STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2014
v	No. 309831 Wayne Circuit Court
ORLANDO EUGENE STEVENS, Defendant-Appellant.	LC No. 11-005675-FH

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of attending an animal fight, MCL 750.49(2)(f), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to fees and costs for the attending an animal fight conviction and two years' imprisonment for the felony-firearm conviction.[1] Defendant appeals as of right, and for the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues there was insufficient evidence that he committed the crime of attending a dogfight. Similarly, defendant argues that the trial court erred by denying his motion for a directed verdict. We disagree.

"Claims of insufficient evidence are reviewed de novo." *People v Kloosterman*, 296 Mich App 636, 639; 823 NW2d 134 (2012). "A court reviewing the sufficiency of the evidence must view the evidence in the light most favorable to the prosecution and determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt." *Id.* Similarly, "[i]n assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have

[1] At sentencing, the trial court granted defendant's motion for bond pending appeal at this Court, so defendant has not begun to serve his two-year sentence yet.

found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

The prosecution may use circumstantial evidence and reasonable inferences to prove the elements of the crimes. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "[A] reviewing court is 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). In order "to establish that the evidence presented was sufficient to support the defendant's conviction, the prosecutor need not negate every reasonable theory consistent with innocence." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011), (internal quotation marks omitted).

MCL 750.49(2), the statute under which defendant was convicted, provides, in relevant part:

> (2) A person shall not knowingly do any of the following:
>
> (a) Own, possess, use, buy, sell, offer to buy or sell, import, or export an animal for fighting or baiting, or as a target to be shot at as a test of skill in marksmanship.
>
> (b) Be a party to or cause the fighting, baiting, or shooting of an animal as described in subdivision (a).
>
> (c) Rent or otherwise obtain the use of a building, shed, room, yard, ground, or premises for fighting, baiting, or shooting an animal as described in subdivision (a).
>
> (d) Permit the use of a building, shed, room, yard, ground, or premises belonging to him or her or under his or her control for any of the purposes described in this section.
>
> (e) Organize, promote, or collect money for the fighting, baiting, or shooting of an animal as described in subdivisions (a) to (d).
>
> (f) Be present at a building, shed, room, yard, ground, or premises where preparations are being made for an exhibition described in subdivisions (a) to (d), or be present at the exhibition, knowing that an exhibition is taking place or about to take place.

Therefore, a person violates MCL 750.49(2)(f) if he (1) is present at a dogfighting exhibition and (2) knows that the dogfighting exhibition is taking place.

There was sufficient evidence to convict defendant of attending a dogfight in violation of the statute.[2] First, the prosecution presented sufficient evidence that defendant was present in the garage. The police officers at the scene testified that defendant was arrested there. The police officers testified that, with the exception of one man who was arrested after walking out of the garage, the people arrested at the scene were all inside the garage when the officers arrived. In fact, defendant admitted to being present in the garage while the dogfight was occurring. Therefore, there was sufficient evidence to establish beyond a reasonable doubt that defendant was present in the garage while the dogfight was occurring.

Next, the prosecution presented sufficient evidence that defendant knew that a dogfight was occurring. The police officers testified that the ring where the fight was occurring took up about half of the garage and that it would have been impossible to enter the garage without realizing that a dogfight was occurring. The officers could hear barking, whimpering, and cheering from outside the garage. There was also a ring with blood on the walls, and two bloody, injured dogs inside the ring with their jaws locked together. Moreover, defendant admitted that he knew there was a dogfight occurring in the garage while he was there. Accordingly, there was sufficient evidence to prove that defendant knew that a dogfight was occurring in his presence.

Defendant argues that he was not watching, witnessing, or participating in the fight. However, MCL 750.49(2)(f) does not require that the prosecutor prove that defendant was attending the fight in order to watch, witness, or participate. Instead, the statute simply requires presence and knowledge that the fight is occurring or is about to occur.

