued that his trial counsel should have introduced the recording of the 911 call made by the complainant, Steven Micallef, because it impeached Micallef's testimony. Second, defendant argued that counsel should have objected when Officer Desantis testified at trial to what Micallef told him occurred, because this was hearsay that only served to bolster Micallef's credibility and make him more believable to the jury. Third, defendant argued that counsel violated his Fifth Amendment right not to testify by promising the jury in his opening statement that defendant would testify, leaving defendant with no real choice on the matter.

"Each of defendant's objections to his counsel's performance relate to trial strategy, and a defense attorney has great discretion over the method of trial strategy. See *Payne*, 285 Mich App at 190. Counsel's theory of the case was that once police realized defendant had a license for the gun in his console, Micallef's story suddenly changed from defendant having a gun in his

² Defendant included a transcript of the 911 call made by the complainant, Steven Micallef, as an exhibit with his appellate brief. However, this transcript was not made part of the lower court record and so this Court will not consider it. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

hand to defendant *pointing* a gun at him. Counsel began by asking Micallef what exactly he told the 911 operator. Micallef stated that he could not remember whether he told the operator that defendant had a gun or pointed a gun at him. At this point, counsel could have introduced the 911 recording to show what Micallef actually said. However, counsel may have determined that the potentially prejudicial effect of the recording far outweighed its potential value. Counsel already elicited the testimony that he wanted – that Micallef could not remember if he told the 911 operator that defendant *pointed* the gun at him or merely had a gun. Introducing a recording of Micallef’s 911 call, in which he likely sounded frightened and panicked, could have garnered more sympathy for Micallef and harmed his client.

In addition, trial counsel’s failure to introduce the 911 recording did not deprive defendant of a substantial defense. See *Payne*, 285 Mich App at 190. Defendant argues that the recording would have impeached Micallef’s testimony and made the jury believe his version of the events. However, Micallef had already testified that he could not remember whether he told the 911 operator that defendant was holding a gun or pointing a gun at him. Assuming that Micallef only told the 911 operator that defendant *had* a gun, it was still a reasonable strategy to not introduce the recording. Micallef’s failure to tell the operator that defendant pointed a gun at him does not directly impeach his testimony. The prosecution could easily explain that Micallef was flustered and scared, and so it was normal for him to miss some details or fail to give an exact account of the events. The recording of Micallef likely sounding panicked and frightened could have garnered sympathy for Micallef, as opposed to impeaching him.

Second, counsel’s theory of the case required him to show that when Micallef spoke with Officer Desantis, his story had changed because by this time he had learned that defendant had a license to carry the gun. Counsel attempted to prove this theory by permitting Officer Desantis to testify to what Micallef told him, even though it was hearsay. Again, this was a question of trial strategy that reinforced counsel’s theory of the case. Though unsuccessful, counsel’s performance did not fall under an objective standard of reasonableness. See *Spisak*, __ US __; 130 S Ct at 685.

Finally, defendant failed to establish a claim for ineffective assistance of counsel based on his trial attorney’s violation of his Fifth Amendment right not to testify. In support of his position, defendant cites *Robinson v US*, 744 F Supp 2d 684, 690-693 (ED Mich, 2010), in which the defendant’s trial counsel promised the jury that defendant would testify, and then failed to fulfill that promise. To begin, we note that this Court is not bound by the decisions of federal trial courts. *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007). Further, we do not find *Robinson* to be persuasive because it is factually distinguishable from the present case. The *Robinson* court concluded that counsel’s failed promise, coupled with his failure to investigate potentially helpful witnesses, supported the defendant’s ineffective assistance of counsel claim. *Id.* at 693. In this case, however, defendant *did* testify. Defendant argues that he essentially had no choice because trial counsel promised he would. However, the circuit court clearly informed defendant of his constitutional right to remain silent. The court also told defendant that it was his decision whether to testify, and if he chose not to, the court would instruct the jury that his failure to testify could not be used as evidence of his guilt. Defendant stated that he understood and said he wanted to testify. Perhaps more importantly, the only way for defendant to explain his version of the events was by testifying. There were no other witnesses and no physical evidence to explain how Micallef knew defendant had a gun in the car. Consequently, counsel’s

promise in his opening statement that defendant would testify neither violated defendant's Fifth Amendment rights, nor constituted unreasonable conduct.

Finally, defendant has failed to show that the result of the trial would have been different if he had not testified. Because Micallef and defendant were the only witnesses to what occurred, defendant's testimony was the only way to introduce his version of the events. If he had not testified, then the jury would have been left with the testimony of Micallef and the corroborating testimony of Officer Desantis, who confirmed that defendant had a gun in the center console of his car. No one other than defendant testified for the defense. Therefore, even if defendant had not testified (and his trial attorney had not promised he would), the jury's verdict would likely have been the same.

II. MOTION FOR A NEW TRIAL

A trial court's decision to grant or deny a new trial on the basis that the verdict was against the great weight of the evidence is reviewed by this Court for an abuse of discretion. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). A court abuses its discretion, "when its decision falls 'outside the range of principled outcomes.'" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), citing *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). This Court gives special consideration to the jury's credibility determinations because of its unique opportunity to view the witnesses firsthand. See MCR 2.613(C).

The circuit court may order a new trial if it concludes the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). However, a new motion should not be granted based on disagreement with the jury's credibility determinations; "[a] trial judge does not sit as the thirteenth juror in ruling on motions for a new trial." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Such a disagreement warrants granting a new trial only when the court finds that the testimony contradicted undisputed physical facts or the witness was so far impeached that the testimony lost all probative value. *People v Roper*, 286 Mich App 77, 89; 777 NW2d 483 (2009).

In this case, the circuit court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence. Defendant's argument for a new trial rested almost entirely on disagreement with the jury's credibility determinations. Defendant claimed Micallef's testimony was incredible because he testified that he "always" drives the speed limit, while defendant's testimony was very credible because of his character and background as a veteran, Ford employee, and family man. First, it is unclear why Micallef's testimony that he "always" drives the speed limit makes him incredible. Second, the jurors were made aware of defendant's background in the military, his firearms expertise and experience, his employment with Ford, and his family situation. However, they still chose to believe Micallef's version of the events. The jury's decision to believe Micallef and not defendant was not so contrary to reason or undisputed facts to warrant overriding the jury's decision and granting defendant a new trial. Micallef's testimony was clear, consistent, and detailed. His testimony was also corroborated by the testimony of Officer Desantis. For example, Micallef's description

of the gun defendant pointed at him matched the gun that was recovered from defendant's center console.

In his argument that the jury's verdict was against the great weight of the evidence, defendant also claims that his trial attorney erred by failing to object to Officer Desantis's hearsay testimony, failing to introduce the 911 tape, and violating his Fifth Amendment right not to testify. However, these issues are not relevant to an argument that the verdict was against the great weight of the evidence. Instead, the evidence in this case consisted almost entirely of Micallef's and defendant's testimony. Because of the great deference given to the jury's credibility determinations, the circuit court did not abuse its discretion when it refused to override those determinations by granting defendant a new trial. See MCR 2.613(C).

III. MOTION FOR A DIRECTED VERDICT

This Court reviews de novo a trial court's decision on a motion for directed verdict. *People v Martin*, 271 Mich App 280, 320; 721 NW2d 815 (2006). This Court construes the prosecution's evidence in the light most favorable to the prosecution in determining if a rational trier of fact could conclude the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Viewing the prosecution's evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational fact finder to conclude that the prosecution proved each element of defendant's felonious assault and felony-firearm convictions beyond a reasonable doubt. Therefore, defendant's motion for a directed verdict was correctly denied.

To sustain a conviction for felonious assault, the prosecution must prove there was: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007); see MCL 750.82. Assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Milton*, 257 Mich App 467, 473; 668 NW2d 387 (2003). To sustain a conviction for felony-firearm, the prosecution must prove beyond a reasonable doubt that, "defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

First, the evidence was sufficient for a rational jury to conclude that defendant committed an assault, or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. See *Milton*, 257 Mich App at 473. Micallef testified that defendant pulled up next to him and pointed a gun at him. He said that he called 911 because he thought defendant was going to shoot him. Micallef stated he was scared, nervous, and in fear of his life. This reaction was reasonable; most people would fear for their life if a gun was pointed at them. Consequently, by pointing the gun at Micallef, defendant placed Micallef in reasonable apprehension of being shot, or receiving an immediate battery.

Second, Micallef testified that he feared being shot because defendant pointed a gun at him. It is rational to conclude that a gun is a dangerous weapon.

Third, a rational trier of fact could conclude that defendant intended to injure Micallef or, at a minimum, place him in reasonable apprehension of an immediate battery. Defendant testified that his gun was in the center console. Consequently, defendant had to open the console and pull out the gun before he pointed it at Micallef. He took these steps after a driving confrontation where he made an obscene gesture toward Micallef. It is rationale to conclude from these actions that defendant intended to threaten and intimidate Micallef and place him in apprehension of an immediate battery.

Finally, the prosecution presented sufficient evidence to convict defendant of felony-firearm. As discussed above, a rational trier of fact could conclude beyond a reasonable doubt that defendant committed a felony (felonious assault). Micallef testified that defendant pointed a gun at him and defendant admitted that he had a pistol in his center console throughout the entire incident at issue in this case. Therefore, a rational trier of fact could conclude that defendant possessed a firearm during the commission of a felony.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause