

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 17, 2017

v

MARCO AARON NICHOLS,  
  
Defendant-Appellant.

No. 333668  
Kalamazoo Circuit Court  
LC No. 2015-01811-FH

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Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant was convicted of assault with a dangerous weapon (felonious assault), MCL 750.82, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to one to four years' imprisonment for the felonious assault conviction, one to five years' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

I. FACTS AND PROCEDURE

Defendant was acquainted with the victim, Katherine Littell, as she was the foster mother of defendant's girlfriend, Lillyann ("Lilly") Ellison. Defendant, Ellison, and their two young children moved in with the victim in November 2015, for approximately one month. When the couple moved out of the victim's home, defendant and Ellison left some of their belongings in the victim's basement.

In December 2015, the victim called Ellison and asked when she and defendant would be able to collect their items. Ellison stated that it was unlikely that defendant would be able to move the items that evening, but for the victim to call and ask defendant herself. The victim called defendant and requested he help them move his belongings that evening.

Defendant showed up later that evening to remove his belongings. He was visibly upset that he had to help move the items and the victim testified that he was "vulgar" and that he called her names. The victim's husband told defendant to leave and walked him out. The victim followed defendant to his car.

The victim's husband observed the entire incident and saw defendant yell at his wife that she was a "stupid bitch" and to "back up" as he had his children in the car. He testified that his wife did not threaten defendant in any way, but that he then saw defendant pull out a gun from underneath his waistband. Defendant then left in his car and the victim called the police. Defendant and his motor vehicle were located by police officers and defendant was detained. Two firearms were discovered in his vehicle.

After the prosecution concluded with its case in chief, and outside the presence of the jury, defense counsel called one preliminary witness, Ellison. She testified that the victim was rude and angry on the phone prior to the incident. Defense counsel argued that Ellison's testimony should be presented to the jury for credibility purposes. The trial court denied the request to have the jury hear Ellison's testimony, and noted that it was "hearsay" and irrelevant as the witness was not able to testify to what occurred at the scene of the incident. The defense attorney offered no other witnesses. When asked by the court, defendant did not object when his attorney stated he would not be testifying.

Defendant filed a motion for a new trial or a *Ginther*<sup>1</sup> hearing claiming ineffective assistance of counsel. At the motion hearing, defendant's appellate attorney argued that the defense attorney at trial had two witnesses that could have testified to the victim uttering a racial slur and spitting on defendant during the incident—one of the witnesses being defendant himself. Defense counsel further argued that Ellison could have testified to the allegations regarding the victim's behavior. Defendant presented an affidavit by Ellison stating that she had spoken to the victim and her husband after the incident and they told her that they had followed defendant out to his car, spit on him, and called him a racial epithet. It also states that she was available as a witness, but defense counsel never questioned her about these allegations despite being aware of them.

The trial court denied the motion and concluded that the verdict would not have been different if another witness was called or other evidence was presented.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that the lower court abused its discretion in denying his motion for a new trial or *Ginther* hearing. He maintains that he was denied his constitutional right to the effective assistance of counsel when his counsel did not offer evidence to present a self-defense argument.

A trial court's decision to deny an evidentiary hearing is reviewed for an abuse of discretion. *People v Danto*, 294 Mich App 596, 613-614; 822 NW2d 600 (2011). A trial court has abused its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). The facts supporting the denial of an evidentiary hearing are reviewed for clear error, and the application

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of the law to those facts is reviewed de novo. *People v Martin*, 271 Mich App 280, 309-310; 721 NW2d 815 (2006), aff'd 482 Mich 85 (2008).

Whether a defendant received ineffective assistance of trial counsel is a mixed question of fact and law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). The trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 47.

The Sixth Amendment to the United States Constitution and Article 1, § 20 of Michigan's 1963 Constitution guarantee the right to have assistance of counsel in all criminal prosecutions. These provisions require "not merely the provision of counsel to the accused, but '[a]ssistance,' which is to be 'for his defense.'" *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Essentially, when representing a criminal defendant, counsel has the basic duty "to advocate the defendant's cause." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). If no assistance has been provided, defendant's constitutional guarantee has been violated. *Id.* There is a presumption of sound trial strategy and that defendant received reasonable professional assistance. *Id.* at 689. Accordingly, judicial scrutiny is to be highly deferential. *Id.*

To prove his counsel was ineffective, defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability the outcome would have been different. *Id.* at 688, 691. The second part of this test must establish that defendant was unfairly prejudiced by defense counsel's errors. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). Defendant has the burden of pointing out the acts or omissions of defense counsel that are to be considered unreasonable professional judgment. *Strickland*, 466 US at 690. The court will then decide whether the acts or omissions satisfy the *Strickland* test. *Id.*

In making this determination, the Court cautioned that "intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.* Thus, this Court will defer to defense counsel's decisions when found to be objectively reasonable. *Id.* at 689. Reasonableness of performance must be judged on the facts of the case viewed at the time of counsel's conduct, and this Court must make every effort to evaluate conduct from counsel's perspective. *Id.* at 689-690.

Defendant argues that defense counsel's performance was deficient as he presented no evidence and no case. This argument fails, as the record does not include any acts or omissions by defense counsel that could be considered the exercise of unreasonable professional judgment.

The decision whether to call a witness is typically a matter of trial strategy and, thus, will not fall below an objective standard of reasonableness unless it deprived defendant of a substantial defense. *People v Carbin*, 463 Mich 590, 602; 623 NW2d 884 (2001). Defendant claims he was not called as a witness and was consequently deprived of the ability to present a self-defense argument. However, given the evidence and defendant's admission on the record that he did not want to testify at trial, this Court will defer to defense counsel's decision and attribute it to trial strategy.

Importantly, defendant's proposed testimony of the victim spitting on him and calling him a racial epithet would not have detracted from the fact that defendant brandished a loaded gun in front of the victim. Although defendant argues his testimony would show that he was trying to protect his children from the victim, it can be inferred from the victim's testimony that defendant told the victim to back up as he had children in the car. Further, testimony in that regard by defendant would have been unnecessary.

A decision to forgo investigating the credibility of a witness, when a case turns on credibility, can fall below an objective standard of reasonableness. *Trakhtenberg*, 493 Mich at 54. In *Trakhtenberg*, the Court held that defense counsel made the "decision to forgo an investigation" by failing to interview a witness and adequately cross-examine the complainant. *Id.* at 54. Since the case turned on credibility, this was not "a sound defense strategy" and fell below what is considered to be acceptable assistance. *Id.* at 55.

Defendant argues that if defense counsel had adequately questioned Ellison in conjunction with having defendant testify, it would have shown that the testimony of the victim was not credible. He asserts that this performance was deficient. However, unlike in *Trakhtenberg* where the Court held counsel's performance to be deficient because of a failure to investigate, here, defense counsel did investigate the credibility of the victim. He presented Ellison at trial for credibility purposes to impeach the victim. It was the trial court's decision, not defense counsel's decision, that precluded Ellison from testifying at trial.

Ellison's affidavit confirms that defense counsel did make an adequate investigation. It states that Ellison had spoken to the victim and her husband after the incident and they had told her that the victim had followed defendant out to his car, spit on him, and called him a racial epithet. The affidavit also states that defense counsel knew about what the victim had allegedly told Ellison after the incident. This demonstrates that defense counsel did know of defendant being spit on and called a racial epithet, but made the decision not to question Ellison about it at trial. Since counsel has a duty to make reasonable decisions that make particular investigations unnecessary, *Strickland*, 466 US at 691, it was within counsel's discretion to decide whether the evidence was substantial and relevant for trial. His investigation was sufficient and the decisions he made were a matter of trial strategy. It did not fall below an objective standard of reasonableness.

Turning to the prejudice prong of the *Strickland* test, defendant argues that but for defense counsel's performance in failing to have defendant and Ellison testify, and accordingly failing to present a claim of self-defense, there is a probability that the outcome of the trial would have been different. Based on the record, this argument also fails.

To prove prejudice, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* A defendant must affirmatively prove prejudice and must show "that they actually had an adverse effect on the defense." *Id.* at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceedings . . . [as] virtually every act or omission of counsel would meet that test[.]" *Id.*

In *Pickens*, 446 Mich at 328, the defendant argued that defense counsel's failure to properly pursue a defense deprived him of his right to assistance of counsel. The Court held that defendant was not denied the effective assistance of counsel and reasoned that although this was "inexcusable neglect" on counsel's part, no evidence had been presented that showed a reasonable probability that the defense would have altered the result of the proceeding. *Id.* at 327.

As in *Pickens*, the failure to present self-defense did not prejudice defendant. When non-deadly force is used and an individual wants to assert self-defense, the individual must be somewhere where he or she has:

the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972(2).]

The prosecution argues that defendant could not have honestly and reasonably believed that such use of force was necessary because even if defendant felt threatened, there were ways he could have protected himself and his family other than pulling out a loaded gun. The prosecution is correct. Although it is conceivable to feel threatened if one is being yelled at and spit on, these circumstances would not entail the imminent unlawful use of force such that defendant would justifiably pull out a gun.

Ellison's proposed testimony does not introduce doubt to whether defendant pulled out a loaded gun on victim and made her feel threatened. Testimony regarding uttering a racial epithet and spitting would not sway a rational trier of fact to find differently on this matter. Thus, defendant cannot prove that he was prejudiced. The lower court did not abuse its discretion and properly denied defendant's motion for new trial or *Ginther* hearing.

### III. SUFFICIENCY OF EVIDENCE

Defendant next argues that the evidence before the jury was insufficient to convict him of felonious assault. Specifically, defendant contends that the victim was aggressive and threatening and that he had a right to defend himself and his young children from her.

Sufficient evidence must support a guilty verdict in order to protect a criminal defendant's due process rights. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Whether sufficient evidence has been presented to convict a defendant beyond a reasonable doubt is a question of law that is reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court must assess whether the evidence, viewed in the light most favorable to the prosecution, permits a reasonable juror to find the defendant guilty beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Both circumstantial evidence and reasonable inferences that arise from the evidence can prove the elements of the crime. *Id.* at 400.

An appellate court must review factual conflicts in a light favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The weight of the evidence and

credibility of witnesses are questions for the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

The Michigan felonious assault statute provides, in relevant part:

Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both. [MCL 750.82(1).]

“An assault is an attempted battery or ‘an unlawful act which places another in reasonable apprehension of receiving an *immediate* battery.’ ” *People v Fordham*, 132 Mich App 70, 74; 346 NW2d 899 (1984), rev’d on other grounds by 419 Mich 874 (1984) (citation omitted).

Accordingly, the prosecutor needed to establish beyond a reasonable doubt that there was “(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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The evidence at trial was sufficient to prove all elements of felonious assault, as it showed that defendant was angry at the victim and pulled out a gun in the victim’s presence. The victim’s husband testified that defendant was attempting to intimidate the victim, and the victim’s testimony indicated that she felt scared and threatened. Accordingly, viewed in the light most favorable to the prosecution, the record demonstrates there was sufficient evidence before the jury to prove all elements of felonious assault beyond a reasonable doubt.

Affirmed.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ Jane E. Markey