STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 291776 Ingham Circuit Court
RICHARD LEE PEARSON, Defendant-Appellant.	LC No. 08-000922-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm, MCL 750.84, and the trial court sentenced defendant to a term of one year in jail, to be followed by 24 months of probation. Defendant appeals as of right. We affirm.

I

Defendant's conviction arises out of an altercation between him and Scott McCarthy on the evening of July 15, 2008, at Tammy Gilyan's residence. Defendant does not dispute that the evidence was legally sufficient to support his conviction. He also does not dispute that his actions may not have been justified as legal self-defense. Rather, he argues that a finding that he acted with the intent to cause great bodily harm is against the great weight of the evidence.

"The elements of assault with intent to do great bodily harm less than murder are (1) an assault, i.e. 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) (citation omitted).

Defendant argues that McCarthy's testimony that defendant attacked him without provocation is "utterly unbelievable by any objective measure" when considered with the other evidence. He asserts that McCarthy's testimony in this regard is so "inherently implausible" and so thoroughly contradicted by other evidence that it should be entirely discounted. He concedes that the evidence by witnesses Holly and Maranda might be sufficient, even without McCarthy's testimony, to allow a reasonable jury to conclude that defendant went beyond what was necessary to defend himself. He contends, however, that, apart from McCarthy's unbelievable testimony, there was no evidence to support a finding that defendant had the specific intent to cause great bodily harm.

Even if evidence is legally sufficient to support a conviction, a new trial may be granted where the verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1988) (citation omitted). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id.* at 642 (citation omitted). Where the question is one of credibility, the verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was "deprived of all probative value or that the jury could not believe it." *Id.* at 643, 645-646. The court must also find that "there [is] 'a real concern that an innocent person may have been convicted' or that 'it would be a manifest injustice' to allow the guilty verdict to stand." *Id.* at 644. Otherwise, questions of weight and credibility are for the jury. *Id.* at 644, 646-647.

Here, there is no dispute that an assault occurred and that McCarthy suffered great bodily harm. The issue is whether defendant intended to cause that harm. Intent can be inferred from any facts in evidence, *People v Unger*, 278 Mich App at 210, 223, 231; 749 NW2d 272 (2008), including the defendant's acts, the means employed to commit the assault, and the extent of the victim's injuries, although actual physical injury is not a necessary element of the crime. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970). Use of a weapon is also not a necessary element of the crime; a defendant can use his bare hands. *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977).

McCarthy did not deny that he was jealous and upset when he went to Gilyan's residence after calling her several times, but he denied yelling while at the front door, denied asking defendant to come outside and fight, denied threatening to slash defendant's tires, and denied calling him any names. He indicated that he was preparing to leave the residence after a few minutes on the porch because Gilyan would not open the door. He testified that defendant was enraged and shouting at McCarthy in a threatening manner when he came charging out of the house shouting "leave this woman alone." He testified that defendant was the aggressor and assaulted McCarthy first. McCarthy further testified that defendant knocked him down, that he was unable to get up or defend himself, and that he suffered serious injuries. He denied having any injuries to his hands. Deputy Hoeksema confirmed that McCarthy was severely beaten and that he did not have any marks on his hands, did not have any defensive wounds on his arms or hands, and did not have any knuckle wounds.

Maranda testified that McCarthy was upset and yelling to defendant to "come out and fight." She did not hear McCarthy call defendant any names, but heard McCarthy threaten to slash defendant's tires if he did not come outside and fight. She testified that defendant "flew open the door and ran out" yelling, "I'll come there and make you leave." Hall indicated that McCarthy attempted to punch defendant, but missed, and defendant punched McCarthy instead. Hall noted that defendant hit McCarthy in the head and face a couple of times, and that McCarthy tried but failed to get up a couple times. She testified that defendant pushed McCarthy back to the ground and hit him a couple more times on the head.

Gilyan testified that she went outside and asked McCarthy to leave. After she went back inside, McCarthy threatened to slash the tires on defendant's truck if he did not come outside. Defendant went outside and calmly talked to McCarthy. She testified that McCarthy "came at defendant" and pushed him. When defendant pushed back, McCarthy fell into some bushes and hit his head on a rock. McCarthy got up and went at defendant again. McCarthy's punch missed defendant, but defendant punched McCarthy in the face. Gilyan denied that McCarthy was on the ground when defendant was hitting him. Gilyan admitted that she told defendant to leave McCarthy alone and to let him go home before the police arrived. She also admitted that McCarthy did not threaten or assault her that night.

Holly testified that McCarthy was on the front porch and "being loud and obnoxious." She testified that she tried to keep defendant from going outside because he was angry. Defendant went outside and told McCarthy to go away. McCarthy responded, "Come on, hit me." McCarthy then punched defendant, defendant then punched McCarthy, and McCarthy fell down, hitting his head. McCarthy got up and went after defendant, saying he was going to "beat his ass." Holly testified that defendant punched McCarthy in the face when McCarthy was on the ground, and that it looked like defendant wanted to fight when he was punching McCarthy. Both men went to their trucks, and defendant started to back up toward McCarthy's truck. Holly had to scream at defendant to keep him from backing into McCarthy's truck. In her statement to police, Holly indicated that she was "too scared to talk to them, mostly Ricky [defendant]."

Defendant testified that he answered Gilyan's telephone and told McCarthy he was a police officer and that he needed to stop calling Gilyan or he would be arrested. He testified that McCarthy arrived at Gilyan's residence and, when Gilyan asked McCarthy to leave, McCarthy asked, "Where is the cop in the house?" McCarthy was screaming for defendant to come outside and fight or else he would "pop" defendant's tires. Defendant testified that he went outside as McCarthy was walking toward his truck and asked McCarthy to go home. McCarthy approached him in a threatening manner and pushed him while stating he was going to "kick his ass." Defendant pushed McCarthy back and McCarthy fell into the bushes. McCarthy then got back up and said he was "gonna kill ya." Defendant swung and hit McCarthy in the jaw and shoulders. He denied hitting McCarthy when he was down. He denied intending to hurt McCarthy.

The evidence presented a credibility contest regarding defendant's intent. Absent exceptional circumstances, issues of witness credibility are for the jury. *Lemmon*, 456 Mich at 642. Both Maranda and Holly testified that defendant was angry when he went out the door. Evidence was presented that McCarthy suffered serious injuries, but had no defensive wounds or injuries to his hands, arms, or knuckles. Although Gilyan and defendant both denied that defendant continued to punch McCarthy while he was on the ground, Maranda testified that McCarthy was unable to get back up after being knocked down, and that defendant continued to punch McCarthy while he was on the ground. Holly testified that defendant punched McCarthy in the face when McCarthy was on the ground, and that it looked like defendant wanted to fight when he was punching McCarthy. McCarthy suffered severe injuries, including two broken orbitals and a broken nose, as well as a bruised and a swollen eye and lips. The trial court correctly realized that there was testimony that the jury could have found that was circumstantial evidence that the defendant intended to cause great bodily harm as opposed to just believing that he was acting in self-defense when he was not acting in self-defense. The evidence did not

preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, 456 Mich at 644.

II

Defendant's argument that he was denied the effective assistance of counsel at trial is essentially predicated on defense counsel rejecting the prosecution's offer during the course of trial to have the jury instructed on the offense of assault and battery. Defendant supports his claims of ineffective assistance of counsel with an affidavit in which he asserts that, prior to trial, he discussed with defense counsel "the possibility of an alternate charge of misdemeanor assault and battery" and that he deferred to trial counsel's experience in recommending not to seek such an alternative charge. Defendant states that he believed at the time of that discussion that he "could get up to a year for a misdemeanor" and that trial counsel did not make him aware that the maximum sentence for assault and battery was only 93 days, so that a conviction of misdemeanor assault and battery would have entitled defendant "to a sentence of no more than time served." Defendant asserts that, if he had known that a misdemeanor assault conviction would not have resulted in additional time, he "would have wanted a jury instruction regarding the lesser offense." Further, defendant states that, on the third day of trial, trial counsel told him that the prosecutor had offered an instruction on an alternative charge of assault and battery but that trial counsel rejected such an instruction. Defendant states that, after going through the trial, he "no longer felt as confident" as he did when he first discussed a potential lesser offense with trial counsel and that, if he had been made aware of the offer, he would have accepted it (presumably meaning if he had been made aware before trial counsel rejected the prosecutor's offer). Finally, defendant states that trial counsel never informed him that he had a right to ask for an instruction on the lesser included offense of simple assault and could still have requested that instruction despite trial counsel rejecting the prosecutor's offer of an assault and battery instruction.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-88, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

At trial, defendant presented the theory that he had acted in self-defense. Trial counsel testified at the motion hearing on remand that defendant had fired his former attorney, George Betts, because Betts wanted defendant to accept a plea bargain and defendant believed he was innocent and did not want a conviction. Trial counsel testified that defendant indicated that he wanted to present his side of the story and wanted to pursue a self-defense theory because that would have entirely exonerated defendant of culpability for his assault of McCarthy. Trial counsel also testified that on the third day of trial he informed defendant that the prosecutor had no objection to an instruction on a lesser included offense, but that he would be opposing it. Defense counsel indicated that he "[f]elt that Mr. Pearson gave me every indication that he was on board with that." Indeed, defendant testified at the motion hearing that "he was okay with

that." Defendant asserted, however, that if he had been advised that a conviction on a lesser included offense would result in a misdemeanor conviction with a maximum penalty of 93 days, that he would have wanted the jury to be instructed on a lesser included offense. Trial counsel testified, however, that he had at one point advised defendant of this fact, but that the discussions were brief because defendant had indicated he wanted to pursue a self-defense theory and avoid a conviction. In light of defendant's refusal to accept a plea bargain, and his firing of Betts for encouraging defendant to plead guilty, as well as his desire to avoid a conviction, it appears that defendant is using the benefit of hindsight to argue that he would have accepted an instruction on lesser included offenses had he been advised of the nature of such a conviction and the penalty.

Given the facts of this case, the trial court properly found that "It was a sound strategy for Mr. Carter to go for all or nothing because his client had indicated he wanted no conviction. There were facts to support self-defense. It was a valid and sound strategy to pursue an all or nothing approach and to avoid any conviction whatsoever by not requesting or arguing for an assault and battery instruction." See *People v Armstrong,* 124 Mich App 766, 769; 335 NW2d 687 (1983) (emphasizing that "defense counsel's decision not to request lesser included offense instructions ... [is] a matter of trial strategy"). Defendant has failed to demonstrate that counsel's performance was deficient.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad