STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2001
v	No. 217129 Monroe Circuit Court
STANLEY JOHN MAZURE, Defendant-Appellant.	LC No. 98-028898-FH

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of felonious assault, MCL 750.82; MSA 28.277, for which he was sentenced to 270 days in jail. We affirm.

This case arises out of an altercation occurring at the home of David and Deborah Loy. Defendant was driving behind Deborah and he continued to follow her as she pulled into her driveway. Defendant began yelling at Deborah while still sitting in his truck and, David Loy, hearing the commotion, came out of the house and approached defendant's truck. Defendant and David exchanged words and then began hitting each other through the truck window. At one point, defendant jumped out of the truck and the two continued to fight. Defendant then got back into his truck and began driving backwards. The open door of the truck hit David and dragged him several feet down the driveway. Defendant drove away, but police picked him up a short time later at a nearby party store.

Defendant's only claim on appeal is that he received ineffective assistance of counsel. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell 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. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of 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).

Defendant claims that defense counsel was ineffective for allowing the admission of evidence regarding defendant's intoxication and for using that evidence as a defense, even though it directly contradicted defendant's own testimony. Alternatively and inconsistently, defendant contends that defense counsel was ineffective for *failing* to investigate and present intoxication as a defense.

At trial, defendant testified that he did not consume any alcohol prior to his altercation with David Loy. In contrast, four witnesses, including the Loys and two police officers, testified that defendant appeared to be intoxicated and smelled like alcohol at or near the time of the incident. Both David and Deborah Loy testified that, during the confrontation, defendant slurred his words and was visibly drunk. Officer Mark Nieman testified that he encountered defendant at the party store minutes after the altercation and that defendant smelled of alcohol, slurred his speech and had an unsteady gait. When Officer Nieman returned with defendant to the scene, fifteen to twenty minutes after the fight, Deputy Ernest Green further questioned defendant about the incident and testified that defendant's speech was slurred and he smelled of alcohol. During cross-examination by defense counsel, Deputy Green testified that he administered a preliminary chemical breath test on defendant and that the test registered a .17. Deputy Green further testified that defendant admitted that he fought with David Loy, but could not remember hitting him.

Prior to the start of trial, during voir dire, defense counsel stated that some evidence might show that defendant was drinking, but that it was defendant's position that he was not. Further, during his opening statement, after the close of the prosecutor's proofs, defense counsel told the jury that defendant would testify that he had not been drinking before the fight. Defendant testified consistently with that position. However, even though defendant maintained that he was not intoxicated, he also testified that he could not remember anything that happened at the Loys' house, including any part of the fist fight or hitting David Loy with his truck. Defendant testified that the only time he consumed alcohol was after the fight when he drank a forty-ounce bottle of beer while at the party store. After the close of defendant's proofs, defense counsel requested a jury instruction on the intoxication defense which the trial court later gave. During closing arguments, defense counsel asserted that defendant could not form the intent required to find him guilty of felonious assault because he was intoxicated.

Defendant's claim that defense counsel was ineffective for *raising* the intoxication defense is not supported by the record. Defense counsel was in the unenviable position of defending a case in which the only viable defense, intoxication, was supported by the testimony of prosecution witnesses. Substantial testimony established that defendant had been drinking at or about the time of the incident though defendant denied it. Also, there was substantial evidence that defendant was intoxicated during the altercation and that the defendant was also the aggressor. It is unclear what defendant would have preferred defense counsel do in this situation. Defense counsel could not coach defendant to lie to bolster his defense, yet he could not abandon a viable defense that was supported by substantial testimony. Even now, on appeal, defendant appears to be unsure how the issue should have been handled because he argues inconsistently

that defense counsel should *not* have pursued the defense and that he should have done so more vigorously.

Were we to find that defense counsel erred by arguing diminished capacity even though it conflicted with defendant's testimony, there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Stanaway, supra*, 446 Mich 687-688. Without the intoxication defense, the best that defense counsel could have done would have been to downplay the conflicts between defendant's testimony and that of the four prosecution witnesses. However, the evidence that defendant committed the assault was overwhelming, particularly because defendant did not deny the fight and testified only that he could not remember anything that happened. Thus, had defense counsel not raised the intoxication defense, defendant would have been convicted based on the overwhelming evidence of his guilt on the assault charge.

Defendant's alternative claim that defense counsel was ineffective for *failing* to pursue an intoxication defense is simply disingenuous. Contrary to defendant's contention, the record reflects that defense counsel did pursue the intoxication defense at trial. While the record indicates an attempt to minimize the issue when defense counsel did not cross examine prosecution witnesses regarding their observations of defendant's visible drunkenness, this appears to have been trial strategy since the record also shows that defense counsel knew that defendant would maintain he had not been drinking. We will not second guess defense counsel's effort to minimize the damage of testimony that directly conflicted with defendant's own version of events. *Rice, supra*, 235 Mich App 445.

More importantly, however, defendant himself testified that he had not been drinking before the altercation that led to the assault charges. That is, while defendant claims on appeal that his counsel failed to properly prepare and present an intoxication defense, at trial, defendant stated unequivocally that he did not drink prior to the incident, but only afterwards. Defendant himself undermined this defense by testifying, truthfully or not, that he was not intoxicated during the altercation. Therefore, it would appear that defendant himself destroyed whatever defense he may have had and that defense counsel merely tried to salvage whatever defense was possible after his client's damaging admissions. Thus, the flaw in defendant's ineffective assistance of counsel claim is that defendant himself did considerably more to defeat his alleged defense of intoxication than anything his lawyer did or failed to do.

Accordingly, we find defendant's claims that defense counsel was ineffective for raising the intoxication defense and for failing to more vigorously pursue the intoxication defense without merit.[1]

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[1] We also find no merit to defendant's claim that defense counsel was ineffective for failing to provide timely notice of his plan to call defendant's treating physician as a witness. Because defense counsel did not give timely notice, defendant was unable to use his treating physician as a witness at trial. Defendant testified in detail about the extent of his injuries and photographs taken of defendant the day after the incident corroborated his testimony. Therefore, the physician's testimony would have been merely cumulative. Further, even if defendant's assertion

(continued…)

Affirmed.

/s/ Henry William Saad
/s/ Helene N. White
/s/ Joel P. Hoekstra

(…continued)

is correct that the doctor would have testified regarding a possible concussion that may have affected defendant's memory of the incident, nothing suggests that this evidence would have affected the outcome of the case. Therefore, even if defense counsel's failure to give timely notice constituted error, defendant has not shown that, absent the error, there was a reasonable probability the result of the proceedings would have been different. *Stanaway, supra*, 446 Mich 687-688. Thus, we find that any error in this regard was harmless.