STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 9, 2001
v	No. 217347 Wayne Circuit Court
PAULETTE M. RUFFIN, Defendant-Appellant.	Criminal Division LC No. 98-002771

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial convictions of two counts of assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277. Defendant was sentenced to serve one year probation. We affirm.

This case stems from a dispute over a shared driveway in the city of Detroit and the physical assault which resulted between defendant and the owner of the rental property next door.

Defendant argues that her waiver of the right to trial by jury was not valid for several reasons which we find unpersuasive.

A trial court's determination that a defendant validly waived his or her right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

We have reviewed the record of defendant's waiver and find that under the standards for waiver of trial by jury set forth by this Court in *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992), and *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711(1993), defendant's waiver was made knowingly, intelligently, and voluntarily, and the court did not clearly err by denying defendant's untimely request to withdraw such waiver on the day of trial.

Defendant further contends that her attorney was ineffective for failing to sufficiently advise her regarding the meaning of her waiver. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as

this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

The record is devoid of any information regarding what defendant's counsel explained to her about waiving the right to trial by jury. Thus, defendant has not established an ineffective assistance of counsel claim. Moreover, a remand for a *Ginther* hearing would be fruitless where the record establishes that defendant knowingly, voluntarily and understandingly waived her right to trial by jury. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Next, defendant argues that there was insufficient evidence to support defendant's conviction for felonious assault and that the court erred by denying defendant's motion for directed verdict of acquittal. Alternatively, defendant contends that the verdict was against the great weight of the evidence. As part of her arguments, defendant contends that a cane is not a dangerous weapon.

In reviewing the sufficiency of the evidence in an appeal from a bench trial, we must determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Lewis*, 178 Mich App 464, 467; 444 NW2d 194 (1989).

Similarly, when reviewing a trial court's denial of a motion for directed verdict, we review "the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

A trial court's decision on a motion for new trial based on the great weight of the evidence is reviewed for an abuse of discretion, and "a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In reviewing the motion, an appellate court may not resolve issues of credibility. *Id*.

There was ample evidence produced at trial to support defendant's conviction. Janice Harvell testified that on the day of the incident, she attempted to move the truck which was blocking the driveway, but tools were blocking the drive. Wheatley moved the tools, and Harvell pulled the truck out of the way; she also apologized to defendant. There was testimony that despite Harvell's apology and attempt to move the truck, defendant then called Harvell a series of vulgar names. The evidence further showed that defendant went after Harvell with her four-toed metal cane walker, striking her on the head. Wheatley positioned himself between the two woman and attempted to block the blows to Harvell; Wheatley was struck in the arm as a result. Wheatley did not hit defendant. Defendant's mother shouted "stop, Paulette" to defendant from the car. Harvell and Wheatley sought treatment at a hospital and reported the incident to the police. A police officer testified that he observed a "large swollen bruse" on Wheatley's arm.

Additionally, Wheatley testified to the effect that defendant instigated the confrontations and that Harvell had said or done nothing to provoke defendant. According to Wheatley, defendant went after Harvell with her cane "cocked" in the air. Wheatley said "you ain't going to hit Ms. Harvell with the cane" and blocked the cane. Wheatley may have had a tool in his hands, but he did not threaten defendant with it. Wheatley did not strike back or say anything during the attack.

The elements of the offense were proven beyond a reasonable doubt. The elements of felonious assault are: (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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Furthermore, it is the manner in which an instrumentality is used and the nature of the act which determines whether an instrumentality is "dangerous" within the purview of the statute proscribing assault with a dangerous weapon. *People v Kay*, 121 Mich App 438, 444; 328 NW2d 424 (1982). Thus, defendant's unsupported assertion that a cane simply cannot constitute a dangerous weapon is not well taken on the victims' testimony.

The trial court found the victims' testimony more credible than that of defendant, and this Court will not interfere with that conclusion. Questions of credibility and intent should be left to the trier of fact. *Avant, supra*, 235 Mich App at 506. Furthermore, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). There was sufficient evidence in this case to support each of the elements of the offense, including the court's finding that defendant did in fact use the cane as a weapon and the finding that defendant was not merely acting in self-defense.

