STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2009
v	No. 284227 Oakland Circuit Court
TIMOTHY LAWRENCE WATT, Defendant-Appellant.	LC No. 07-217354-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions following jury trial of felonious assault, MCL 750.82, and breaking or entering a vehicle with the intent to steal property valued at less than $200, MCL 750.356a(2)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel because counsel failed to move to quash the information following the preliminary examination. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resulting proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must overcome a strong presumption that his attorney's actions were sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant claims that John Verbovsky's testimony at the preliminary examination failed to establish an assault. Verbovsky testified that after coming upon defendant rummaging through his friend's truck, he and defendant had a brief verbal exchange, and then defendant started to walk away. Verbovsky stated that he was about 20 feet away but moved towards defendant, at which point defendant turned. Defendant was holding a knife with an exposed blade. Verbovsky thought he was being threatened with the knife and was frightened. The elements of felonious assault are (1) a simple 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 Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). In *People v Sanford*, 402 Mich 460; 265 NW2d 1 (1978), our Supreme Court adopted the definition of a "simple criminal

assault" as being either "'an attempt to commit a battery or an unlawful act which places another person in reasonable apprehension of receiving an immediate battery.'" *Id*. at 479, quoting Perkins on Criminal Law (2d ed), p 117. But even under this definition, a victim's subjective experience of fear is not an element of an assault. *People v Perez*, dec'd sub nom *People v Davis*, 277 Mich App 676, 684-688; 747 NW2d 555 (2008).[1] "[T]he subjective element of fear simply has no place in a criminal assault . . . apart from an inferential determination of whether a rational person in the victim's shoes would have reasonably believed that the defendant's behavior threatened an immediate battery." *Id*. at 685-686. Consequently, "a victim's subjective experience of the emotion of fear is not an element of assault, even in 'apprehension' types of criminal assault cases." *Id*. at 688.

Defendant argues that if he were retreating and was 20 feet away, the victims had no *reasonable* apprehension of receiving an *immediate* battery. But even if defendant had moved away and eventually ran off does not negate the perceived threat that he would use the knife against the victims. And defendant was capable of fulfilling the threat. We conclude that it was behavior a rational person would reasonably believe threatened an immediate battery. Thus, a motion to quash would have been futile, and counsel had no obligation to make a futile argument. *Chambers*, *supra* at 11.

Defendant next argues that counsel should have requested an instruction on attempted felonious assault. We disagree.

"Neither an attempt to commit an offense nor all the elements of an attempt to commit an offense are elements of the completed offense." *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982). A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Smith*, 478 Mich 64, 73 n 3; 731 NW2d 411 (2007). An instruction on a cognate lesser included offense is not permissible. *Id*. at 69, 73. So, the failure to request the instruction was not ineffective assistance. *Chambers*, *supra* at 11.

Defendant next argues that there was insufficient evidence to support his felonious assault conviction with respect to the requisite intent and, again, insufficient evidence the victim *reasonably* apprehended receiving 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

> "[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to

[1] Our Supreme Court in *Davis*, *supra*, 482 Mich 978, vacated in part on other grounds and remanded, and in *Perez*, *supra*, denied leave to appeal, 482 Mich 894 (2008).

be given to their testimony." [*Id.* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).]

At trial, Chris Connell testified that defendant was within a step forward of being able to stab the victims, and Connell was afraid that if they did not get out of the way, defendant would do so. This evidence was sufficient to establish defendant's intent to place the victim in reasonable apprehension of an immediate battery, and the reasonableness of the victim's apprehension of receiving an immediate battery. Accordingly, the evidence was sufficient to.

We affirm.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey