

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY NAPIER DAVIS,

Defendant-Appellant.

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UNPUBLISHED

July 15, 2004

No. 247856

Muskegon Circuit Court

LC No. 02-047845-FH

Before: Fort Hood, P.J., Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with a dangerous weapon, MCL 750.82, and was sentenced as an habitual offender, fourth or subsequent offense, MCL 769.12, to a prison term of 46 months to 15 years. Defendant appeals his conviction as of right. Because the evidence was sufficient from which a reasonable jury could find guilt beyond a reasonable doubt and the other assignments of error lack merit, we affirm.

Defendant was confronted by two store managers after sticking a pair of shoes in his shirt and attempting to leave a shoe store. After being approached by the loss prevention manager, defendant walked toward the back of the store, where he threw the shoes from under his shirt. When cornered between the two store managers, who were insisting that defendant accompany them to the store's office, defendant pulled a hammer from his waistband. Both managers moved away, but the loss prevention manager testified that he saw an arm movement that indicated that defendant swung the hammer toward either himself or the other manager. Defendant then ran out of the store, with the loss prevention manager in pursuit. Once outside the store, defendant attempted to get on his bicycle. When the loss prevention manager attempted to apprehend him, defendant swung the hammer back and forth at the manager. Defendant then fled on his bicycle, and continued to flee from law enforcement officers for several hours before being apprehended.

Defendant, through his appellate counsel, argues that there was insufficient evidence to support his conviction for felonious assault. We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Gonzales*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or put the victim in reasonable apprehension of an immediate battery.

*People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of a crime may be proved by both direct and circumstantial evidence, and the trier of fact may draw reasonable inferences from the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), citing *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The loss prevention manager testified that he believed that, outside the store, defendant was going to hit him with the hammer, and the store manager testified that defendant swung hard and that defendant would have made contact had the loss prevention manager not pulled out of the way. Reviewing the evidence in the light most favorable to the prosecution, there was ample direct and circumstantial evidence from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt.

In the same vein, defendant's claim of actual innocence, raised in propria persona, must also fail. This claim is more commonly reserved to federal habeas corpus petitions. However, the federal courts use a reasonable juror standard similar to that used by our courts when reviewing a sufficiency of the evidence claim. See *Calderon v Thompson*, 523 US 538, 559-560; 118 S Ct 1489; 140 L Ed 2d 728 (1998). As we have already held, the evidence introduced at trial is sufficient to support defendant's conviction, and despite defendant's protestations to the contrary, he does not establish that there is new evidence that would change the collective findings of a reasonable jury.

Defendant, in his supplemental brief, argues that the prosecutor violated his rights to discovery and a fair trial by suppressing the content of telephone call made to 911 while defendant was concealing the shoes he tried to remove from the store, and a later call made as defendant was running out of the store. Defendant further contends that this violated his right to a fair trial. We disagree. Defendant failed to raise any objection to the prosecutor's failure to introduce the 911 tapes at trial, and has failed to preserve this issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 838 (2000). We review defendant's unpreserved claim for plain error affecting his substantial rights. *Carines*, *supra* at 763.

To demonstrate that the prosecutor committed error requiring reversal, defendant must establish that the tapes constituted evidence in the people's possession that defendant did not possess and could not have obtained the tapes by exercising reasonable diligence, that the people suppressed this evidence, and that introduction of the tapes would have had a reasonable probability of changing the outcome of his trial. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). The people's response to defendant's attorney's motion for discovery illustrates that the tapes were not suppressed, and testimony introduced at trial indicated that the tapes would not have contained exculpatory evidence. Defendant fails to demonstrate that plain error occurred, and his claim must fail.

Defendant also argues that the people failed to sustain their statutory duty to provide reasonable assistance to the defense to locate and produce *res gestae* witnesses, and that the people again attempted to suppress evidence by failing to produce all of their endorsed witnesses at trial. MCL 767.40a. Defendant failed to move for a post-trial evidentiary hearing, or a motion for new trial on this basis, and again has not preserved this issue for appeal. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). We note that there is no basis in the record for defendant's claim that the prosecutor failed to render reasonable assistance to the defense to locate and produce witnesses, and that defendant cannot establish that the parties had not

stipulated before trial to excuse some of the witnesses on the people's witness list. There is no record basis for this claim.

Largely on the basis that trial counsel did not introduce all of the evidence and witnesses that defendant now contends he requested be introduced at trial, defendant asserts that his trial counsel was ineffective. Because defendant failed to move for a *Ginther*<sup>1</sup> hearing, we review defendant's claim for "mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant's claim that trial counsel was unprepared is simply not borne out on the record. Further, decisions regarding the evidence to be presented, and witnesses to be called, at trial are considered matters of strategy, and this Court will not substitute its judgment for that of trial counsel on this basis alone. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant does not demonstrate that trial "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Therefore, defendant's claim must fail.

Defendant's claim that the trial court erred by refusing to instruct the jury on the defense theory of the case also must fail because it is without merit. Defendant argues that he was entitled to instructions on lesser included offenses of felonious assault. Defendant's theory of the case advanced at trial, and which he asserts many times in his supplemental appellate brief, was that he did not commit any crime but shoplifting. No jury instructions regarding lesser offenses were requested by the defense, and, any such instructions would have diminished the defense theory. Further, defendant's claim fails, because defendant fails to demonstrate that the evidence clearly supported a conviction for a lesser included offense, and thus cannot establish that additional jury instructions would have been outcome determinative. See *People v Cornell*, 466 Mich 335, 361-367; 646 NW2d 127 (2002).

Finally, defendant claims that he has been denied effective assistance of appellate counsel. We disagree. Just because appellate counsel did not submit every issue on appeal that defendant believed meritorious does not mean that appellate counsel has been ineffective. Appellate counsel need not raise every possible appellate claim, and may be selective as a matter of discretion and strategy when choosing which meritorious issues to raise on appeal. *People v Reed*, 449 Mich 375, 397, 391, 405; 535 NW2d 496 (1996). Defendant's arguments that appellate counsel was under a duty to procure transcripts of the phone calls made to the 911 operator fails to recognize that the tapes were available to the defense both before and at trial, counsel did not demand their introduction at trial, because of the timing of the calls, logical significance is doubtful, and the arguments are without any legal support. This Court will not search for law in support of defendant's claims. *People v Kelly*, 231 Mich App 627, 640-641;

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

588 NW2d 480 (1998).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello