STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2004
v	No. 245685 Wayne Circuit Court
CLEATUS ISREAL CRENSHAW, Defendant-Appellant.	LC No. 02-003823-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a bench trial, of aggravated assault, MCL 750.81a(1). The conviction was based on an assault against defendant's former girlfriend, Anna Marie Powell-Rose, on December 31, 2001. Defendant was also tried for first-degree home invasion, MCL 750.110a(2), based on the events that occurred on December 31, 2001, but the trial court acquitted him of that charge. The court sentenced defendant to one year of probation for the aggravated assault conviction. We affirm.

I. Facts

The trial took place on October 17, 2002. Powell-Rose testified as follows: She began dating defendant in May 2001 but the relationship ended, mutually, around December 19 or 20, 2001. Around 8:00 p.m. on December 31, 2001, she was watching television at her home in Detroit when defendant entered the home without permission. Defendant asked her where and with whom she had been. She replied that that "it was none of his business" and asked him to leave her home. Defendant then jumped on her and began choking her and dragging her around the house. He stated that he should kill her and at one point choked her so severely, with his hands around her neck, that she could not breathe. She was very sore and sustained bruises on her face and marks on her neck as a result of defendant's actions. She feared for her life during the assault.

The prosecutor introduced photographs depicting the injuries Powell-Rose sustained on the night in question. The pictures were taken the following day by Carolyn Rogers, one of Powell-Rose's friends.

Powell-Rose further testified as follows: Her telephone rang while defendant was assaulting her. The person calling was her son, asking Powell-Rose to pick him up and drive

him home, apparently from a visit at his father's house. She drove to get her son and then went to the police station to report the assault. Although she had earlier given defendant a key to her house, she believed that he no longer had this key on December 31, 2001, so she did not know how he entered the home on that evening. In August 2001, she obtained a personal protection order (PPO) against defendant because he "came through [her] window, two consecutive nights in a row." She did not enforce the PPO, however, and continued dating him, because she liked him and thought that the relationship could improve. She began experiencing swallowing and breathing problems after the December 31, 2001, incident.

On cross-examination, the defense attorney pointed out that Powell-Rose had earlier told the police that the assault against her had lasted an hour or an hour and a half, whereas during trial she testified that the assault lasted approximately twenty minutes. The attorney also elicited that Powell-Rose did not seek medical treatment after the assault. He also elicited that Powell-Rose did not report defendant for any PPO violations between August and December of 2001 and that she did not use her cellular telephone to call the police immediately as she was driving away from her house after the December 31 incident. He also elicited that no doctor had linked Powell-Rose's swallowing and breathing problems to the assault. The attorney insinuated that perhaps defendant had not known on December 31, 2001, that the romantic relationship between him and Powell-Rose had ended and that perhaps defendant believed that Powell-Rose was cheating on him at that time. He pointed out that at the preliminary examination, Powell-Rose testified that she did not specifically recall breaking up with defendant.

On redirect examination, Powell-Rose testified that the day after the assault, defendant called her home "all day long."

Aubrey Wade of the Detroit Police Department, who saw Powell-Rose when she came to the police station on January 1, 2002, testified that Powell-Rose was "scratched up" and "slightly bruised" at that time.

Defendant called one witness: Carolyn Rogers. Rogers testified that she took photographs of Powell-Rose on January 1, 2002, but that she could not remember at what time she took them. She additionally testified that she had no personal knowledge regarding where Powell-Rose had been on December 31, 2001.

The court acquitted defendant on the charge of first-degree home invasion, stating that Powell-Rose, although a credible witness, was unclear concerning whether she and defendant had truly ended their relationship at the time of the incident in question. The court emphasized that defendant had earlier been given a key to Powell-Rose's home, and it concluded that the prosecutor had failed to prove beyond a reasonable doubt that defendant entered Powell-Rose's home on December 31, 2001, without permission and with the intent to commit a larceny or felony.

The court convicted defendant of aggravated assault, emphasizing the credibility of Powell-Rose's testimony and the probative value of the photographic evidence. In fact, the court questioned why the prosecutor did not bring a higher charge against defendant as a result of the physical assault and threats he made against Powell-Rose.

II. Ineffective Assistance of Counsel

On appeal, defendant argues that his trial attorney rendered ineffective assistance of counsel in several respects. To establish ineffective assistance of counsel, a defendant must show (1) that the performance of counsel "was below an objective standard of reasonableness under prevailing professional norms" and (2) a reasonable probability that, in the absence of counsel's error or errors, the outcome of the proceedings would have differed. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). This Court presumes effective assistance of counsel, and a defendant bears a heavy burden to overcome this presumption. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first contends that counsel "failed to investigate any information provided by Mr. Crenshaw, including the witnesses Mr. Crenshaw provided." In support of this claim, defendant attaches to his appellate brief an affidavit in which he states that "he provided his trial counsel with names of witnesses who would have provided favorable testimony at his trial and who would have discredited the testimony of the complaining witness, Anna Marie Powell-Rose." Defendant further states in the affidavit that "his trial counsel failed to subpoena those witnesses and failed to investigate the potential testimony of these witnesses." Defendant has failed to establish that he is entitled to appellate relief. Indeed, neither the affidavit nor any other document establishes who the additional witnesses were and of what their testimony would have consisted. Accordingly, defendant has not shown that, absent counsel's alleged errors, the outcome of the proceedings would have differed. *Sabin, supra* at 659.

Next, defendant contends that his attorney failed to subpoena Powell-Rose's cellular telephone records "to use to discredit her testimony regarding the telephone calls she claimed to have received from Mr. Crenshaw." In his affidavit, defendant states that "the cellular records would have discredited and contradicted Ms. Powell-Roses[']s testimony." Apparently, defendant is referring to Powell-Rose's testimony in which she stated that defendant called her on her cellular telephone after Powell-Rose left her house on the night of the incident and additionally called her on her cellular telephone on days other than that of the incident. Once again, defendant has failed to establish that he is entitled to appellate relief. First, without any detailed facts supporting his assertion and without a copy of the actual telephone records, defendant's bare assertion that the records "would have discredited and contradicted Ms. Powell-Roses[']s testimony" is insufficient as an offer of proof to demonstrate that the records were relevant for impeachment purposes. Second, even assuming that the records would have contradicted certain of Powell-Rose's testimony, we are not convinced that the contradiction would have affected the outcome of the trial, considering the nature of the additional evidence introduced at trial. Reversal is unwarranted. *Id.*

Next, defendant contends that trial counsel "did not communicate with Mr. Crenshaw regarding his defense" because counsel failed to call Investigator Rocco Cercetti as a witness, even though defendant did not want to waive Cercetti's appearance as a witness. However, defendant fails to demonstrate, or even to argue, what the substance of Cercetti's testimony would have been and how it would have affected the outcome of the proceedings. Defendant

states only that "this officer's testimony would have helped discredit Ms. Powell-Rose[.]" This bare assertion is insufficient to establish that counsel erred, and reversal is unwarranted. *Id.*[1]

Defendant next contends that trial counsel improperly examined witness Carolyn Rogers with regard to the photographs she took of defendant. Defendant states that

> [i]f [t]rial [c]ounsel had simply inquired when the prosecution was notified that pictures of Ms. Powell-Rose's injuries existed, he would have had a better argument for prosecutorial misconduct. He would have been able to argue that the prosecution had ample opportunity to produce the pictures prior to the day of trial and that their failure to do so constituted prosecutorial misconduct, forcing the Judge to either not allow the pictures to be admitted into evidence or adjourning the case to give the defense an opportunity to investigate.

In making these statements, defendant is referring to an exchange at trial in which defendant objected to the prosecutor's failure to provide him before trial with a copy of the photographs. The prosecutor stated that she had only received the photographs the morning of the trial. The court ruled as follows:

> Okay. That [getting the photographs the morning of trial], I understand, having been a former prosecutor, but that never washed with any Judge that I appeared before. And most time they uh, they did not allow admission in if I didn't present it long before the day of trial. Having said that, however, I don't hold the prosecution responsible, because I know of the limitations it's placed on them. Which is why I give then an ample opportunity to the defense. Okay? In all fairness to defense. Now, she may not be listed as a witness on your witness list, but, if you want these pictures to be admitted, you have to find the person who took those pictures and we need to find out the date. It's very simple. Okay? What we can do, because it is a bench trial . . . [i]s we can ask this witness [Powell-Rose] to step down, have [Rogers] come up here under oath and have the defense attorney give an opportunity to cross, to examine her.

In addition to making this ruling, the court stated that it would give defendant an opportunity to review the pictures and that defense counsel should let the court know when he was ready to resume the trial proceedings. Defense counsel responded, "Oh, I have seen them. They were shown to me about 45 minutes ago."

Defendant has once again failed to establish ineffective assistance of counsel. First, he makes no offer of proof indicating that Rogers would have provided testimony favorable to his position (i.e., that Rogers would have testified that the prosecutor knew about the photographs long before trial). Moreover, we conclude that, even if Rogers *had* provided such testimony, defendant cannot demonstrate that the outcome of the proceedings would have differed, given the court's evident willingness to rectify any negligence on the part of the prosecutor by allowing

[1] Moreover, defense counsel stated on the record that "we don't need [Cercetti's] testimony[,]" yet the record reflects no attempt by defendant to express his desire that Cercetti testify.

defendant time to review the photographs before continuing with the trial. Reversal is unwarranted. *Id.*

Next, defendant contends that his attorney "failed to argue whether or not Ms. Powell-Rose's injuries rose to the level of injury necessary for a finding of guilty on the [a]ggravated [a]ssault charge."[2] However, given Powell-Rose's testimony about having been choked by defendant and about being sore as a result of the assault, and given the photographs depicting Powell-Rose's injuries, we conclude that an argument in this regard would not have affected the outcome of the case. *Id.*

Defendant's final argument with regard to his ineffective assistance of counsel claim is that his attorney improperly "failed to ask the [c]ourt to consider the lesser-included charge of [a]ssault and [b]attery." Once again, given the testimony and the photographs introduced in this case, we conclude that a request for the court to consider a lesser offense would not have affected the outcome of the trial.[3] Reversal is unwarranted. *Id.*[4]

III. Judicial Bias

Defendant argues that the trial judge was biased against him because she allowed the photographs of Powell-Rose's injuries into evidence despite the prosecutor's failure to provide a copy of them to defendant before the day of trial. In support of his allegation of bias, defendant emphasizes that the trial court (1) referred to having formerly been a prosecutor and (2) allowed the photographs into evidence despite acknowledging that, in her experience, prosecution evidence generally would not be admitted at trial if it had not been turned over to the defendant long before trial.

A judge is not disqualified to hear a case "[a]bsent actual personal bias or prejudice against either a party or the party's attorney." *People v Wells,* 238 Mich App 383, 391; 605 NW2d 374 (1999). "A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *Id.*

Defendant's argument concerning judicial bias is without merit. Indeed, the judge displayed no evidence of bias. She simply mentioned her past experiences with discovery violations but then fashioned a remedy tailored to this particular case. Specifically, she (1) accepted the prosecutor's statement that she did not obtain the photographs until the day of trial,

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[2] MCL 750.81a(1) states, "Except as otherwise provided in this section, a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both."

[3] As noted earlier, the court in fact questioned why the prosecutor did not bring a *higher* charge against defendant.

[4] We reject defendant's contention that his attorney's alleged errors, viewed cumulatively, constituted ineffective assistance of counsel.

(2) allowed defense counsel to examine the witness who took the photographs, and (3) expressed her willingness to stop the trial long enough for defense counsel to examine the photographs. This was not improper. See, generally, *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987) ("denial of discovery of inculpatory evidence subject to an order or agreement does not necessarily constitute a denial of due process and . . . trial courts have discretion to fashion appropriate remedies for such prosecutorial misconduct"). Moreover, the mere factual statement by the judge that she had once been a prosecutor did not amount to evidence of bias.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood