

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAIOMI DIANA MCCALISTER-PULLIAM,

Defendant-Appellant.

UNPUBLISHED

January 3, 2008

No. 271927

Wayne Circuit Court

LC No. 06-002289-01

Before: Murray, P.J., and Heekstra and Wilder, JJ.

MEMORANDUM.

Defendant was convicted after a jury trial of two counts of assault with intent to do great bodily harm less than murder, in violation of MCL 750.84. She was sentenced to two to eight years in prison and appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that she was denied the effective assistance of counsel by the deficient, prejudicial performance of her trial attorneys. US Const, Am VI, Const 1963, art 1, § 20. Defendant filed a motion to remand under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court granted the motion, and a hearing was held at which defendant's trial attorneys testified. The court found their performance deficient but also found that defendant was not prejudiced thereby or denied a fair trial.

Although the prosecution and defense argue strenuously that parts of the above rulings were erroneous, our review of the record shows no reversible error. Trial counsel stated in opening argument that the jury would hear defendant's story, yet put defendant on the stand and asked only her name. Testimony at the remand hearing did not explain how this "strategy" could possibly benefit the defense, when it depended entirely on the prosecution asking the defendant questions as if on direct, a situation that never materialized. Trial counsel also failed to call defendant's husband, sister, and daughter, who were present at the time of the alleged offense and attended the trial. In failing to put defendant's story before the jury, counsel's performance was defective. However, we agree with the trial court that the defective performance was not shown to have been prejudicial or to have denied defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). To show prejudice, the defendant must show that, but for counsel's error, there was a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998). Here,

defendant did not testify at the remand hearing, and we cannot speculate what her testimony would have shown or how it might have affected the jury. The testimony of complainants and other prosecution witnesses was quite strong and believable, and the jury's verdict was supported by the evidence.

Defendant has also failed to show prejudice or denial of a fair trial resulting from her counsel's failure to request an instruction on defense of others. Jury instructions must not exclude material issues, theories, and defenses supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Here, the court gave CJI 2d 7.24, Self-Defense Against Persons Acting in Concert, but without substantive testimony from the defense to show defense of others, the failure to instruct on defense of others cannot be found prejudicial.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder