

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VENISE J. ELLEDGE,

Defendant-Appellant.

UNPUBLISHED

November 18, 1997

No. 195144

Oakland Circuit Court

LC No. 95-140100-FH

Before: Holbrook, Jr., P.J., and White and R. J. Danhof,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and was sentenced to two years' probation with costs. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support a conviction of felonious assault. We must disagree.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 amended 441 Mich 1201, ___ NW ___(1992). In order to establish the crime of felonious assault, the prosecutor must prove (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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Viewing the evidence in a light most favorable to the prosecution, there was evidence from which the jury could infer that defendant knew the victim was standing one foot away from the rear of defendant's car; that despite his close proximity, defendant put the car into reverse, gunned the engine and stepped on the gas; and that the victim had to scramble backward to avoid being run over. Although the defense presented testimony that the victim was eight feet behind the car and defendant

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

backed up slowly for one to six inches, this court may not interfere with the jury's role in determining the credibility of witnesses. *Wolfe, supra* at 514-515. Viewed in a light most favorable to the prosecution, a rational trier of fact could find that defendant used the car as a dangerous weapon with the intent to place the victim in fear or apprehension of an immediate battery.

Defendant next asserts that the trial court erred in denying her motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant argues that a *Ginther* hearing was required to establish the existence of the plea bargain agreement and to determine whether trial counsel was ineffective because he did not place the alleged plea bargain on the record and seek to enforce it.

In order for defendant to establish ineffective assistance of counsel, she must establish that her counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, that the deficient performance prejudiced her. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1995).

The trial court had previously heard argument, during a hearing on defendant's motion for a new trial, regarding the alleged plea agreement. During the hearing, the prosecution stated that there had been a breakdown in plea negotiations and denied that a plea agreement was ever reached between the parties. In contrast, defendant submitted an affidavit from defendant's retained trial counsel contending that a plea offer had been made and was to remain open until the jury was chosen. It appears that the judge was not present when the discussions took place and so the alleged agreement could not be placed on the record. The agreement was never placed on the record and, defendant alleges, on the day of trial, the prosecutor revoked the offer prior to the selection of the jury. Defense counsel pursued the matter with the court in chambers, and the court determined that it could not interfere with the negotiations and that the matter was within the prosecutor's discretion.

Defendant does not argue that her counsel failed to convey the prosecutor's offer to her, or that counsel was unprepared to proceed with trial because of his reliance on the alleged plea bargain. In fact, defendant chose to reject the prosecutor's plea offers on two occasions and proceed to trial. Defendant argues that if her trial counsel had placed the plea agreement on the record, she would have been able to force the prosecutor to accept her plea on the day of trial; that counsel did not seek to enforce the agreement; and, although not stated as an issue in her brief, that if the existence of the agreement is established at an evidentiary hearing, the bargain should be enforced.

We conclude that defendant cannot show that she was prejudiced by counsel's failure to place the alleged agreement on the record. Further, counsel did seek to enforce the agreement. When counsel sought to enforce the alleged agreement on the day of trial, the trial court determined that the matter was left to the prosecutor's discretion. A court cannot, over the prosecutor's objection, accept a plea of guilty to an offense defendant was not charged with. *People v Siebert*, 450 Mich 500, 511; 537 NW2d 891 (1995). Further, defendant has not

established the requisite detrimental reliance. *People v Ryan*, 451 Mich 30, 41; 545 NW2d 612 (1996). The alleged agreement did not involve any performance on defendant's part that compels the enforcement of the alleged agreement. We conclude counsel's failure to place the proposed plea agreement on the record did not amount to ineffective assistance of counsel and that no further hearing was required.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Robert J. Danhof