

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK BRISTOL,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 193215

Muskegon Circuit Court

LC No. 95-138324 FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON DARNELL TAYLOR,

Defendant-Appellant.

No. 193314

Muskegon Circuit Court

LC No. 95-138325 FC

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Before: Hoekstra, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

This case arises out of a prisoner stabbing in a bathroom at the Muskegon County Correctional Facility. Following the stabbing, the victim, Jairocey Simpson, accused fellow inmates, defendant Frederick Bristol, defendant Aaron Taylor, and Charles Thomas.<sup>1</sup> Bristol was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, being a prisoner in possession of a weapon, MCL 800.283; MSA 28.1623, and being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Taylor was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Both appeal as of right. We affirm.

*People v Bristol*, 193215

First, Bristol claims that the trial court improperly admitted impeachment evidence. We disagree. At trial, prisoner Michael Johnson was asked if he spoke with inspector Raymondo Mascorro on June 20, 1995. Johnson testified that he spoke with Mascorro, but denied implicating Bristol in the stabbing. Subsequently, Mascorro testified that he spoke with Johnson on June 20, 1995 and on another occasion, and that during both conversations, Johnson implicated Bristol. Because Johnson was never asked if he gave a statement, other than the one on June 20, 1995, to Mascorro, a proper foundation for impeachment by inconsistent statement was not laid. See *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987). However, the error was harmless. Because the improper impeachment was merely cumulative to Mascorro's prior testimony that Johnson did implicate Bristol, we find no prejudice warranting a new trial.

Next, Bristol claims that the trial court improperly denied him the right to present an alibi witness. We disagree. On the eighth day of trial, defense counsel sought to call alibi witnesses Wallace Moore and Rodney Wade. Defense counsel stated that he was given the names of those witnesses before trial, but was under the impression that they were to be character witnesses. Defense counsel stated that he was unaware of their alibi potential until the testimony of a late prosecution witness eventually led him to Moore and Wade. Defense counsel also stated that defendant Bristol did not tell him that Moore and Wade could provide an alibi until trial. As a result, no notice of alibi was filed pursuant to MCL 768.20; MSA 28.1043.

*People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993), does indicate that the trial court has some discretion to allow testimony even though the notice requirement of MCL 768.20; MSA 28.1043 has not been followed. Although not applying *Travis*, this Court has held that where a defendant is negligent in providing defense counsel with alibi information, the trial court does not abuse its discretion in refusing to grant a continuance to allow alibi testimony. *People v Hill*, 88 Mich App 50, 58; 276 NW2d 512 (1979). In the present case, presumably, Bristol would have been aware of his alibi since the date of the incident, but waited until after trial began to inform defense counsel. Based on the reason for the delay in giving notice of alibi and the late date of such notice, we find no abuse of discretion in the trial court's denial of Bristol's request to present alibi testimony.

Next, Bristol claims that his trial counsel was ineffective by failing to interview Moore and Wade before trial, and in failing to interview Bristol "more carefully." Bristol argues that if defense counsel had done so, he would have been aware of the alibi and would have been able to file timely notice. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Because Bristol did not move for a new trial or an evidentiary hearing on this basis below, appellate review is foreclosed unless the record contains sufficient detail to support defendant's claims, and if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). This Court has stated that an attorney who fails to properly file a notice of alibi when informed that this defense exists does not perform at least as well as a lawyer with ordinary training and skill in the criminal law. *People v Bennett*, 116 Mich App 700, 708 n 3; 323 NW2d 520 (1982).

In this case, counsel admitted that he was aware of Moore and Wade before trial, but stated that he thought they were going to be character witnesses. As a result of that belief, counsel did not make interviewing them a priority. Whether and how to use a witness' testimony is considered a matter of trial strategy. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Counsel also stated that Bristol did not inform him of Moore and Wade's alibi potential until trial began, and there is no reason to believe that a "more careful" interview of Bristol would have brought the information out earlier. Based on counsel's belief as to the nature of Moore and Wade's testimony and the fact that he had no reason to believe otherwise until trial, it does not appear that counsel's failure to vigorously pursue interviews with them fell below an objective standard of reasonableness. As a result, on the record before us, we cannot conclude that Bristol's trial counsel was ineffective.

Last, Bristol claims that there was insufficient evidence to instruct the jury on flight. This Court has held that mere evidence a defendant left the scene of the crime is not enough to support a flight instruction, there must be evidence that the defendant feared apprehension at the time the defendant left the scene. See *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). However, in the case at bar, the victim testified that when Bristol attacked him, Bristol was wearing a white shirt and red sweat pants, but that as Bristol left the scene, he removed his white shirt, and headed toward the laundry room, holding something behind his back. Two corrections officers testified that after the attack they saw a prisoner wearing red sweat pants and a red shirt leaving the area and walking "real fast," about as fast as possible without running. (Prisoners are prohibited from running.) When defendant was arrested soon after the incident, he was wearing a red shirt and red sweat pants. This evidence is sufficient to support the conclusion that it was defendant who was seen leaving the area walking "real fast," and the fact that defendant left the area "real fast" is evidence that he feared apprehension as he left the scene. The instruction was proper.

Defendant Bristol's convictions are affirmed.

*People v Taylor*, 193314

First, Taylor claims that there was insufficient evidence presented to support his assault conviction. He argues that there was insufficient evidence presented that he, even on an aiding and abetting theory, possessed sufficient intent to be convicted of assault with intent to commit great bodily harm.

In order to convict Taylor, the prosecution must have presented evidence that he either possessed the specific intent to do great bodily harm or knew that the principal possessed that specific intent. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). Taylor's specific intent or his knowledge of the principal's specific intent may be inferred from circumstantial evidence. *Id.*

At trial, the victim testified that soon before the attack, he saw defendants Taylor and Bristol and Thomas whispering suspiciously in the television room. The victim also testified that soon thereafter, he saw Taylor and Thomas talking and heard Taylor say "Give it to Bristol." The victim testified that soon after he witnessed that conversation, he went into the bathroom and noticed Taylor and Thomas

following him. The victim stated that he then saw Bristol get up from a toilet. While the victim was at a sink washing his hands, Thomas gave Bristol a shank, Taylor grabbed the victim, and Bristol came at the victim. The victim was able to shake Taylor's grasp, but was stabbed repeatedly by Bristol. The victim testified that during the attack, Taylor stood nearby, blocking the victim's escape route.

Looking at this evidence in a light most favorable to the prosecution, a reasonable juror could conclude that Taylor assisted Bristol and Thomas in planning the attack, and assisted in executing the plan by attempting to hold the victim and blocking his escape while Bristol repeatedly stabbed the victim with an eight to ten inch steel shank. A reasonable juror could conclude from such action that either Taylor himself had the intent to cause the victim great bodily harm, or that Taylor knew Bristol had such intent.

Next, Taylor claims that his sentence is disproportionate. Taylor was convicted of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. As a result, his maximum possible sentence was twenty years. (MCL 769.11; MSA 28.1083 doubles the maximum sentence allowed for a first offense, which in this case is ten years, MCL 750.84; MSA 28.279). Taylor was sentenced to twelve to twenty years. Based on the circumstances surrounding the offense and the offender, a twelve-year sentence is not disproportionate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Defendant Taylor's convictions and sentence are affirmed.

/s/ Joel P. Hoekstra  
/s/ Richard Allen Griffin  
/s/ Richard A. Bandstra

<sup>1</sup> Thomas was a codefendant at trial, but is not a party to this appeal.