STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2009
v	No. 284986 Eaton Circuit Court
JONATHON EMORY MORGAN, Defendant-Appellant.	LC No. 07-020040-FC

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of carjacking, MCL 750.529a. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 96 months to 20 years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of carjacking. Witnesses testified that defendant ordered a woman out of her car and drove away from a gas station in her vehicle, and later, on the same day, forced another woman out of her car at a restaurant and attempted, unsuccessfully, to drive away in that vehicle. Defendant was arrested and volunteered the location where he parked the car taken from the gas station. A police detective testified that defendant acknowledged trying to "jack" a couple of cars. Defendant asserted that he only took the vehicles out of fear for his life because he was attempting to escape thousands of bats that were appearing out of the sky, turning into vampires, and eating people alive.[1]

Defendant first contends that the evidence was insufficient to prove that he intended to permanently deprive the owners of their vehicles. In reviewing a sufficiency of the evidence claim, this Court must view the evidence de novo in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proven

[1] Defendant was found competent to stand trial. In addition, the evaluating psychologist at the Forensic Center opined that defendant was not criminally insane at the time of the offense. On defendant's request, the trial court then ordered that defendant be permitted to obtain an independent evaluation at public expense and it appears that such an evaluation took place. Defendant did not present an insanity defense at trial.

beyond a reasonable doubt. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002); *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). We must resolve all conflicts in the evidence in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We are required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.529a provides in relevant part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle . . . is guilty of carjacking . . . .
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> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

The jury instruction for carjacking defines larceny as "the taking and movement of someone else's motor vehicle with the intent to take it away from that person permanently." CJI2d 18.4a(3).

Testimony elicited from several witnesses supported the jury's determination that defendant used force or threats to take a vehicle from one woman and also engaged in a separate attempt to take a different vehicle from another woman. Defendant's concealment of the first vehicle behind a building supported an inference that he intended to permanently deprive the owner access to the vehicle, meeting the definitional requirement for the commission of a larceny as delineated in CJI2d 18.4a(3). See also *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980). Evidence that defendant gained entry into a second vehicle also supported an inference that he was attempting to permanently deprive the owner of that vehicle, resulting in an attempted larceny. MCL 750.529a(2); CJI2d 18.4a(3); *Jones*, *supra*. Consequently, sufficient evidence was existed to support defendant's convictions.

Defendant next asserts that the trial court violated his right to due process by instructing the jury in a manner that relieved the prosecution of proving all of the essential elements of carjacking. Specifically, defendant contends that the trial court failed to include the specific intent element of carjacking in the instructions. However, because defendant expressly approved the instructions as given by the trial court, appellate review of this claim is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *Leuth*, *supra* at 688.

Finally, defendant contends that he was denied the effective assistance of counsel because his attorney failed to object to the jury instruction, which he alleged failed to address all of the essential elements of carjacking. Because defendant failed to move for a new trial or an evidentiary hearing in the trial court our review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that the acts of trial counsel do not pass an objective standard of reasonableness, *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); (2) that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different, *Strickland, supra* at 694; and (3) that the result of the proceeding was fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Defense counsel is given wide discretion concerning matters of trial strategy." *Id*. at 415. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]his Court neither substitutes its judgment for that of trial counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In this instance, the prosecution presented sufficient evidence to convince a jury that defendant committed two acts of carjacking. Even if counsel should have objected to the jury instruction, given the substantial amount of evidence it is highly unlikely that such an objection would have impacted the outcome of the trial. A review of the record serves to confirm that the result of the proceeding was neither fundamentally unfair nor unreliable because sufficient evidence supported the verdict. In addition, we note that trial counsel's strategy was to present a defense of compulsion. Counsel argued, "Compulsion and duress constitutes justification or excuse for the commission of a crime. It's not a way to get rid of any mens rea portion of an offense." Hence, counsel's efforts to excuse defendant's behavior rather than to focus on his intent, particularly given defendant's bizarre explanation and that he took the cars to escape from flesh-eating bats and vampires, was not objectively unreasonable under the circumstances.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro