# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 8, 2000 |
| v | No. 215205<br>Wayne Circuit Court |
| MALISSA S. SEILER,<br><br>Defendant-Appellant. | LC No. 98-001130 |

Before: Neff, P.J., and Talbot and J.B. Sullivan,* JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to 119 days in the Wayne County Jail and four years' probation. We affirm.

Defendant first claims she was denied effective assistance of counsel because counsel failed to adequately present a voluntary intoxication defense. We disagree. Because defendant failed to preserve this issue for appeal by moving for a new trial or an evidentiary hearing before the trial court, our review is limited to mistakes apparent on the existing record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *Id.*, at 662. A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). This Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *Id.*, at 445.

Defendant concedes that trial counsel "did actually attempt to set out an intoxication defense," but claims that it was deficient due to counsel's failure to request a referral for a diminished capacity evaluation and failure to retain expert testimony to establish whether defendant was so affected by alcohol intoxication she could not form the specific intent necessary to commit the offense. Decisions regarding what evidence to present and whether to call or

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

question witnesses are presumed to be matters of trial strategy. *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial defense. *People v Hoyt,* 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

In this case, defendant presented a voluntary intoxication defense through her testimony that one forty-ounce bottle of malt liquor makes her drunk and that she consumed approximately one and one-half forty-ounce bottles at the same pace as complainant. However, she also testified that the beer was consumed over a four hour period with a half-hour break between the two bottles, that she had eaten a hamburger before consuming any beer, that she did not pass out or throw up, that she remembered details such as where she was sitting, where complainant was sitting, who was in the room, that there was beer all over the wall after she threw the bottle, that there was blood dripping from the left side of complainant's face, that when someone called 911, she was scared and left. She remembered that her car keys were in her purse and the purse was on the floor next to the couch; she had no trouble unlocking the car door or getting the key in the ignition. She then drove to her best friend's house.

Notwithstanding the trial court's comment regarding expert testimony, defendant's claim that such testimony would have proven defendant was so intoxicated that she was "incapable of entertaining the intent," *People v Savoie,* 419 Mich 118, 134; 349 NW2d 139 (1984), is speculative at best. See *People v Rockwell,* 461 Mich 1002-1004; 608 NW2d 811 (2000) (Concurrence by Markman, J.). In any event, failure to present expert testimony is presumed to be a permissible exercise of trial strategy. *People v Cooper,* 236 Mich App 643, 658; 601 NW2d 409 (1999). Given the facts in this case, the same analysis applies to defendant's claim that counsel should have requested a referral for a diminished capacity evaluation.

Defendant next claims that the prosecutor's cross-examination regarding prior bad acts (her under-age purchase of beer with lottery tickets she knew had been cashed on a prior occasion) denied her a fair trial. We disagree. MRE 611(b) provides that a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. *People v Ross,* 145 Mich App 483, 489; 378 NW2d 517 (1985). Generally, the allowance of cross-examination on collateral matters to impeach the credibility of a witness is within the discretion of the trial court. *People v McConnell,* 124 Mich App 672, 682-683; 335 NW2d 226 (1983). A defendant cannot claim prejudicial error by evidence which he introduced into the trial. *Id.*, at 683. In this case, defense counsel elicited testimony from defendant on direct examination that she and complainant went to a party store in Livonia and used lottery tickets that they knew had already been cashed in to purchase a case of forty-ounce bottles of malt liquor. Thus, defendant opened up the door to that line of questioning and no error or unfair prejudice resulted when the prosecutor followed up with additional questions on the same issues. *Id.*

Moreover, even if the prosecution did elicit evidence of prior bad acts under MRE 404(b) on cross-examination of defendant, the evidence was admitted for a proper purpose. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford,* 458 Mich 376, 390; 582 NW2d 785 (1998). In this case, money allegedly owed to complainant for the purchase of beer that night was the subject of the argument that led defendant to assault complainant. Defendant claimed the beer was purchased

with cashed lottery tickets, and complainant testified that she gave defendant $30 cash to purchase the beer. Therefore, the prosecution's cross-examination of defendant on these matters was proper, relevant, and probative of defendant's credibility and the circumstances surrounding the assault. Parties must be able to give an intelligible presentation of the full context in which disputed events took place. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Finally, while conceding that "[d]efendant threw the bottle at complainant and struck her in the head," defendant argues there was insufficient evidence that she caused the cut on complainant's face. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The offense of assault with intent to do great bodily harm requires proof of (1) an attempt or threat with force or violence to do corporal harm to another, with (2) the specific intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Actual physical injury is not required for the elements of the crime to be established. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). The fact that defendant threw a forty-ounce beer bottle at complainant's head and came at her with a broken piece of glass provides sufficient evidence of an attempt with force or violence to do corporal harm to complainant with intent to do great bodily harm. Defendant also testified that complainant did not fall down and cut her cheek on broken glass. The fact that complainant does not remember her face actually being cut does not alter our conclusion.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan