

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTICE MICHAEL HERRON,

Defendant-Appellant.

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UNPUBLISHED

June 10, 2004

No. 246010

Wayne Circuit Court

LC No. 02-003794

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to five to fifteen years. He appeals as of right. We affirm.

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b, and assault with intent to commit murder, MCL 750.83, involving a former girlfriend. The jury found defendant not guilty of sexual assault, and convicted him of the lesser included offense of assault with intent to do great bodily harm less than murder.

Defendant first argues that the prosecutor failed to present sufficient evidence to prove that he intended to inflict great bodily harm. We disagree. When reviewing the sufficiency of evidence in a criminal case, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Defendant argues that complainant's wounds were not deep enough to indicate an intent to inflict great bodily harm, and suggests that, had he wished to inflict greater injury, he certainly could have done so. There was evidence that defendant repeatedly stabbed complainant with a knife, said he was going to kill her, and that he only stopped after she hit him in the head with a bottle. This evidence is sufficient to support the jury's conclusion that defendant acted with the intent to cause serious bodily harm.

Defendant also argues that he was convicted without the benefit of the effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant must also 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 proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Defendant must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court will not assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Because defendant did not move for a new trial or a *Ginther*<sup>1</sup> hearing below, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant asserts that defense counsel conceded that defendant was guilty of an assault, basing this argument on the following statement in defense counsel's closing argument: "I'd ask if you'd consider convicting [defendant] solely of a count of aggravated assault or assault with a dangerous weapon." This remark was made in the context of arguing that the complainant's stab wounds were not serious. Counsel's other comments in this context included the following: "I'd ask if you'd consider convicting him of the assault, but not the assault with intent to murder, because there was no assault with intent to murder. He didn't intend to kill her. He was in a fight. . . . This was a continuation from the hours of arguing the night before. And she got stabbed, and she was angry. . . ."

Defendant asserts that there was no possible strategic advantage in suggesting such an outcome to the jury. We disagree. We note that one of defendant's own witnesses testified that she heard screaming and called the police when she saw that complainant had been stabbed, and that defendant said he was sorry and "didn't mean to do it." It is not ineffective assistance of counsel for defense counsel to concede lesser crimes in hopes of avoiding a finding of guilt on greater ones. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Defense counsel's concession that defendant was involved in a fight was, in light of the overwhelming evidence of a fight between complainant and defendant, an inescapable conclusion. Defense counsel was not in fact conceding guilt, but instead trying to steer the jury away from the most serious of possible verdicts. Asking the jury to "consider" forms of assault less than the one with which defendant was charged was a reasonable trial strategy on these facts, and counsel's candid admission of the inevitable may well have lessened the impact of the evidence. *Wise, supra*.

Indeed, defense counsel's representation resulted in the jury finding defendant not guilty of any form of criminal sexual conduct, and further electing to reject the charge of assault with intent to murder in favor of the lesser included offense of assault with intent to do great bodily harm. For these reasons, we not only conclude that defense counsel was not ineffective, but

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

credit defense counsel for mitigating defendant's plight perhaps as well as any advocate could have.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello