STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2000
v	No. 215574 Oakland Circuit Court
PATRICK MICHAEL PETERS, Defendant-Appellant.	LC No. 98-160729-FH

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to thirty days in jail and two years' probation. We affirm.

Defendant first argues that the jury's verdict was against the great weight of the evidence. To preserve this issue for appellate review, a defendant must move for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Because defendant failed to move for a new trial below, this challenge was waived and we decline to address the issue. See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Defendant next argues that there was insufficient evidence for the jury to convict him of felonious assault. We disagree. The prosecution must introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Id*. at 723; *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

Felonious assault is established by evidence of: (1) a simple assault, (2) use of a weapon, and (3) a present ability or apparent present ability to commit a battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A simple assault is an attempted battery or an unlawful act that places the victim in reasonable apprehension of receiving an imminent battery. *Id*. Here, the complainant testified that during an argument with defendant, defendant pointed a gun at him from a distance of approximately arm's length for a duration of a few seconds. As the

complainant backed away, defendant said, "I'm going to get you." The complainant testified that, while defendant was pointing the gun at him, he was scared and in fear. After the police arrived, they removed a gun from defendant's home that was identified at trial by the complainant as the gun that was pointed at him. Defendant admitted to owning the gun and stated that he took the gun to the door at the time of the incident. Viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence for the jury to find that each element of the felonious assault was proven beyond a reasonable doubt.

Defendant further argues that he was denied the effective assistance of counsel. We disagree. Because defendant did not move for a new trial or a *Ginther*[1] hearing, we review this issue on the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). To establish ineffective assistance of counsel, defendant must prove that: (1) trial counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Regarding the first element, competent counsel is presumed as a matter of law. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989). A reviewing court starts with a strong presumption that any challenged conduct was sound trial strategy. Appellate courts should refrain from substituting their collective judgment reached with the benefit of hindsight, for that of trial counsel, whose judgment was exercised in the heat of trial. As our Supreme Court warned, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful [or later deemed incorrect], to conclude that a particular act or omission of counsel was unreasonable." *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995), quoting *Strickland v Washington,* 446 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In the present case, defendant claims that his trial counsel's performance fell below an objective standard of reasonableness in two ways: (1) by failing to interview a police officer witness; and (2) by allegedly instructing defendant to lie on the witness stand. The failure to interview witnesses does not alone establish inadequate preparation by defense counsel. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Moreover, there is no indication in the record that defense counsel failed to interview the witness in question. Likewise, nothing in the existing record supports the conclusion that defendant was instructed by his counsel to lie on the witness stand. We therefore conclude that defendant has failed to establish that defense counsel's performance was deficient.

Last, defendant argues that he was denied a fair trial due to prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Claims of prosecutorial misconduct are decided on a case by case basis. We examine the record and evaluate the alleged improper remarks in context. *Id.*

---

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

Defendant claims that the prosecutor intentionally inflamed the jury during cross-examination by asking defendant whether he previously pointed his gun at people in boats on a lake. After an objection from defense counsel, the prosecutor explained that his question was based on the fact that he was told by the complainant that defendant previously engaged in that specific conduct.

Contrary to defendant's assertion, the prosecutor was not arguing facts not in evidence, but rather, was properly impeaching defendant's direct testimony that he had never pointed a gun at anyone. The prosecutor was within his right to challenge defendant's direct testimony with information that he had obtained from the complainant. See *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). Therefore, we find that the prosecutor's question was not improper.

Defendant also claims that the prosecutor violated the discovery order by failing to provide the defense with the evidence introduced during the prosecutor's rebuttal. In his case in chief, defendant testified that complainant knocked frantically on defendant's door and defendant answered the door holding a gun at his side. Defendant testified that when complainant's conduct became confrontational, he lifted the gun to his chest, but never pointed the gun at complainant. On rebuttal, an investigating police officer testified that, contrary to what defendant testified to at trial, defendant told the officer that he did not move the gun from his side during the incident. Defendant claims that the substance of this rebuttal testimony should have been provided to the defense.

There are three situations where a defendant's due process rights to discovery may be implicated. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). First, where the prosecution allows false testimony to stand uncorrected. Second, where the prosecution suppresses material evidence favorable to the defendant after the defendant requested discovery. Third, where the prosecution suppresses exculpatory evidence. *Id*. We conclude that none of these circumstances are present in this case.

Pursuant to MCR 6.201(B), the prosecutor, upon request, must provide defendant: (1) any exculpatory information or evidence known to the prosecutor; (2) any police reports concerning the case; (3) any written or recorded statements by the defendant; (4) all search and seizure information; and (5) any plea agreements or immunity agreements in connection with the case. In this case, there is no indication that defendant made a request for MCR 6.201(B) discovery. Further, the pretrial discovery order entered by the court indicated that no further discovery was sought by defendant and discovery was complete.

Defendant further claims that regardless of the discovery request, the prosecution was required to provide him any exculpatory evidence. See *Brady v Maryland*, 373 US 83, 87-88; 83 S Ct 1194; 10 L Ed 2d 215 (1963). It is questionable whether the statement defendant initially made to the police officer was favorable to defendant. After telling the officer that he did not move the gun from his side, defendant made a subsequent written statement to police that he brought the gun up to his chest. While the initial statement by itself is exculpatory, when taken in context with his subsequent written statement, the initial statement is not favorable, but instead is contradictory. Because the prosecutor did not violate the discovery order or withhold

exculpatory evidence in violation of *Brady*, we conclude that the prosecution did not engage in misconduct that denied defendant a fair trial.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald