

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY LEE CREER,

Defendant-Appellant.

UNPUBLISHED

December 14, 2004

No. 250328

Oakland Circuit Court

LC No. 2002-185810-FH

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 30 to 180 months' imprisonment. Defendant appeals as of right, and we affirm.

On July 19, 2002, the victim lived with her eight year old son and her then husband, defendant, in Pontiac, Michigan. On that date, the victim went to Detroit to help her sister move. Defendant did not want the victim to go, and they argued before she left the home with her son. Defendant said that the victim would have the opportunity to cheat without him present to see what she was doing. Her son stayed with her sister's boyfriend while the women made multiple trips from the old home to the new home. After moving, the victim retrieved her son and arrived home at approximately 4:00 a.m. Although a couple of lights were normally on in and around the home, none were lit when she arrived at home.

The victim opened the door to the home with her keys. Her son entered the home and went straight to his room. The victim was in her home with no lights on when she felt someone grab her wrist. Her keys were in her hand, and she had bags hanging on her arms. The victim dropped all items that she was carrying to the floor. The victim was then repeatedly punched in the face by a fist with something sticking out from between the fingers. Initially, the victim did not know if it was rings on the fingers that hurt her. She was able to scream, then the person began to choke her. The perpetrator spoke for the first time, threatening to knock her out if she screamed or ran. After he spoke, the victim realized that defendant, her husband, assaulted her. Defendant then pulled the victim by her braids toward the sink, where he turned on the hot water. At that point, the victim's son turned the lights on, and she could see her key chains balled up in defendant's hands with the car key sticking out of his fingers.

Defendant told the victim's son to return to his room, but her son began screaming to leave the victim alone. Defendant loosened his grip on the victim's hair, and she was able to flee with her son to the bathroom. The victim saw that her face was bloody, her eye was swollen, her lip was busted, and her arm was injured. Defendant did not enter the bathroom, but stood outside the door. Defendant asked for forgiveness and said he would buy the victim anything she wanted. The victim did not respond. She whispered to her son to flee if possible and call police. Defendant then opened the bathroom door and asked if the victim was trying to tell police about the incident. He would not let the two near the kitchen toward the back door, but instructed them to go into the bedroom. Defendant then asked that the victim not tell on him because it was an accident. The victim said that she would not tell if the police came to the home in order to pacify him. The victim could not telephone police anyway because the phones had been removed from the wall.

Defendant brought the victim cold rags and some pain pills. While they were in the bedroom, defendant cleaned up the blood in the kitchen and the bathroom and ran the vacuum. The victim pretended to sleep so defendant would go to the store to get cigarettes. She actually fell asleep, but when she awoke, defendant was gone. The victim woke up her son and fled to the neighbor's home, where she called the police. The victim was taken by ambulance to the hospital while neighbors cared for her son. Defendant acknowledged that an altercation occurred between the two, but denied that a dangerous weapon was utilized. Rather, at most, he asserted that an assault and battery had occurred. The jury convicted defendant of assault with a dangerous weapon (felonious assault).

Defendant first alleges that the prosecutor committed misconduct by improperly vouching for the credibility of the witnesses. We disagree. Our review of an unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

Review of the record reveals that the defense, in closing argument, asserted that the case was resolved on the issue of credibility, the victim was not credible because the photographs did not reflect multiple strikes with keys, and where two different versions of testimony were presented, reasonable doubt existed. To counter the arguments of defense counsel, the prosecutor noted that the victim and attending police and medical personnel did not have a motive to fabricate their testimony; whereas defendant had a prior record and a motive to lie to avoid returning to prison. Moreover, the prosecutor argued that the testimony by the victim and attending personnel was truthful based on its consistency with the evidence. Because the prosecutor's argument, in context, was responsive to the argument raised by the defense, we cannot conclude that the prosecutor engaged in misconduct. *Noble, supra*.

Defendant next alleges that he was denied the effective assistance of counsel where trial counsel failed to call medical personnel to testify. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*,

212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Decisions addressing the evidence to be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not substitute our judgment for that of trial counsel when addressing issues of trial strategy, nor will we view counsel's competence with the benefit of hindsight. *Id.* at 76-77. A testimonial record from trial counsel is essential to support a claim of ineffective assistance of counsel. *Id.* at 77. When a testimonial record is not presented, our review is limited to mistakes apparent on the existing record. *Id.*

On the record available, we cannot conclude that trial counsel was ineffective for failing to call medical personnel as witnesses. While appellate counsel asserts that the testimony would have been beneficial to the defense, without any affidavits to support such an assertion, the presumption of trial strategy has not been overcome. It is equally as plausible that defense counsel interviewed the witnesses and concluded that the medical testimony would not support the defense theory. This contention is without merit.

Defendant next argues that there was insufficient evidence to support the conviction. We disagree. Our review of a challenge to the sufficiency of the evidence is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When examining the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). It is the role of the trier of fact, not the appellate court, to determine the inferences that may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The assessment of credibility, when presented by two diametrically opposed versions of events, rests with the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). We do not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To convict a defendant of felonious assault, the prosecutor must establish an assault, with a dangerous weapon, and the intent to injure or place the victim in apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). In the present case, defendant only contests the dangerous weapon requirement, specifically, the use of any key during the assault. However, the question of the use of a dangerous weapon presented a question for the trier of fact. The victim and defendant testified to differing versions of events, and the trier of fact concluded that the victim's testimony was credible. *Lemmon, supra*. On this record, we do not interfere with the decision of the trier of fact. *Wolfe, supra*. Accordingly, the challenge to the sufficiency of the evidence is without merit.

Defendant next alleges that the presentence information report (PSIR) erroneously indicated that defendant had sixteen prior felonies, when in actuality, he only had nine or eleven.

This challenge to the PSIR is not preserved for appellate review. MCR 6.429(C). Additionally, defendant failed to establish plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Lastly, defendant alleges that he was entitled to credit for time served while jailed pending the trial in this case. MCL 769.11b provides that a defendant is entitled to a sentencing credit if he has been denied or is unable to furnish bond. *People v Seiders*, 262 Mich App 702, 707; 686 NW2d 821 (2004). Review of the record reveals that defendant posted ten percent of the bond imposed, but was not released. Rather, defendant was returned to prison for violation of his parole. Where a defendant is held on a parole detainer, the question of bond is not at issue, and MCL 760.11b does not apply. *Id.* Accordingly, this challenge is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood