STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2000
v	No. 214791 Washtenaw Circuit Court
ANDREW JOSEPH TREMBLAY, Defendant-Appellant.	LC No. 97-007897-FH

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant, who admitted driving his taxicab toward the victim, Michael Borders, but contended that he did so accidentally, appeals by right from his conviction by a jury of assault with a dangerous weapon, MCL 750.82; MSA 28.277. The trial court sentenced him to one year of probation. We affirm.

Defendant first argues that the prosecution presented insufficient evidence that he had the specific intent necessary to commit felonious assault. When determining whether the prosecution presented sufficient evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Because of the difficulty of proving a defendant's state of mind, minimal circumstantial evidence and the reasonable inferences that arise from the evidence can constitute sufficient evidence of intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The prosecution was obligated to prove that defendant drove toward the victim "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). This intent was sufficiently established by (1) the testimony of Borders, who testified that defendant drove directly toward him three different times, and (2) the testimony of Titus Keller, who testified that defendant drove directly toward Borders so that Borders had to leap out of the path of the vehicle. From defendant's actions as described by Borders and Keller, the jury reasonably could have concluded, beyond a reasonable doubt, that defendant intended to place Borders in fear or apprehension of an immediate battery by using his cab as a dangerous weapon. Although there

were some inconsistencies in the testimony, the jury evidently chose to believe one or more witnesses' testimony pertaining to intent, and we will not interfere with the jury's role of determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

Next, defendant argues that the trial court should have granted his motion for a new trial because the verdict was against the great weight of the evidence. We review for an abuse of discretion a trial court's determination that a verdict was not against the great weight of the evidence. *People v Brown*, 239 Mich App 735, 745; 610 NW2d 234 (2000).

Defendant's argument is premised solely on the alleged inconsistency and incredibility of the prosecution witnesses. Our Supreme Court has noted that "[n]ew trial motions based solely on the weight of the evidence regarding witness credibility are not favored" and should be granted only when the evidence preponderates so heavily against the verdict that a serious miscarriage of justice would result if the verdict were allowed to stand. *People v Lemmon*, 456 Mich 625, 639-642; 576 NW2d 129 (1998); see also *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its judgment for that of the jury. *Lemmon*, *supra* at 642. Examples of exceptional circumstances include the following: (1) where testimony is patently incredible or defies physical realities; (2) where a witness' testimony is material and is so inherently implausible that it could not be believed by a reasonable juror; or (3) where the witness' testimony has been seriously impeached and the case is marked by uncertainties and discrepancies. See *id*. at 643-644. If the trial court determines that an exceptional circumstance applies, then the trial court must determine if there is

> "a real concern that an innocent person may have been convicted" or [if] "it would be a manifest injustice" to allow the guilty verdict to stand. If the "evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions," the judge may not disturb the jury findings although his judgment might incline him the other way. Any "real concern" that an innocent person has been convicted would arise "only if the credible trial evidence weighs more heavily in [the defendant's] favor than against it." [*Id*. at 644-645 (citations omitted).]

Here, we find no exceptional circumstances as described in *Lemmon*. The testimony of the prosecution witnesses was not inherently implausible; nor did it defy physical realities. Moreover, the prosecution witnesses were not seriously impeached, and although there were some discrepancies in their testimony, the discrepancies did not amount to blatant contradictions but merely represented the observations of people having different vantage points. The evidence, as a whole, was such that different minds would naturally and fairly come to different conclusions, and therefore we will not disturb the verdict on appeal. *Id*.

Next, defendant argues that his trial attorney provided ineffective assistance of counsel in several different respects. This Court presumes the effective assistance of counsel, and a defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To determine whether ineffective assistance of counsel

occurred, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Pickens*, 446 Mich 298, 311-327; 521 NW2d 797 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To convince this Court of prejudice, a defendant must establish "'a reasonable probability that, but for counsel's errors, the result [of the proceedings] would have been different.'" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first claims that his trial counsel unreasonably failed to call an eyewitness, Crystal Coleman, who would have corroborated defendant's theory of the case that his driving toward Borders was accidental.

Our Supreme Court has elaborated on the discretion afforded to a criminal defense attorney:

> Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. . . . Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat." [*Pickens*, *supra* at 324-325, quoting *People v Lundberg*, 364 Mich 596, 600, 601; 111 NW2d 809 (1961).]

Further, this Court "will not second-guess counsel regarding matters of trial strategy, and . . . will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to call a particular witness is presumed to be trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); *Rockey*, *supra* at 76.

Defendant failed to overcome the presumption that his counsel's decision not to call Coleman was sound trial strategy. See *Avant*, *supra* at 507-508. Indeed, counsel testified during the ineffective assistance hearing that he did not call Coleman because when she arrived for trial she told him that "[defendant] was trying to scare the guy." In light of this statement, which the trial court accepted as indeed having been made, counsel reasonably did not call Coleman to testify because her testimony would have undermined defendant's theory that he lacked the specific intent to commit an assault. Reversal is unwarranted. See *Rockey*, *supra* at 76.

Defendant additionally contends that his trial counsel gave the jurors an improper, negative inference about defendant's case by indicating to the jurors that Coleman would testify for defendant and then failing to call her. Defendant contends that counsel should not have mentioned Coleman without first interviewing Coleman to determine what her potential testimony would be and determining for certain whether she would testify. We find no basis for reversal. First, counsel testified (1) that he made several attempts to locate Coleman but was unsuccessful; and (2) that in mentioning Coleman to the jury, he relied on defendant's representations that Coleman would testify favorably to the defense. Accordingly, counsel did not act unreasonably. See *Rockey*, *supra* at 76. Second, even assuming, arguendo, that counsel acted unreasonably in his attempts to locate Coleman and in his statement to the jury, defendant

cannot demonstrate prejudice. Indeed, the evidence against defendant was sufficiently strong that the mention of Coleman to the jury could not reasonably have affected the outcome of the case. See *Hoag, supra* at 6.

Defendant next claims that defense counsel unreasonably failed to impeach Borders with contradictory testimony from the preliminary examination. Borders testified at trial that he did not know defendant, personally, at the time of the offense and that there was no animosity between them. At the preliminary examination, however, Borders testified that one time after he had been in an accident, defendant stopped in the middle of the street, pointed, and laughed while making comments to the other driver such as "you should have hit him a little harder" and "you should have waited until he got out of his car and hit him." Defendant contends that counsel should have used this preliminary examination testimony to impeach Borders and imply that Borders had a reason to falsely accuse defendant of a crime.

Once again, defendant has failed to overcome the presumption that counsel's actions constituted sound trial strategy. Indeed, counsel testified that he decided not to impeach Borders with the testimony in question because he did not want the jury to consider that there was prior animosity between defendant and Borders, thus giving defendant a motive for wanting to assault Borders. This constituted sound trial strategy, especially since the prior exchange elicited during the preliminary examination involved defendant encouraging someone to hit Borders with a vehicle. Reversal is unwarranted. See generally *Rice, supra* at 445.

Finally, defendant claims that defense counsel should have objected – on grounds of improper opinion, conclusion, or speculation – to Keller's testimony that he "knew [defendant's driving] was a . . . deliberate action towards [Borders]." The testimony was as follows:

> What—What appeared to me is that [defendant] was aiming for [Borders] because once—once he was up in this area here, was when—you know, he had passed him; and then once he was up in this area here was when I heard, you know, it slammed into reverse and it was when he squealed his tires. So I knew it was a deliberate—a deliberate action towards him.
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> . . . once I saw him dart out of the way was when I knew that it was, you know, it wasn't – wasn't by accident . . . .

Defense counsel testified that he vaguely recalled the above testimony, and when asked why he failed to object to it, he stated that he may have thought about objecting but decided that he "didn't want to because that was going to come in, and I didn't want to make a bad impression in front of the jury, like I'm trying to stop the damning testimony from coming in that's going to come in, anyway." Thereafter, counsel noted that "it might have been another portion of the trial where I wanted to object. I'm not sure if it was that one."

The trial court determined that counsel's decision not to object was trial strategy:

> Well, first of all, [defense counsel] stated that—and we all know that objections are often waived for purposes of trial strategy so as not to appear to want to look like we're trying to—as [defense counsel] said, keep out the bad stuff or that you somehow have something to hide. So, again, it was trial strategy not to object.
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> And, moreover, as [the prosecuting attorney] said, I mean, there might be some things that failure to object, even though it's strategic or not, there might be some real harm in having the answer come out. This is a statement by a witness that's, apparently, speculating, "I know what his intent was." Everybody in this courtroom knows that he doesn't know what his intent is. Everybody knows that's simply an off-the-cuff opinion. I see absolutely no prejudice could visit upon the defendant because a witness said, "I know he intended to"—of course they know he doesn't know that. So it's an absolutely minor point, even if you assume that an objection should have been made.
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> But, of course, the Court would not substitute nor would it be proper to substitute the judgment of an attorney's trial strategy. And in this particular instance, the Court agrees with that strategy, even if I wanted to substitute my judgment for it.

We conclude that the trial court's assessment was correct. Defendant failed to establish that counsel's failure to object to Keller's testimony constituted deficient performance and that this failure prejudiced defendant's case. Accordingly, reversal is unwarranted. See *Rockey, supra* at 76-77, and *Hoag, supra* at 6.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter