

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY LEE RICHMOND,

Defendant-Appellant.

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UNPUBLISHED

December 21, 1999

No. 206467

Lake Circuit Court

LC No. 96-003230 FH

Before: Fitzgerald, P .J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of aggravated stalking, MCL 750.411i; MSA 28.643(9), and was sentenced to a prison term of 2 ½to 5 years. He appeals as of right. We affirm.

Defendant's conviction arose out of an incident that occurred on May 15, 1996, in which shots were fired at a residence belonging to Gary Ouderkirk while the complainant, Sherri Morgan, was present. The shots hit a car and a propane tank. At the time of the offense, one of two domestic personal protection orders was in place prohibiting defendant from having any contact with Morgan.

On appeal, defendant first argues that there was insufficient evidence to link him to the shooting and resulting damage at the Ouderkirk residence. This Court reviews a claim that the evidence was insufficient to support a defendant's conviction by considering the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

Here, viewing the evidence in a light most favorable to the prosecution, the trier of fact could rationally conclude beyond a reasonable doubt that defendant was guilty of the offense of aggravated stalking. Defendant does not contest any particular element of the offense of aggravated stalking, but instead claims that he was not involved in the shooting incident. However, Morgan testified that she saw defendant driving his car twice on the night of the shooting, once when he drove by her place of employment and again after she left work. Wheel rim marks from a car with a flat tire led from the Ouderkirk residence to a location near defendant's home. There was evidence that on the morning

after the crime, defendant's car had a flat tire. Furthermore, there was evidence that a grommet was found at the scene of the offense and that defendant's car was missing a grommet. These facts, when viewed in a light most favorable to the prosecution, support the rational inference that defendant was in the immediate area of the Ouderkirk residence at the time the crime occurred.

Defendant next argues that he was denied the effective assistance of counsel. 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 (1994). To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). A defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that counsel was ineffective because he did not file a motion for directed verdict based on the prosecution's failure to secure an in-court identification of defendant. The claim is without merit. There was no question that Morgan, who was involved with defendant in an intimate relationship for over one year and who had obtained a restraining order against him, was referring to defendant when she testified about seeing him on the night of the offense. Accordingly, there was no need for an in-court identification of defendant. See *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985). Counsel is not required to argue a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Because defense counsel's omission to move for a directed verdict for lack of an in-court identification could not have affected defendant's chances for acquittal, we reject this claim.

Defendant also contends that he was denied the effective assistance of counsel when his attorney did not object to the prosecution's failure to secure testimony proving venue. Again, we disagree. Ouderkirk's testimony established his residence was shot at, and that the residence was located in Webber Township, Lake County. Again, counsel is not required to argue a frivolous or meritless motion. *Darden, supra* at 605. Based on this record, it would have been frivolous for defense counsel to have argued that the prosecution failed to establish venue.

Finally, defendant contends that counsel was ineffective in failing to move for directed verdict or "JNOV," presumably meaning a new trial. 2a Gillespie, Michigan Criminal Law & Procedure (2d ed), § 786.50, p 126. We disagree. Failure to move for a directed verdict of acquittal has been held not to rise to the level of ineffective representation. *Chinn, supra*, 141 Mich App at 98; *People v Viaene*, 119 Mich App 690; 326 NW2d 607 (1982). It was permissible trial strategy for counsel not to move for a directed verdict when the prosecutor introduced evidence sufficient to prove the elements of aggravated stalking. Furthermore, a motion for directed verdict is properly denied where there is conflicting testimony because issues of credibility must be left for the jury to decide. *People v Russell*, 35 Mich App 387; 192 NW2d 689 (1971). Finally, a motion for a "JNOV" or a new trial would have

been futile in light of the extent of evidence linking defendant to the shooting at Ouderkirk's residence. Defendant has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Jane E. Markey