Based upon a de novo review of the same evidence described above and considering the evidence presented by the prosecution in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. See *Mayhew, supra*, 236 Mich App at 124. Accordingly, defendant's motion for a directed verdict was properly denied.

Moreover, in this case, the evidence did not "preponderate[] heavily against the verdict," nor would it be "a miscarriage of justice to allow the verdict to stand." *Gadomski, supra*, 232 Mich App at 28. Thus, defendant is not entitled to a new trial on the ground that the verdict was against the great weight of the evidence.

Finally, defendant argues that counsel was ineffective for failing to object to the admission of alleged hearsay testimony, specifically regarding what defendant's mother had said, and by failing to investigate and produce a helpful known res gestae witness, namely, defendant's mother.

In order to establish that defendant's right to effective assistance of counsel is sufficient to justify reversal of an otherwise valid conviction, defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Mitchell, supra*, 454 Mich at 156; *Messenger, supra*, 221 Mich App at 181. Judicial scrutiny of trial counsel's

performance must be highly deferential. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must overcome the presumption that the challenged action or omission could conceivably be considered sound trial strategy under the circumstances. *Id*. at 694-695.

Defendant claims that counsel was ineffective for failing to object to two specific portions of testimony regarding a statement her mother made during the physical altercation. We disagree.

According to both Harvell and Wheatley, defendant's mother yelled at defendant to "stop" during a startling event or condition, that is, during the physical confrontation that occurred between Harvell and defendant. The statement which both victims testified to was admissible as an excited utterance under MRE 803(2), which allows statements otherwise excludable as hearsay as evidence. Thus, defendant has not shown how counsel's failure to object to the statement constitutes ineffective assistance.

Next, defendant asserts that counsel was ineffective for failing to "investigate and produce" defendant's mother. According to defendant, counsel failed to explain to the court that her mother was hospitalized and could not appear. At sentencing, defendant's retained counsel informally requested a *Ginther* hearing and moved for a new trial, which was denied.

As the trial court explained, this trial was adjourned on two occasions in order to accommodate witnesses. Trial was adjourned for almost three weeks so that defendant's mother could testify and defendant was directed to have her mother appear on July 10, 1998. When the July 10 trial date arrived, defendant asked the court to adjourn the matter a third time because defendant, displeased with her appointed counsel, had allegedly retained another attorney and wanted her new attorney to replace her appointed counsel. Having received no notice that a new attorney had been retained, and having adjourned the trial on two previous occasions, the court denied defendant's last-minute request to postpone trial again. Defendant did not indicate that her mother would be unavailable to testify, despite the fact that the court specifically stated that trial had been adjourned so that defendant's mother could testify on that date. In fact, defendant said nothing whatsoever about her mother even though she carried on a relatively long discussion with the court about her reasons for wanting the third adjournment. The court specifically asked defense counsel, "[D]o you have your witness present, sir?" to which counsel simply responded "[n]o, Your Honor, but the defendant will be testifying." Immediately thereafter defendant spoke directly with the court and made no mention of her mother or of her current contention that her mother was hospitalized. At sentencing, the court stated that no reason had been put forth for the witness' absence; nor had anyone asked for the court's assistance in producing the witness. Neither defendant nor her counsel ever indicated that the mother was "being a hostile witness" or that "she was unavailing herself to court."

Because a *Ginther* hearing has not taken place, this Court's review is limited to a review of the record. Especially in light of defendant's curious failure to even mention her mother's absence during her dialogue with the court, the record, which is wanting of any evidence regarding why the mother did not appear to testify or to what she would have testified, does not support defendant' claim of ineffective assistance of counsel. As in *Hurst*, *supra*, 205 Mich App at 641, the record is devoid "of information that might help this Court review the possible

effectiveness" of a strategy which utilized this witness' testimony. Thus, defendant has not overcome the presumption that counsel's failure to produce the mother was sound trial strategy, and a remand is not in order. Accordingly, both of defendant's ineffective assistance of counsel claims fail.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy