

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARELL SPENCER,

Defendant-Appellee.

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UNPUBLISHED

October 16, 2012

No. 305284

Wayne Circuit Court

LC No. 09-011870-FC

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

The People of the State of Michigan appeal by leave granted the trial court's grant of Darell Spencer's post-conviction motion for a new trial based on ineffective assistance of counsel. A jury convicted Spencer of assault with the intent to murder,<sup>1</sup> felon in possession of a firearm ("felon in possession"),<sup>2</sup> carrying a concealed weapon without a license,<sup>3</sup> discharge of a firearm at a dwelling,<sup>4</sup> and possession of a firearm during the commission of a felony ("felony-firearm").<sup>5</sup> Spencer was sentenced as a third habitual offender<sup>6</sup> to concurrent terms of 20 to 30 years' imprisonment for the assault with intent to murder conviction, three to ten years' imprisonment for each felon in possession and carrying a concealed weapon convictions, and three to eight years' imprisonment for the discharge of a firearm in a dwelling conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We reverse the trial court's order and remand for resentencing.

The prosecution argues that the trial court erred when it determined that defense counsel was ineffective. We agree. Ineffective assistance of counsel claims are mixed questions of law

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<sup>1</sup> MCL 750.83.

<sup>2</sup> MCL 750.224f.

<sup>3</sup> MCL 750.227.

<sup>4</sup> MCL 750.234b.

<sup>5</sup> MCL 750.227b.

<sup>6</sup> MCL 769.11.

and fact.<sup>7</sup> This Court reviews a trial court's findings of fact, if any, for clear error, and reviews "the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo."<sup>8</sup> An appellate court reviews a trial court's decision to grant a motion for a new trial for an abuse of discretion.<sup>9</sup>

A criminal defendant has the right to the effective assistance of counsel.<sup>10</sup> "To prove a claim of ineffective assistance of counsel, a defendant must establish [(1)] that counsel's performance fell below objective standards of reasonableness, and that [(2)] but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different."<sup>11</sup> "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise."<sup>12</sup> This Court does "not substitute [its] judgment for that of counsel on matters of trial strategy[.]"<sup>13</sup> A defense counsel's decisions regarding "what evidence to present . . . are presumed to be matters of trial strategy[] which [this Court] will not second-guess with the benefit of hindsight."<sup>14</sup> "The law does not require counsel to raise every available nonfrivolous defense."<sup>15</sup>

Assault with intent to murder requires a specific intent to kill.<sup>16</sup> The jury may infer intent by considering:

the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.<sup>17</sup>

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<sup>7</sup> *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

<sup>8</sup> *Id* (citation and quotations omitted).

<sup>9</sup> *People v Grissom*, 492 Mich 296, \_\_; \_\_ NW2d \_\_ (Docket No. 140147, decided July 31, 2012), slip op, p 14.

<sup>10</sup> *Swain*, 288 Mich App at 643.

<sup>11</sup> *Id*.

<sup>12</sup> *Id*.

<sup>13</sup> *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

<sup>14</sup> *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (internal quotation marks omitted).

<sup>15</sup> *Knowles v Mirzayance*, 556 US 111, 127; 129 S Ct 1411; 173 L Ed 2d 251 (2009).

<sup>16</sup> *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

<sup>17</sup> *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985) (citation and quotations omitted).

Alternatively, assault with intent to do great bodily harm less than murder requires the defendant to have intent to cause the victim “serious injury of an aggravated nature.”<sup>18</sup>

Defense counsel’s performance fell below an objective standard of reasonableness because he failed to obtain the medical records of the victim, Oliver Johnson. At the *Ginther*<sup>19</sup> hearing, defense counsel stated that he was relying on the prosecution’s burden of proof. Additionally, counsel explained that he did not obtain the medical records because he believed that he did not need them, in part because Johnson testified regarding his injuries. Defense counsel also admitted that the records would have been helpful to his trial strategy. Moreover, defense counsel was aware that the medical records existed and of their potential value to the defense as he asked Johnson on the stand regarding the records. Defense counsel, however, failed to further pursue the medical records after Johnson stated that he did not have them. Relying on the prosecution’s burden of proof, and assuming that because Johnson testified confidently regarding his injuries, the medical records would not reveal any helpful information, is not trial strategy. Thus, counsel’s performance was deficient.

Despite counsel’s inadequate performance, we find that it is not reasonably probable that a jury would have rejected intent to kill and inferred intent to do great bodily harm because two shots, as opposed to four, were fired. “[I]ntent to kill may be inferred from any facts in evidence[,]” and “minimal circumstantial evidence is sufficient to establish a defendant’s intent to kill.”<sup>20</sup> Even if Johnson was only shot twice, multiple witnesses testified that four or five rounds were fired. Additionally, the evidence demonstrated that Johnson was shot from approximately three feet away, and Johnson’s wounds were inflicted while he was lying unarmed on the ground. Moreover, the jury was aware that Johnson’s injuries were not life-threatening based on his testimony, but nevertheless found that Spencer had the intent to kill.

It is also not reasonably probable that defense counsel’s failure to discredit Johnson’s testimony by cross-examining him on his marijuana and opiate use was outcome-determinative error. Defense counsel effectively impeached Johnson’s credibility based on his mental illness and related prescription drug use, as well as the fact that he was not wearing his glasses on the night of the incident. Furthermore, Johnson’s identification of Spencer was not contradicted by the DNA evidence and was corroborated by another witness’s testimony. Therefore, the trial court abused its discretion when it granted Spencer’s motion for a new trial.<sup>21</sup>

At the hearing on Spencer’s motion for a new trial, the trial court indicated that based on the information contained in the medical records, if the court was resentencing Spencer at that time, it would have scored offense variable (“OV”) 3 differently, thus changing Spencer’s sentence under the guidelines. Because defense counsel’s failure to obtain the medical records

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<sup>18</sup> *Brown*, 267 Mich App at 147 (citation and quotations omitted).

<sup>19</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>20</sup> *Unger*, 278 Mich App at 223.

<sup>21</sup> *Grissom*, 492 Mich at \_\_ (slip op at 14).

resulted in the trial court relying on inaccurate information to determine Spencer's sentence and an error in scoring the sentencing guidelines,<sup>22</sup> remand for resentencing is necessary.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

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<sup>22</sup> *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010), citing MCL 769.34(10). The prosecution does not object to the case being remanded for resentencing.