STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2011
v	No. 298150 Wayne Circuit Court
CHESTER RONALD HALL, Defendant-Appellant.	LC No. 09-030046-FH

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction of felonious assault, MCL 750.82. The trial court sentenced defendant as a fourth habitual offender, MCL 769.1, to 4 to 15 years in prison. We affirm.

I. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence to prove the elements of felonious assault and that the verdict was against the great weight of the evidence. "We review de novo challenges to the sufficiency of evidence in criminal trials to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proved beyond a reasonable doubt." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). "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 Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).[1]

[1] A new trial is not justified merely on the basis that testimony conflicts to some extent. *Id.* at 219. We will not set aside a trial court's findings of fact unless they are clearly erroneous. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "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." *Id.* We also "will not interfere with

The trial court found defendant guilty of felonious assault pursuant to MCL 750.82, which provides, in relevant part:

> [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).]

"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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (quotation marks and citations omitted). Defendant emphasizes that "assault" has also been defined to include the offender's "'apparent present ability to effectuate the attempt [to injure] if not prevented.'" *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940).

Defendant claims that the prosecutor presented insufficient evidence to prove that he assaulted the complainant because he presented evidence that the complainant instigated the fight and that defendant was never physically close enough to stab the complainant with the knife he allegedly had at the scene. The record reflects that the trial court generally credited each of the prosecution witnesses including the complainant, who testified that defendant came within an arm's length of the complainant and the complainant's girlfriend. The prosecution witnesses also testified that defendant advanced toward the complainant with a knife drawn, saying he would kill or "get" the complainant. Physical evidence also confirmed that defendant had a knife—police officers discovered a Kershaw knife sheath on defendant's shin and, at the scene of the fight, they found a Kershaw knife that fit the sheath. Further, to the extent defendant contends that he was not the first aggressor, the court was free to believe the testimony of other witnesses who stated that defendant threatened the complainant before the complainant said anything or took any action. Moreover, although both men took part in the ensuing verbal altercation, it is undisputed that the complainant was unarmed. Evidence also showed that, once the complainant saw the knife, he stopped making comments and began backing away because he was scared. We further note that the precise distance between the men is not critical. Though the complainant and his girlfriend testified that defendant was much closer, it appears defendant at least concedes that he may have been within ten feet of the complainant. At either distance, the court could reasonably conclude that the complainant was in imminent danger of being stabbed by defendant.

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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); MCR 2.613(C).

On the basis of the evidence, the trial court reasonably ruled that defendant had a knife, which qualifies as a dangerous weapon under MCL 750.82(1). Further, because evidence showed that defendant advanced toward the complainant with a knife and stated that he would kill the complainant, the court could infer that defendant, at a minimum, intended to "inflict great bodily harm less than murder," MCL 750.82(1), and intended to "injure or place the victim in reasonable apprehension of an immediate battery," *Avant*, 235 Mich App at 505. Finally, because evidence showed that defendant was in close proximity to the complainant, the complainant's apprehension of being stabbed was reasonable and defendant had the "'apparent present ability to effectuate the attempt [to injure] if not prevented,'" *Bryant*, 80 Mich App at 433, quoting *Tinkler* 295 Mich at 401. Accordingly, the evidence was sufficient to prove each element of felonious assault.

For similar reasons, the court's verdict was not against the great weight of the evidence. As the prosecution stressed in closing, the trial was primarily a credibility contest between the parties' witnesses. It was the trial court's role to determine the weight and credibility of the testimony. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008); MCR 2.613(C). The court specifically observed that, in light of the "overwhelming evidence" that defendant had a knife, the defense witnesses were "denying the obvious" by saying he did not have a knife, which ultimately undermined their credibility on other issues. Further, as the court noted, Ryan Curcio—who was the only witness unacquainted with either defendant or the complainant—supported the prosecution's case. Clearly, the evidence did not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219.

II. ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel because his lawyer indicated that she could not properly represent defendant, but the court denied her motion to withdraw.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). An appellate court reviews the trial court's factual findings for clear error. *Id.* A defendant seeking a new trial on the basis that he or she was denied the effective assistance of counsel must show: "(1) the performance of his [or her] counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).[2]

[2] The defendant bears a heavy burden of proof, *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009), and must overcome a strong presumption that counsel's decisions constituted a

The conflict between defendant and counsel appears to have arisen just before trial. Defendant complained that counsel told certain defense witnesses that a police officer could question them before they took the stand. Defendant apparently found this practice unfair, although the attorneys and the trial judge confirmed that it was permissible. Defendant does not argue that he was prejudiced by this practice; indeed, the prosecution confirmed that the witnesses were not actually questioned. Rather, he cites defense counsel's statements that, because defendant accused her of "working with the prosecution," she could not communicate with defendant before trial and could not represent him to the best of her ability.

In denying counsel's motion to withdraw, the trial judge observed that witnesses were ready to proceed and that delaying trial would be very disruptive. Counsel conceded that she was able to communicate with defendant and that this was the first time she heard that he was dissatisfied. The record reflects that counsel provided defendant with more than adequate representation. As the trial judge observed at the hearing on defendant's motion for a new trial, counsel put defendant's "best foot forward" and he "d[id]n't know what she or any other lawyer could have done to save this defendant from the inevitable conclusion. And if they weren't getting along at the beginning of the trial, well, that's frequently the case here." Despite counsel's initial reluctance, defendant has not shown that she performed below an objective standard of reasonableness.

Defendant has also failed to show that counsel's performance prejudiced him in any respect. There is no evidence that counsel's initial concerns affected the outcome of the trial. Accordingly, the court also did not abuse its discretion in denying defendant's motion for a new trial on this basis. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Defendant argues that counsel also provided ineffective assistance by failing to call a witness who worked at the bar where the altercation took place. In an affidavit, defendant states: "I had an employee of the bar who was willing to be a witness, who had never met me prior to the incident, but my attorney said we did not need him." At the hearing on defendant's motion for a new trial, defendant's appellate counsel stated that he was unable to reach the witness, but defendant believed he would testify that defendant was not the aggressor and was not close enough to the complainant to place him in fear of an imminent battery.

The trial judge assumed for purposes of the motion that defendant gave his trial attorney the employee's name, but he noted that, for all the court knew, "she had no better luck contacting him" than did the appellate attorney. In any event, the court ruled that the employee's testimony would not have affected the outcome of the case. Therefore, the court ruled that counsel was not ineffective and an evidentiary hearing on the matter was unnecessary.

We agree with the trial court. Were we to assume that the employee would testify as defendant claims, defendant never asserts—let alone provides an affidavit from the employee

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sound trial strategy, *Sabin*, 242 Mich App at 659. Decisions concerning whether to call witnesses are presumed to be matters of trial strategy for which this Court will not substitute its judgment with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

asserting—that the employee would state that defendant did not have a knife. Accordingly, the employee's testimony would not give the trial court a basis to reconsider its conclusion that, as recounted by the prosecution witnesses and confirmed by the physical evidence, defendant ultimately assaulted the unarmed complainant with a knife.

Further, as discussed, the exact distance between the men was not decisive of the question whether the complainant reasonably feared an immediate battery. Therefore, another witness's testimony about defendant's proximity to the complainant would have been either irrelevant or cumulative. For these reasons, we agree with the trial court that counsel did not err by failing to call the employee as a witness, and defendant has not shown that the employee's testimony likely would have affected the outcome.

III. RIGHT TO PRESENT A DEFENSE

Defendant claims that he was denied his right to present a defense because the trial court improperly limited defense counsel's questions to the complainant concerning defendant's present ability to commit a battery.

It is generally within the trial court's discretion to limit cross-examination. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). The court has a duty to "exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence" for purposes including "avoid[ing] needless consumption of time." MCR 611(a).

We hold that the court did not improperly restrict counsel's questions and any limitation in no way affected defendant's ability to argue that he lacked the apparent present ability to commit a battery. The complainant's testimony on this point was already quite clear—he stated that defendant was within an arm's reach of himself and his girlfriend. Further, although the court was therefore free to believe that defendant actually came close enough to touch the complainant or his girlfriend with the blade of the knife, the court correctly observed that the precise distance between the men was not crucial to the outcome. Defendant provides no authority for his apparent presumption that he had to come close enough to the complainant to reach him with the blade of the knife in order for the complainant to reasonably fear an immediate battery or for defendant to have the apparent ability to effect an immediate battery. To the contrary, it was sufficient that defendant was able to reach the unarmed complainant quickly enough for the trier of fact to conclude that defendant had the "'apparent present ability to effectuate the attempt [to injure] if not prevented.'" *Bryant*, 80 Mich App at 433, quoting *Tinkler*, 295 Mich at 401. For these reasons, the trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis of this issue.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher