# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 10, 2009 |
| v | No. 282218<br>Chippewa Circuit Court |
| MICHAEL CONRAD-FREDRICK GARDNER,<br><br>Defendant-Appellant. | LC No. 07-008443-FH |

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of assault with a dangerous weapon, MCL 750.82(1), as a lesser offense of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to serve 28 months to six years' imprisonment. We affirm.

## I. Basic Facts

The present case arises out of an incident between defendant and David Soper. Defendant, Soper, Tonya Cadreau, Perry LaTour and William Berger were all drinking at a bar when they decided to continue drinking at Cadreau's home. After drinking there for some time, Cadreau agreed to drive everyone home. Defendant sat behind the front passenger seat and Soper sat in the middle between defendant and LaTour, who sat behind the driver's seat. Soper testified that he had not known defendant prior to the incident.

During the drive, defendant and Soper began to argue. Soper testified at trial that defendant pulled out a knife and began waving it in front of his own face. Soper stated that he asked defendant what he was going to do with the knife, to which defendant responded, "I'm going to cut you." Soper stated that he grabbed for defendant's wrist and tried to push the knife away, but missed and cut his hand. Berger testified that, at some point during the verbal argument, defendant asked to be let out. Before Cadreau pulled over, Soper stated that he tried to kick and push defendant out of the car. Soper stated that, after the car stopped, defendant reached and "got" him in the back of the leg. Berger testified that, after defendant got out of the car, defendant punched at Soper. He also stated that he saw defendant lunge at Soper "a bunch of times" while Soper was lying on his back and kicking at defendant. During the altercation, Soper suffered three lacerations, including a deep cut to the back of his leg.

## II. Sufficiency and Great Weight of the Evidence

Defendant first argues there was insufficient evidence to sustain his conviction. Specifically, defendant contends that the prosecutor failed to present sufficient evidence that he had the intent to injure or place another in fear of an immediate battery.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003) (citation and internal quotation marks omitted; alteration in original). "The standard is deferential and requires that this Court 'draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"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). At trial, Soper testified that as defendant was holding the knife, defendant told Soper, "I'm going to cut you." The victim testified that his first instinct "was to grab [defendant's] wrist." Evidence of defendant's verbal threat as he was holding the knife coupled with the victim's defensive reaction is sufficient to support a finding that defendant intended—and succeeded—in placing the victim in fear of an immediate battery. Moreover, the victim clearly testified that defendant cut him with the knife. Berger also testified that, after Soper closed the door, he said that "the kid [defendant] sliced" him up. Berger stated that he believed defendant was "trying to kill [Soper] and [Soper] was trying to defend himself." Accordingly, there was sufficient evidence for a rational trier of fact to conclude that defendant intended to injure the victim.

Defendant also argues the jury verdict was against the great weight of the evidence. A trial court "may grant a new trial 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 Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). In this case, defendant's theory was that Soper largely injured himself while grabbing and kicking defendant, who merely held the knife. Although this is a possible interpretation of the evidence, considering the evidence already noted along with the remaining evidence presented at trial, we cannot conclude that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

## III. The Video of Defendant's Police Interview

Finally, defendant argues that the trial court erred when it refused to let his trial counsel question an officer about a video of defendant's police interview and erred when it refused to let defendant's trial counsel use the video to impeach the interviewing officer. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martin*, 271 Mich App at 315. "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

On the first day of trial, defendant's trial counsel asked to have the video of defendant's police interview suppressed because the prosecutor had only disclosed it a few days before trial. The prosecutor stated that he did not "have a problem with that." He explained that he had only recently become aware of the video.

Thereafter, the video did not get mentioned until defendant's trial counsel began to cross-examine the prosecution's last witness, who happened to be the officer that interviewed defendant. During the cross-examination, defendant's trial counsel questioned the officer about the officer's reports and his testimony from both the preliminary hearing and trial. Specifically, defendant's trial counsel questioned the officer about what defendant purportedly told him during the interview. During the questioning, defendant's trial counsel asked the officer whether he taped the interview and repeatedly made reference to the "tape." Eventually, the trial court interrupted and asked if the jury was going to see the tape. Defendant's trial counsel responded, "We do have a TV here." To which the trial court noted that defendant's trial counsel had agreed with the prosecutor that the tape would not be shown. The trial court then expressed concern that the references to the tape might make the jury wonder why they were not able to see it. For this reason, the trial court told defendant's counsel, "Quit referring to the tape" or "show it to the jury." After this, defendant's trial counsel stated, "Fine. I would be happy to show it." The trial court then stated: "No, you don't. You made an objection to it and they agreed with you. Prior to this trial you said no. Now, you want the tape, that tape is not admitted by your own motion. They won't be seeing the tape." After this exchange, defendant's trial counsel continued to cross-examine the officer about his characterization of defendant's version of the events as related during the interview.

After defendant's conviction, defendant's trial counsel moved for a new trial. In part, defendant argued that he was entitled to a new trial because the trial court erred when it refused to let defendant's trial counsel impeach the officer who conducted defendant's interview with the video under MRE 613. The trial court denied the motion.

Although defendant's trial counsel did not directly request the admission of the video in order to impeach the officer's testimony, she did implicitly ask to have the video shown to the jury when she remarked that they did "have a TV" and that she "would be happy to show it." Nevertheless, on this record, we cannot conclude that the trial court abused its discretion when it asked defendant's trial counsel to stop referring to the tape and refused to show the video.

As already noted, the prosecution indicated that it did not learn about the video until shortly before trial. For this reason, the prosecution readily agreed that the video should not be admitted. Nevertheless, without warning and during cross-examination of the prosecution's last witness, defendant's trial counsel repeatedly made reference to the video. Out of concern that the references might mislead the jury, the trial court asked defendant's trial counsel to stop referring to the video. The trial court did not, however, tell defendant's trial counsel that she could not continue to cross-examine the officer about the statements defendant allegedly made during the interview.[1] Moreover, defendant's trial counsel did not state that she wanted to admit

[1] For this reason, we reject defendant's contention that he was denied the right to confront the officer. The purpose of the guarantee "is to provide for a face-to-face confrontation between the
(continued…)

the video for any particular purpose. Indeed, defendant's trial counsel's request appeared to be motivated solely by the trial court's decision to restrict her references to the video. Defendant's trial counsel also did not express any reason why she should be permitted to reference the video without showing it. Given the circumstances that led to the suppression of the video, and the fact that defendant's trial counsel's request was vague and unsupported by a legal argument in favor of admission, we cannot conclude that the trial court's decision to deny the request and restrict references to the video was outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353. Therefore, the trial court did not abuse its discretion. In any event, even if we were to conclude that the trial court erred in this regard, we would conclude that any error was harmless. See *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004) ("Evidentiary error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative.").

As already noted, defendant did cross-examine the officer. During that examination, counsel got the officer to clarify that defendant never stated that he stabbed Soper. Instead, the officer indicated that defendant admitted that he had the knife and that defendant "inferred it must have cut [Soper.]" The officer also indicated that defendant denied hurting Soper and denied that he ever tried to hurt Soper. Counsel also cross-examined the officer about his preliminary examination testimony and elicited testimony that the officer's previous testimony that defendant told him that he "used" the knife may have been misunderstood, because, as the officer noted, defendant didn't technically say "I used it." Significantly, defendant's trial counsel also elicited testimony from the officer that defendant asserted that Soper had gotten in trouble at the bar, which supported defendant's theory that Soper was the aggressor.[2] Likewise, on direct examination, the officer stated that defendant said that he thought Soper and Berger were talking about him at the party and that they were looking at him in the car in a away that made him feel uncomfortable. The officer also indicated that defendant said he wanted them to stop the car. Hence, defendant's trial counsel was able to test the alleged inconsistencies in the officer's testimony and the officer actually gave testimony that supported defendant's theory of the case.

In addition, contrary to defendant's contention on appeal, this case did not hinge on the credibility of the officer. At trial, defendant's trial counsel did not contest that defendant was in the car and had pulled a knife; the primary issue was defendant's reason for pulling out the knife and what he actually did with the knife. For that reason, the most significant evidence against defendant was the testimony of the victim and the other eyewitnesses. Because the officer's testimony supported defendant's theory of the case, any impeachment value that the video may have had was negligible. Finally, although in retrospect defendant's trial counsel might have preferred to bring defendant's statements out through the video, defendant's trial counsel

---

(…continued)

defendant and his accusers at trial . . . [to] enable[] the trier of fact to judge the witnesses' demeanors." *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998) (quotation marks and citation omitted). Defendant had a full and fair opportunity to cross-examine the officer.

[2] LaTour testified at trial that Soper always argued with people when drunk and that Soper had been in an altercation at the bar.

nevertheless had the relevant testimony from the officer and could have elicited further details about defendant's statements had she wished. For these reasons, we conclude that, even if it were an abuse of discretion to restrict references to the video and deny defendant's trial counsel's request to play the video, those errors were harmless.

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly