

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

v

KRZYSZTOF TUBISZ,

Defendant-Appellee.

UNPUBLISHED
September 1, 2000

No. 214498
Oakland Circuit Court
LC No. 98-158744-FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to 3½years to 15 years' imprisonment. Defendant appeals as of right. We affirm.

First, defendant argues that his conviction should be reversed because the minor injury sustained by the victim was insufficient to establish his intent to commit great bodily harm less than murder. We disagree. This Court reviews a challenge to the sufficiency of the evidence in a bench trial de novo, and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Sherman-Huffman*, ___ Mich App ___; ___ NW2d ___ (Docket No. 217609, issued May 26, 2000).

The elements of assault with intent to commit great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal harm to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986). Defendant claims that there was insufficient evidence to establish intent. The only requirement in regard to intent is that a defendant have the intent to do great bodily harm; the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction. *Id.* The specific intent necessary to constitute the offense may be found in conduct as well as words. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

In this case, defendant's intent was demonstrated by both his actions and his threats toward the victim. There was evidence that defendant approached the victim, started to yell at him, and accused him of stealing his coat and owing him money. Defendant proceeded to rip the victim's shirt and threatened to "mess" his face up by the end of the night. He then returned, apparently armed with a cutting instrument, and cut the victim's face from his eye to his lip. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant assaulted the victim with the intent to inflict serious or aggravated injury, and thus with the intent to do great bodily harm. *Mitchell, supra* at 39.

Defendant next argues that he was denied his constitutional right to a fair trial and the effective assistance of counsel where his attorney failed to contact or produce a potential defense witness to testify that the victim recently stole money from defendant. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's ineffective assistance claim, this Court must determine whether (1) counsel's performance was objectively unreasonable, and (2) the defendant was prejudiced by counsel's deficient performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The performance of defense counsel is measured against an objective standard of reasonableness. *Id.* To persuade this Court that a defendant was prejudiced because counsel was ineffective, a defendant must establish a reasonable probability that, but for counsel's errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). This Court will not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor will it assess the competence of defense counsel with the benefit of hindsight. *Rockey, supra* at 77.

Defendant contends that if counsel had called the witness, she would have testified that the victim misappropriated defendant's money shortly before the assault. According to defendant, this testimony could have been used by defense counsel to discredit the victim's testimony because the victim denied that he stole defendant's money and characterized the attack as being without apparent reason. However, we agree with the prosecution that the evidence would have been inadmissible under MRE 608(b). Extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). Although extrinsic evidence may be used to impeach a witness where a matter bears closely on a defendant's innocence or guilt, *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995), in this case whether the victim owed defendant money was not closely bearing on defendant's guilt or innocence. The issue before the trial court was whether defendant intended to do great bodily harm to the victim, not his motive for the assault. Further, even if defendant's motive were at issue, there was testimony that defendant accused the victim of stealing his coat and money before the assault. Moreover, even discounting the victim's testimony, there was other competent evidence establishing that defendant assaulted the victim and cut his face. Because there is no reasonable probability that the result of the bench trial would have been different had the witness testified, defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the trial court abused its discretion by denying his motion for a new trial and request for a *Ginther*¹ hearing. We disagree and find no abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). The purpose of a *Ginther* hearing is to allow the appellate court to determine the adequacy of trial counsel from the facts on the record. *People v Mixon*, 170 Mich App 508, 517; 429 NW2d 197 (1988) rev'd on other grounds 433 Mich 852 (1989). The present case is not one in which it is unclear from the record whether the representation defendant received was adequate. As discussed above, defense counsel's performance was reasonable and there was no mistake requiring a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

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