

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN SCOTT BURRELL,

Defendant-Appellant.

UNPUBLISHED

October 15, 2009

No. 286009

Wayne Circuit Court

LC No. 07-008011-FH

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of one to four years for the felonious assault conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

A. FACTS

As of March 2007, Jamie Camarda had been working for approximately a year at Moose McGregor's, a bar-restaurant in Brownstown owned by Oscar Eugene Burrell ("Gene") and managed by defendant, who is Gene's son. Sometime in February 2007, Camarda and her daughter moved into defendant's home temporarily while waiting for their newly purchased home to "become available." Defendant and Camarda only had a platonic relationship.

Camarda worked the night shift at the restaurant as a waitress from 6:30 p.m. until sometime between 2:00 a.m. and 3:00 a.m. Though defendant was only on trial for the acts of March 12, 2007, Camarda testified regarding three separate "incidents" that she had with defendant the weekend of March 9-12, 2007. Camarda testified that while at work on Friday, March 9, 2007, defendant ignored a question of hers and when asked again, he pushed her ten feet, knocking her into a trash can that toppled over. Camarda testified that Jerry Crump, an employee at the restaurant, called her on the phone to apologize for not intervening and to check on her well being.

Camarda also testified that on Saturday, March 10, 2007, defendant pushed her behind the bar in the salad area, and then pushed her again an hour later in the kitchen area into the "walk-in door." After work that night, Camarda returned to defendant's house where defendant and another employee, Vince Gibson, were present. Defendant immediately began yelling and

screaming at Camarda and took his house key back. Defendant also threw stuff around the house and pushed Camarda to the ground before calling Gene to come pick Camarda up. Camarda stayed at Gene's home for about an hour to an hour-and-a-half. During this time, they discussed Gene retrieving \$800 in cash and a checkbook that Camarda had left at defendant's home.

On Sunday evening, March 11, 2007, Camarda showed up for work, and defendant had the day off. Gene was present and did not have any of the items Camarda had previously requested. Camarda asked Gene about the items, and Gene said that she was not to talk about it, and if she did again, she would be fired. Later that night, at around 1:00 a.m. on March 12, Camarda asked again about her belongings, and she was promptly fired. She left the restaurant and proceeded straight to defendant's house to retrieve her property. On her drive to defendant's house, she repeatedly called defendant on the phone, but defendant kept hanging up.

Camarda arrived at defendant's house and walked up to the front porch. When she was standing on the porch, defendant moved some blinds on the front window, revealing that he was carrying an assault rifle. Camarda told defendant she was not looking for a fight, but just wanted to pick up her property. Defendant began to scream and yell at her, and he opened the front door. He showed her that there was ammunition in a clip, and then loaded the clip into the gun, pointed the gun at her, and stated he was going to "blow her head off" if she did not leave. Camarda did not think defendant was serious until defendant started moving his aim downward towards her legs. At that point, Camarda thought she really was going to be shot and left the porch area. She pulled away in her car and called the Trenton Police Department.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell, supra* at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that trial counsel was ineffective by not questioning and calling certain witnesses at trial. Defendant asserts that these witnesses would have directly contradicted Camarda's claims that defendant had assaulted her at work a couple days before the alleged

felonious assault incident at defendant's house, thereby challenging her credibility with regard to whether the felonious assault actually occurred.

At the *Ginther*¹ hearing, defendant produced the testimony of three "new" witnesses: Amanda Geist, Jeremy Crump, and Jason Crump. All three testified that they were present in the restaurant's kitchen at the time of the alleged assault on Friday, March 9, 2007. They stated that defendant and Camarda were involved in a loud, cussing exchange when Camarda tried to strike defendant with her hand but defendant was able to physically move or block her hand away. All three were certain that defendant never struck or pushed Camarda that evening. All three testified that they communicated this information to defendant or defendant's father. The trial court found that Geist's evidentiary contribution is nullified since she never informed the Burrells about what she saw until *after* defendant's trial. The trial court further found that Jason would have been unlikely to testify at defendant's trial because Jason was reluctant to appear because of his own prior criminal record. A trial court's finding of facts will not be disturbed unless they are clearly erroneous. *LeBlanc, supra* at 579. A finding is clearly erroneous if it leaves this Court with "a definite and firm conviction" that a mistake has been made. *People v Adkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

A review of the record reveals that no such mistake occurred. Geist testified at the hearing in May 2008 that she only informed defendant's father "a couple months ago"² of what she saw the night of the altercation in the kitchen. The record also shows that Jason was extremely reluctant to appear in court because he was on parole for a crime involving theft or dishonesty and evidently wanted to stay "in the shadows." Jeremy's testimony would have simply corroborated what defendant, Gene, and Jerry Crump already testified to at trial. Defense counsel testified that he did not want too many people to testify regarding the events that took place in the restaurant. His concern was that there could be inconsistencies introduced at trial, which would not help defendant's cause. In addition, it also arguably was cumulative evidence. Trial counsel thought that no less than four witnesses – defendant, Gene, Jerry Crump, and Vince Gibson – were going to testify and cover everything Jeremy would have covered.³ Again, not presenting cumulative evidence is a matter of trial strategy. Defendant has failed to overcome the strong presumption that this was proper trial strategy. Looking back with hindsight and seeing that Gibson did not show up at trial to testify is not a permissible means to challenge trial counsel's strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also argues that his trial counsel was ineffective for failing to move to admit both Camarda's and Jerry's phone records. According to defendant, Camarda's phone records would show that *she* called Jerry after defendant was arrested and would contradict her testimony that Jerry called her. Jerry's phone records supposedly would have also shown that Jerry *received* a call from Camarda instead of him calling her as she testified to. Even if trial counsel

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² Defendant's trial took place almost a year prior in June 2007.

³ It turns out Vince Gibson actually never testified at trial because, while he showed up for the first day, he appeared *after* the conclusion of the trial on the second day. Gibson never testified at the *Ginther* hearing either, so what he would have testified to at trial is speculation.

was deficient in his performance in getting these phone records admitted, it is not clear how their being admitted would have resulted in a reasonable probability of a different outcome. Simply put, the phone records allegedly would have clarified who called whom. The fact remains that both Camarda and Jerry testified that they spoke to each other on the night of March 9, 2007. Thus, given the lack of probative value of the records, it also is evident that trial counsel did not commit any error in not seeking their admission.

Defendant has failed to overcome his high burden in showing that trial counsel failed to perform at an objectively reasonable level.

C. ADMISSION OF BULLETPROOF VEST

Defendant argues that he was denied a fair trial because of the introduction of damaging, irrelevant information, coupled with the fact that no limiting instruction was given, even though requested.

Defendant's claim has three aspects: (1) the testimony recounting the finding of the bulletproof vest should not have been admitted, (2) the juror's question asking the witness-officer whether it was unusual for one to have a bulletproof vest should never have been asked, and (3) in any event, a limiting or cautionary instruction should have been given to the jury to minimize any undue prejudice.

Defendant did not object to the testimony regarding the finding of the bulletproof vest and, therefore, we review the admission of this testimony for plain error. Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The prosecutor concedes that evidence regarding the finding of the bulletproof vest is irrelevant. MRE 402. However, defendant does not show how the introduction of the fact about the bulletproof vest affected a substantial right. There is nothing in the record to support defendant's speculation that the jury convicted him on the basis of this evidence. The record does, however, reveal ample, relevant evidence to support the jury's verdict. Defendant failed to open the door for the police and wondered why they were present even though he stated he called 911, gun lubricant and ammunition boxes were recovered from near defendant's front door, a loaded assault rifle was found in a nearby bedroom matching Camarda's description of the gun used in the assault, and defendant's own admission to police that he never pointed a gun at Camarda even though, arguably, the police never told defendant that he was being arrested for pointing a gun.⁴ The erroneous admission of the evidence did not affect defendant's substantial rights.

⁴ The prosecutor stressed this during closing arguments: "When the officer takes the defendant into custody, they told the defendant you are being arrested for felony assault. They gave the (continued...)"

Because the evidence of the bulletproof vest was irrelevant, the trial court erred by allowing further questioning regarding how usual or unusual it may be for someone to possess such an item. “Evidentiary error does not merit reversal unless it involved 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.” *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004). Given the overwhelming evidence of guilt, we cannot conclude that it is more probable than not that the error was outcome determinative.

Lastly, defendant argues that the trial court erred by failing to give a limiting instruction to the jury regarding the finding of the bulletproof vest. Defendant relies on MRE 404(b) in seeking the instruction. Typically, when other bad acts evidence is admitted under MRE 404(b), the trial court gives a limiting instruction to the jury to let them know that they can only consider the evidence for its *proper* purpose. MRE 105; See *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993). The trial judge denied defendant’s request for an instruction because, in part, the trial judge did not “know what [she] would be instructing.” Part of the difficulty in trying to give a limiting instruction is that its goal would be to inform the jury of the proper purpose for which the evidence is to be considered. But here, there is no proper purpose. Therefore, the appropriate instruction would have been to strike any and all references to the vest, but defendant did not request such an instruction.⁵

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald

(...continued)

legal term. What was his response? He said: I did not point the weapon at the girl. How did he know what they were arresting him for if he didn’t do anything?” And again during rebuttal, “We also have this testimony that when he was taken into custody he told the officers: I did not point that weapon at her. No one ever told him he did. He told them that. How would he know that was the allegations, if he didn’t do it?” We know this argument carried weight with the jury because the jury later asked the judge to provide a transcript of the testimony regarding this exchange between the police and defendant after defendant’s arrest, and the judge had that portion of the transcript read back to them.

⁵ The Supreme Court has discussed the requirement that the underlying bad act must be relevant: “[MRE 404] presumes a showing of logical relevance. It is only then that considerations of legal relevance are implicated.” *VanderVliet*, *supra* at 62.