Defendant argues that mere presence at the scene is not enough to convict him under the statute and that the prosecution did not prove that he had the requisite *mens rea* to commit the crime. According to defendant, he did not intentionally attend the dogfight. However, the statute only requires that a defendant *knowingly* "be present at the exhibition, knowing that an exhibition is taking place or about to take place." MCL 750.49(2)(f). As stated above, the prosecution presented evidence that defendant knew that he was attending a dogfight. Defendant's motivation for staying at the fight is irrelevant with respect to whether the prosecution was able to prove the elements of the crime beyond a reasonable doubt.

II. GREAT WEIGHT OF EVIDENCE

Defendant next argues that his verdict for attending a dogfight is against the great weight of the evidence. We disagree.

"We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

[2] Defendant also does contest the felony-firearm conviction but only in the context of the sufficiency of the evidence for the underlying felony.

A "new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). When the testimony "is patently incredible or defies physical realities," "is material and is so inherently implausible that it could not be believed" or "has been seriously impeached and the case [is] marked by uncertainties and discrepancies," a new trial may be justified. *Id.* at 643-644 (citations omitted).

Defendant argues that if the verdict was allowed to stand, it would be a serious miscarriage of justice because the trial court found defendant's testimony credible, and defendant testified that he was innocent. However, the evidence does not "preponderate[] heavily against the verdict." *Id.* at 642. In fact, all of the evidence supports the verdict, including defendant's own testimony. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis.

III. CONSTITUTIONALITY

Defendant next argues that the dogfighting statute is unconstitutional because it imposes strict liability. Specifically, defendant argues that the statute is unconstitutional because it imposes strict liability and criminalizes mere presence for a serious felony. We disagree. Defendant never raised this issue at the trial court. Thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Generally, the commission of a crime requires both an *actus reus* and a *mens rea*." *People v Likine*, 492 Mich 367, 393; 823 NW2d 50 (2012). "A strict-liability crime is one for which the prosecutor need only prove that the defendant performed the act, regardless of intent or knowledge." *People v Adams*, 262 Mich App 89, 91; 683 NW2d 729 (2004). "Although strict-liability offenses are disfavored, there is no question that the Legislature may create such offenses without running afoul of constitutional concerns." *Likine*, 492 Mich at 391.

In claiming that the statue lacked a *mens rea* element, defendant focuses solely on subsection (f) of the statute that provides that one is guilty if "present at the exhibition." But defendant ignores the preceding language in section (2), which requires that a person "*knowingly* do any of the following," acts, including subsection (f). Thus, it is evident that the statute does not impose strict liability or criminalize mere presence. MCL 750.49(2)(f) specifies that a defendant must have been present at the exhibition where he knows that the exhibition is taking place or about to take place. Thus, the statute's *mens rea* component is knowledge of the exhibition.

Defendant seems to argue that the prosecution should have to prove that he had a malicious intent. However, the crime as currently codified reflects a general intent crime, and not a specific intent crime. A general intent crime only requires a defendant have the intent to perform the crime's *actus reus*. *People v Abramski*, 257 Mich App 71, 72; 665 NW2d 501 (2003). In general intent crimes, this "knowledge element is necessary simply to prevent innocent acts from constituting crimes." *Id.* at 73. Therefore, simply *knowing that an exhibition*

was occurring in defendant's presence satisfied the general intent, *mens rea* requirement, and defendant failed to establish that the statute is unconstitutional.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in his supplemental brief after remand, defendant argues that the trial court clearly erred in crediting trial counsel's testimony at the *Ginther*[3] hearing and that defendant should be given the opportunity to accept the plea offer made before trial. We disagree.

In his brief on appeal, defendant argued that he was denied the effective assistance of counsel and that this case should be remanded for a *Ginther* hearing. He subsequently filed a motion to remand with this Court. This Court granted the motion, and on remand, an evidentiary hearing was held, at which defendant and his trial counsel testified. Defendant testified that his counsel informed him that in order to be convicted, the prosecution had to prove that defendant was present *with the purpose of attending the dogfight*. Based on this information, and knowing that he was there for a different purpose, he decided to reject the prosecutor's plea offer and go to trial. However, defense counsel denied providing such advice to defendant. Defense counsel testified that he informed defendant that he could be convicted based on evidence that he was present and *had knowledge that a dogfight was taking place*. He claimed that defendant did not want to accept the plea offer because of its negative effect on his future ability to work with children and make a living. Accordingly, defense counsel attempted to formulate the best defense possible under the circumstances.

After hearing the testimony of both defendant and defense counsel, the trial court determined that defense counsel's testimony was credible and ruled that defendant was not given erroneous advice. Accordingly, the trial court denied defendant's request for a new trial.

> Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. We review the trial court's factual findings for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. We review de novo questions of constitutional law. [*People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011) (citations and internal quotation marks omitted).]

In general, in order to prove that a defendant was denied the effective assistance of counsel, he must establish that defense counsel's actions fell below an objective level of reasonableness and, but for counsel's error, the outcome would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). In the context of plea negotiations, this Court has stated:

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[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> A defendant's Sixth Amendment right to counsel extends to the plea-bargaining process. A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer. . . . In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. Counsel's assistance must be sufficient to enable the defendant to make an informed and voluntary choice between trial and a guilty plea. [*People v Douglas*, 296 Mich App 186, 205-206; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012), lv held in abeyance ___ Mich ___; 828 NW2d 381 (2013) (citations and internal quotation marks omitted).]

The Court further provided:

> In *Lafler* [*v Cooper*, 566 US ___; 132 S Ct 1376, 1385; 182 L Ed 2d 398 (2012)], the Court articulated the standard that a defendant must establish in order to demonstrate prejudice in cases in which counsel's ineffective advice led the defendant to reject a plea offer and proceed to trial. The Court stated:
>
> > In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Douglas*, 296 Mich App at 206-207.]

Defendant argues that his trial counsel's performance was deficient when he allegedly advised defendant that in order to be convicted under MCL 750.49(2)(f), the prosecution had to prove beyond a reasonable doubt that defendant intended to attend the dogfight. As discussed earlier, MCL 750.49(2)(f) prohibits a person from being present at a dogfight with knowledge that a dogfight is taking place—it does not require the prosecution to prove that a defendant specifically intended to attend such an event. Thus, if trial counsel advised defendant that the prosecution had to prove his intent to attend the dogfight, such advice would have been erroneous. And because the information regarding the elements of the offense charged "was essential to enable defendant to make an informed decision about whether to accept the prosecution's plea offer or proceed to trial," such performance would be considered deficient. *Douglas*, 296 Mich App at 206.

As noted previously, a trial court's finding made at a *Ginther* hearing is reviewed for clear error. *Armstrong*, 490 Mich at 289. Further, a trial court's findings based on credibility determinations are entitled to deference. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). This is so because the trial court is in the best position to judge the credibility of the witnesses before it. *People v Akins*, 259 Mich App 545, 566; 675 NW2d 863 (2003).

This was a pure credibility battle, with defendant testifying that counsel informed him that the prosecution had to prove that defendant had the purpose of attending the dogfight, and defense counsel testifying that it was defendant's choice to reject the plea offer and proceed to trial, despite being properly warned that the prosecution needed to only prove his knowing presence at the dogfight.

Defendant argues that defense counsel's testimony "defies belief" and "does not make sense" because a trial attorney would not knowingly put a defendant on the witness stand to admit all of the necessary facts establishing his guilt. This, arguably, is an indicator that defense counsel may have had an incorrect view of the applicable law and undercuts his assertion that he provided defendant with the correct law. However, we are also cognizant that there was evidence presented that showed that defendant was very concerned with the effect that any conviction—even that from a guilty plea—would have on his ability to continue working with children and making a living. He testified that this was, in fact, one of his primary motivations in rejecting the plea offer and seeking an acquittal through a trial. Thus, given the underlying facts of the case and defendant's decision to proceed with trial, defense counsel was presented with, as he described, "an uphill battle," in mounting a defense. As a result, we cannot critique defense counsel's unenviable position at trial and use the unsuccessful, mounted defenses as a reason to somehow prove that it was defense counsel that had a misconception of the law, when the evidence also supports a finding that defendant rejected the plea deal because of his work concerns, despite being given the appropriate information. Given the deference that we afford the trial court's credibility determinations, we are not left with a "definite and firm conviction" that the trial court made a mistake in its factual finding and credibility determination. Because defendant failed to show that his attorney's performance fell below an objective standard of reasonableness, he failed to establish his claim of ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio