STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2019
v	No. 345104 Wayne Circuit Court
KENNY BERNARD WALLS Defendant-Appellant.	LC No. 18-000988-01-FH

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of felonious assault, MCL 750.82, for which defendant was sentenced to one year of probation. On appeal, defendant argues that the evidence presented was insufficient to sustain his felonious assault conviction because (1) the prosecutor failed to prove the intent element, (2) his conviction was contrary to the great weight of the evidence, and (3) he was denied his right to the effective assistance of counsel because defense counsel failed to seek admission of defendant's 911 telephone call into evidence. We affirm.

I. FACTS

On January 21, 2018, Tahirah Beverly (Tahirah) and Tahirah's son, Daryon Beverly-Thompson (Thompson), were at a house Tahirah purchased because a pipe burst and caused flooding. At that time, Tahirah was not residing at the property. Tahirah's brother and cousin had been cleaning up Tahirah's property, and were placing objects on the curb in front of her house when defendant stopped by. Defendant claimed that he worked part-time for a charity group that had office space and files inside of Tahirah's house, and that equipment belonging to his charity group was still in the house. Defendant asserted that he stopped by to find out whether Tahirah changed the locks, and to retrieve whatever objects belonging to defendant and his charity group that had been placed on the curb. Defendant threatened to sue Tahirah, and said that he was going to return to the property to destroy it.

When defendant and defendant's passenger, Brandon Alan Anderson (Anderson), returned to Tahirah's property later on that evening, defendant parked his van in the middle of

the street, jumped out of his van, and threatened Tahirah. Thompson heard defendant call his mother a "b***h," and attempted to attack defendant. According to Tahirah and Thompson, defendant reentered the driver's side of his van, stated that he had something in store for them, drove his van in reverse at a fast speed onto Tahirah's property, and tried to run Tahirah and Thompson over with his van. To avoid being hit by defendant's van, Tahirah shoved Thompson behind a cast iron tub, which was situated on the patch of grass between the sidewalk and curb of the street. Tahirah also hid behind that tub. Instead of striking Tahirah and Thompson, defendant's van collided into the cast iron tub. Defendant telephoned 911, and stated that unidentified individuals at the house had guns.

Detroit police officer Alexander Pettit testified that he and his partner, Officer Dominika Majda, received a 911 call about a felonious assault with a dangerous weapon in progress, and that the dangerous weapon was a van. When Officers Pettit and Majda arrived at Tahirah's property, Officer Pettit observed defendant and several other people standing in the street yelling. Tahirah told Officer Pettit that she hid behind the tub to avoid being hit by defendant's van.

The trial court found that a relevant question concerned defendant's state of mind when he backed his van onto the sidewalk and struck the cast iron tub. The trial court recognized that defendant's own witness, Anderson, testified that defendant backed up and hit the cast iron tub. The trial court also stated that it might have been able to better determine the veracity of the witnesses had the parties submitted evidence of defendant's 911 call. Notwithstanding, the trial court stated that evidence established that defendant backed up his van and tried to hit Tahirah and Thompson, fulfilling the elements of felonious assault.

II. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the evidence presented in the trial court was insufficient to sustain his felonious assault conviction because the prosecutor failed to prove the intent element of the felonious assault offense. Defendant also asserts that his conviction was contrary to the great weight of the evidence.

"This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial." *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law." *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). "Constitutional questions are reviewed de novo[.]" *People v Hoang*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 336746); slip op at 8.

"Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). The evidence is viewed "in the light most favorable to the prosecution," to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id*. "[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime." *Id*. (quotation marks and citation omitted). On appeal, "[t]his Court will not interfere with the trier of fact's role of

determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "Unpreserved challenges to the great weight of the evidence are reviewed for plain error affecting the defendant's substantial rights." *People v Lopez*, 305 Mich App 686, 695; 854 NW2d 205 (2014). Because defendant's great weight of the evidence argument is unpreserved, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. The third aspect of the plain error test requires a showing of prejudice. *Id*. Reversal is warranted only where the plain error leads to "the conviction of an actually innocent defendant," or affects the "fairness, integrity, or public reputation" of the judicial proceeding. *Id*. at 763 (quotation marks and citation omitted). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *Unger*, 278 Mich App at 232. "Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Id*.

