

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CIARA DAWKINS,

Defendant-Appellant.

UNPUBLISHED

December 22, 2009

No. 289065

Wayne Circuit Court

LC No. 08-006728-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felon (felony firearm), MCL 750.227b. The trial court sentenced defendant to two years' imprisonment for the felony firearm conviction and four years' probation for the felonious assault conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that there was insufficient evidence upon which to convict her of either offense. This Court reviews 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 reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). The elements of assault are that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of an immediate battery. *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001). Finally, "the elements of felony firearm are that the defendant possessed a firearm during the commission, or attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Viewing the evidence in a light most favorable to the prosecution, the elements of these offenses were established by the testimony of the victim and corroborated by the other prosecution witness. The victim testified that, after two physical altercations with defendant, defendant returned, pointed a handgun at her, and fired the gun twice. A prosecution witness also testified that defendant pointed a gun at the victim and fired it twice. Both testified that,

after the incident, there was a bullet hole in the victim's car that had not been there before. This testimony establishes the offense of felonious assault: that defendant committed an assault, with a handgun, with the intent to injury or place the victim in reasonable apprehension of an immediate battery. *Chambers, supra* at 8. Evidence that defendant used a handgun in the commission of felonious assault also established the offense of felony firearm. *Avant, supra* at 505.

Finally, it must be noted that when reviewing sufficiency of evidence claims, this Court must make all reasonable inferences and resolve all credibility issues in favor of the jury verdict. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Defendant's arguments that sufficient evidence was not presented are arguments against the credibility of the prosecution's witnesses. There was sufficient evidence of felonious assault and felony firearm such that a rational trier of fact could find that the essential elements were proven beyond a reasonable doubt.

Next, defendant argues that her counsel was ineffective for several reasons. To establish ineffective assistance of counsel, a defendant must establish that 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; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first argues that trial counsel was ineffective for failing to object to the admission of the prosecution's exhibits, which were photographs of a bullet hole in the victim's car. Counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). The victim testified that the photographs were of her vehicle and showed damage to her vehicle that was not present before defendant fired shots at her. The photographs were admissible under MRE 401 and 402 because they were relevant; the pictures had a tendency to make the fact that defendant shot a gun at the victim's car more probable than it would have been without the evidence. Therefore, it would have been futile for trial counsel to object to their admission, and trial counsel was not ineffective for failing to do so.

Defendant also argues that trial counsel was ineffective for failing to object to testimony by Investigator Castelow that the hole in the car was, in fact, a bullet hole, because Investigator Castelow was not qualified as an expert. Again, counsel is not required to advocate a meritless position. *Riley, supra* at 142. Investigator Castelow's testimony did not include scientific or technical information regarding the type of gun used or the type of bullet used, such that an expert would be required by MRE 702, but was limited to a simple recognition that there was a bullet hole in the car door. Because the testimony was not scientific or technical in nature, objecting to this testimony would have been futile, and counsel's performance did not fall below an objective standard of reasonableness when he failed to do so.

Defendant lastly contends that trial counsel was ineffective for failing to subpoena Officer Bastine, the station officer who took the victim's report on the night of the shooting, because his testimony would have been favorable to defendant. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). There is no reason to believe that Officer Bastine's testimony would have been favorable to defendant. Further, the prosecution subpoenaed Officer Bastine, and Officer Bastine failed to appear at trial. There is also no indication that Officer Bastine

would have been more likely to appear for defendant's subpoena than for the prosecution's subpoena. Trial counsel's failure to subpoena Officer Bastine did not deprive defendant of the effective assistance of counsel.

Finally, defendant argues that the trial court erred by failing to instruct the jury that, if the jury found that a BB gun or air rifle caused the bullet hole in the car, then a firearm did not cause the damage. However, defendant waived appellate review of claims of error in the jury instructions by affirmatively agreeing to the instructions given. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Further, we find that the instruction given regarding the definition of a firearm was sufficient, and further instruction would have been cumulative and not supported by the evidence.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder