

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CHARLES CARTWRIGHT,

Defendant-Appellant.

UNPUBLISHED

January 10, 2006

No. 254736

Wayne Circuit Court

LC No. 03-013309

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. He was also convicted of driving with a suspended license, MCL 257.904(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant went over to his former girlfriend’s house, entered without permission, and found her in her bedroom, on the bed with another man, the victim. Defendant’s young child with his former girlfriend was nearby. Defendant was angry and, when the victim would not leave, went to the kitchen and got a knife. A fight ensued and defendant cut the victim’s arm and held the knife to the victim’s throat. The victim also cut his thumb in an attempt to remove the knife and received other scratches during the fight.

Defendant argues that his counsel was ineffective for failing to raise the defenses of self-defense and accident. Because defendant did not raise this issue at the trial court level in a motion for a new trial or evidentiary hearing, this Court’s review is limited to those mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant first argues that his counsel’s performance was so deficient as to constructively deny him counsel. The Michigan Supreme Court recognized the possibility of a constructive denial of the right to counsel in *People v Mitchell*, 454 Mich 145, 153-154; 560 NW2d 600 (1997), and that in such a case, prejudice would be presumed. Although defendant argues that his counsel provided no defense, our review of the record reveals that defense counsel knowledgeably and aggressively cross-examined the eyewitnesses, recalled a prosecution witness, called a defense witness to impeach an eyewitness’s testimony, and ably examined defendant. Therefore, defense counsel’s performance was not a constructive denial of the right to counsel. Because defendant did not establish constructive denial of counsel, he must establish that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and 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, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's primary argument is that his counsel failed to argue self-defense or accident. However, it is clear from defense counsel's opening statement, cross-examination of prosecution witnesses, calling of an impeachment witness, and questioning of defendant, that the defense to the assault charge was self-defense and accident. Even if defense counsel's performance fell below an objective standard of reasonableness because defense counsel did not use the words "self-defense" or "accident," defendant was not prejudiced by the performance. The case was tried to the bench and the trial court made specific findings of fact. The trial court stated that it did not believe the whole of the testimony from the former girlfriend, the victim, or defendant, but that, based on the testimony, demeanor of the witnesses, and its assessment of their credibility, it found that defendant was the one who got the knife, that defendant threatened the victim with the knife, and that defendant did so because he was angry and wanted to scare the victim. The trial court found that the victim was injured when he grabbed the knife in a defensive way and that the victim had the right to defend himself. The trial court's findings recognize that, generally, a defendant may not claim self-defense where he used excessive force or was the initial aggressor. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Because of the trial court's specific findings, it is apparent that defendant was not prejudiced by his counsel's failure to specifically use the words self-defense or accident. Therefore, defendant did not establish ineffective assistance of counsel on the record before this Court.

Defendant next claims that the evidence was insufficient to support his conviction for felonious assault, and that, because felonious assault was an element of first degree home invasion, the evidence was therefore also insufficient to support that conviction. We review sufficiency of the evidence issues de novo in the light most favorable to the prosecution to determine whether a rational trier of the fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "The elements of felonious assault are 1) an assault, 2) with a dangerous weapon, and 3) with the intent to injure or place the victim in a reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The victim and defendant's former girlfriend testified that defendant assaulted the victim with a knife, a dangerous weapon. There was also circumstantial evidence to support an intent to injure the victim or, at the least, place the victim in a reasonable apprehension of an immediate battery where there was testimony that defendant held a knife to the victim's throat and applied pressure. The victim testified that he had to use all of his strength to remove the knife from his throat and, in the process of doing so, cut his thumb. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence of felonious assault.

Defendant argues, however, that the evidence was insufficient where he presented evidence of self-defense. Once a defendant introduces evidence of self-defense, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). There is no requirement that the prosecution bear this burden by calling rebuttal witnesses or presenting additional testimony. Instead, the prosecution may rely on evidence presented during its case in

chief to meet this burden. Viewing the evidence in a light most favorable to the prosecution, the testimony of the victim and defendant's former girlfriend would have to be believed over defendant's testimony and, therefore, the prosecution met its burden of proving beyond a reasonable doubt that defendant did not act in self-defense.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

/s/ Michael J. Talbot