Felonious assault has three elements: "(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 felonious assault statute, MCL 750.82, states, in relevant part:

> (1) 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.

Defendant only challenges the third element of intent, arguing that he did not intend to hit Tahirah and Thompson with his van. Because the plain language of the third element uses the disjunctive term "or," *Avant*, 235 Mich App at 505, the prosecution need not establish both an intent to injure and an intent to place Tahirah and Thompson in reasonable apprehension of an immediate battery. See *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011) (use of the term "or" establishes an alternative). Thus, defendant's intent must have been either an intent to injure Tahirah and Thompson, or an intent to place Tahirah and Thompson in reasonable apprehension of an immediate battery.

Although defendant denied attempting to hit Tahirah and Thompson with his van, "[a] trier of fact can infer a defendant's intent from his words, acts, means, or the manner used to commit the offense." *People v Harrison*, 283 Mich App 374, 382; 768 NW2d 98 (2009). An

automobile can be considered a "dangerous weapon" under the felonious assault statute. *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984). Defendant's intent to place Tahirah and Thompson in reasonable apprehension of receiving an immediate battery is evidenced by defendant's statement to Tahirah and Thompson—that he had something in store for them—in addition to defendant's act, immediately after making that statement, of driving his van in reverse at a fast speed over the curb and onto the sidewalk, toward Tahirah and Thompson. *Harrison*, 283 Mich App at 382. Thus, the prosecution proved that defendant intended to place Tahirah and Thompson in reasonable apprehension of an immediate battery.[1] Thus, a reasonable inference can be made that defendant intended to strike and injure Tahirah and Thompson, rather than strike the cast iron tub. *Harverson*, 291 Mich App at 175. "Minimal circumstantial evidence and reasonable inferences can sufficiently prove the defendant's state of mind, knowledge, or intent." *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the intent element of felonious assault was proven beyond a reasonable doubt.

Defendant's conviction of felonious assault was supported by sufficient evidence and was not contrary to the great weight of the evidence. Specifically, defendant asserts that the court's findings were against the great weight of the evidence because there was evidence that he could not physically see what was behind his van when he allegedly reversed his van over the curb, and because he was acting in self-defense.

On appeal, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619. The trial court did not appear to credit defendant's testimony about not being able to see what was behind him, considering that the trial court did not mention this point when it stated its findings of fact and conclusions of law. Besides defendant's testimony that his van did not have a window in the back, no evidence exists to establish that defendant was unable to see behind him when backing up. And, as we have recounted, there was sufficient evidence that defendant intended to use the van to harm the victims. Therefore, the evidence did not preponderate so heavily against the trial court's verdict "that it would be a miscarriage of justice to allow the verdict to stand." *Unger*, 278 Mich App at 232.

Defendant's blanket assertion of self-defense is also unavailing because defendant relies on the trial court's statements out of context. The trial court said:

> [I]f I look at what I'm left with there's really only one conclusion that I can reach and that is that you did, in fact, put that vehicle in reverse and backed up trying to hit those people. And I think you may have thought that you were doing it to

[1] Although the prosecution was not required to also prove that defendant intended to injure Tahirah and Thompson, see *Kowalski*, 489 Mich at 499, defendant's intent to injure is evidenced by the act of driving his van into the area where Tahirah and Thompson stood, which was approximately one foot from the cast iron tub, which defendant struck with his van. *Harrison*, 283 Mich App at 382.

defend yourself because they had guns pointed at you, but that's not what you do. You're in your car, even if they have guns pointed at you[,] you drive off.

The trial court discounted defendant's credibility by stating that it believed that defendant's behavior escalated the situation, and that "[t]here's just no way that backing up in a hurry to get away that you could back up that far onto the sidewalk." The trial court was in the best position to determine defendant's credibility, *Kanaan*, 278 Mich App at 619, and therefore, even if defendant was trying to get away from the men who allegedly brandished and pointed guns, defendant's self-defense theory fails under MCL 780.972 (right to use force in self-defense).

The evidence at trial did not heavily preponderate against the trial court's findings, and defendant has failed to demonstrate any plain error. Accordingly, defendant's great weight of the evidence argument fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied his right to the effective assistance of counsel because defense counsel failed to seek admission into evidence of defendant's 911 telephone call.

To preserve an ineffective assistance of counsel argument, a defendant must move for a new trial or a *Ginther*[2] hearing in the trial court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or a *Ginther* hearing in the trial court. Thus, defendant's ineffective assistance of counsel argument is unpreserved. *Id*.

This Court reviews an unpreserved ineffective assistance of counsel argument for errors apparent on the record. *Hoang*, ___ Mich App at ___; slip op at 8-9. "Generally, an ineffective-assistance-of-counsel claim presents a mixed question of fact and constitutional law." *Id*. at ___; slip op at 8 (quotation marks and citation omitted). "Constitutional questions are reviewed de novo[.]" *Id*. at ___; slip op at 8. "[F]indings of fact are reviewed for clear error." *Id*. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Lanzo Const Co*, 272 Mich App at 473.

The Sixth Amendment states, in relevant part: "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence [sic]." US Const, Am VI. " 'The right to counsel guaranteed by the Michigan Constitution is generally the same as that guaranteed by the Sixth Amendment; absent a compelling reason to afford greater protection under the Michigan Constitution, the right to counsel provisions will be construed to afford the same protections.' " *Hoang*, ___ Mich App at ___; slip op at 4, quoting *People v Marsack*, 231 Mich App 364, 373; 586 NW2d 234 (1998). To prevail, a defendant must show "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In satisfying the first prong, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness[.]" *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Ackley*, 497 Mich 381, 388; 870 NW2d 858 (2015), citing *Trakhtenberg*, 493 Mich at 52, citing *Strickland*, 466 US at 689 (quotation marks omitted). However, "a court cannot insulate the review of counsel's performance by calling it trial strategy; counsel's strategy must be sound, and the decisions as to it objectively reasonable." *Ackley*, 497 Mich at 388-389, citing *Trakhtenberg*, 493 Mich at 52 (quotation marks omitted).

There is no dispute that defendant telephoned the 911 operator during these events. In support of his ineffective assistance of counsel argument, defendant only asserts that the trial court noted in its ruling that it may have been helpful to the defense had defendant presented the 911 call, so that the trial court could have had an indication of defendant's demeanor at the time to ascertain his intent.

Defendant's contention is undermined by the trial court's full statement acknowledging that neither the prosecution nor defense counsel admitted the 911 call into evidence, which could have helped the court determine the veracity of the witnesses. While the trial court stated that defendant's 911 call could have been helpful to the defense, the trial court's statement, in its full context, also infers that defendant's 911 call could have been helpful to the prosecution, and harmful to defendant.

Furthermore, defendant provides no evidence to indicate whether defense counsel reviewed defendant's 911 call, and if he did, why the call was not proffered as evidence. Thus, defendant has not established any factual predicate for his argument. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Notwithstanding, if defense counsel did review defendant's 911 call, then defense counsel may have reasonably decided against admitting the call into evidence because it may have weighed against defendant's credibility. *People v Vaughn,* 491 Mich 642, 670; 821 NW2d 288 (2012). Thus, defendant has not presented any evidence to negate the presumption that defense counsel's decision to not present defendant's 911 call was presumptively a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In addition, to establish ineffective assistance of counsel "a defendant must show that . . . (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. Assuming defense counsel should have reviewed and moved to admit the 911 call into evidence, defendant failed to describe his demeanor at the time that he called 911, or argue how his demeanor could have led to a different outcome. Furthermore, defendant had already retreated to his van, a place of safety, before he drove the van in reverse and struck the tub, where Tahirah and Thompson had been standing. The trial court ruled that defendant was required to retreat to a place of safety because defendant was somewhere he did not have a lawful right to be. Thus, even if defendant would have sounded "afraid" at the time he called 911, there was no legitimate reason for defendant's action,

considering that he had already withdrawn to a place of safety. Because defendant has failed to establish that but for defense counsel's alleged error, he would not have been convicted of felonious assault, defendant has not demonstrated that he was denied the effective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher