STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY KEENAN SHARP,

Defendant-Appellant.

UNPUBLISHED
April 14, 1998

No. 194129
Recorder's Court
LC No. 95-008962

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to seventy-five months to ten years' imprisonment. We affirm.

On appeal, defendant argues that his trial counsel erred several times and, as a result, defendant was denied effective assistance of counsel. We disagree. To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Here, defendant argues that his trial counsel lied to him in order to get defendant to waive the testimony of certain witnesses and his right to testify. Specifically, defendant contends that he waived the prosecution's witnesses, other than complainant, and his right to testify because his trial counsel indicated that a deal had been struck between trial counsel, the prosecutor, and the trial judge to convict defendant of aggravated assault.

The determination of this issue is mainly one of credibility because defendant claims that his trial counsel lied to him and told him there was a deal for defendant to be convicted of aggravated assault and trial counsel denied defendant's claims. Ordinarily, when confronted with a conflict in the

testimony, it is the trier of fact's duty to determine credibility of the witnesses and arrive at a decision of whom to believe. *People v Carigon*, 128 Mich App 802, 810; 341 NW2d 803 (1983).

Defendant's trial counsel denied conveying information to defendant that a deal existed and denied existence of a deal. Defendant maintained that he waived witnesses and his right to testify because he relied on a deal trial counsel told him existed between the prosecutor, the trial judge and trial counsel. Defendant stated that he thought that the trial judge was in on the deal because the trial judge looked at him funny at sentencing when he asked defendant whether anyone had made defendant any promises. However, defendant also testified at the *Ginther* hearing that he knew there had never been a deal. Defendant's testimony is not consistent with his insistence that he relied on a deal between the prosecutor, the trial judge and trial counsel to his detriment. Instead, defendant jumped to the conclusion that trial counsel lied to him about a deal. Because defendant did not affirmatively demonstrate that trial counsel lied to defendant, he did not overcome the presumption that he received effective assistance of counsel. *Mitchell, supra*, 454 Mich 158. Nor has defendant overcome the presumption that counsel's advice, that testifying in his own behalf might damage defendant's case, might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant next argues that his trial counsel was ineffective because he failed to file a motion to disqualify the trial judge. We disagree. Since disqualification was not required in this case, trial counsel was not ineffective because he was not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant argues that the trial judge should have been disqualified because the trial judge, like complainant, only has one eye and wears a glass eye. Defendant claims that his similarity between the trial judge and complainant rendered the trial judge unable to impartially determine defendant's guilt or innocence. Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003; *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996). A showing of actual bias or prejudice is required before a trial judge will be disqualified. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *Coones, supra*, 216 Mich App 726. MCR 2.003(B)(1) also requires that the judge be personally biased or prejudiced. *Cain, supra*, 451 Mich 495. The challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. *Cain, supra*, 451 Mich 495-496. Defendant must also overcome a heavy presumption of judicial impartiality. *Cain, supra*, 451 Mich 497; *Coones, supra*, 216 Mich App 727.

To support his argument, defendant relies on the trial judge's statements when he ultimately recused himself during the *Ginther* hearing to show that the trial judge was prejudiced against defendant throughout the entire proceedings. The trial judge's subsequent disqualification during the *Ginther* hearing only shows that the judge "may have been prejudiced against defendant after or as a result of the trial." *In re Contempt of Rapanos*, 143 Mich App 483, 498; 372 NW2d 598 (1985). The trial judge expressly stated that he had a "certain amount of empathy . . . for a father whose son is *convicted* of having half-blinded him." The trial judge's personal feelings about the parties as a result of the trial do not establish that the trial judge was biased in favor of complainant or biased against

defendant at the time of the trial. *Id*. Defendant has failed to overcome the presumption of judicial impartiality, and therefore, his trial counsel was not ineffective in failing to file a motion for disqualification of the trial judge. *Gist, supra,* 188 Mich App 613.

Defendant also argues that trial counsel was ineffective because he failed to call eleven witnesses who would have established reasonable doubt that defendant assaulted complainant with intent to commit great bodily harm. Decisions concerning which witnesses to call are issues of trial strategy and will not be second-guessed. *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989). Failure to call witnesses can result in ineffective assistance of counsel but only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Hyland, supra*, 212 Mich App 710.

At the hearing, defendant failed to show that he was deprived of a substantial defense that would have made a difference in the outcome of the trial. Defendant's proposed witnesses were not present when complainant was attacked and their testimony could just as easily have hurt defendant as helped him. Testimony that there had been bad blood between defendant and complainant could have helped defendant's theory that he was trying to get complainant off him or it could have hurt by establishing a motive for defendant's assault upon complainant. Defendant has not presented a record which supports his claim that failure to call these witnesses deprived him of a substantial defense. *Calhoun, supra*, 178 Mich App 523.

Defendant also argues that trial counsel was ineffective as trial counsel because he failed to file motions in defendant's behalf. However, in his brief on appeal, defendant did not discuss any motions that trial counsel failed to file. We do not address the merits of unbriefed issues. *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993).

Defendant's next claim of ineffective assistance of counsel is that trial counsel failed to focus on the inconsistencies of complainant's testimony at the preliminary examination and the trial. We disagree. Trial counsel's decision not to delve into all the differences constituted a matter of trial strategy which will not be second-guessed. *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). There is no reasonable probability that failure to impeach complainant on all contradictory aspects of his preliminary examination and trial testimony would have changed the outcome of the trial. *Mitchell, supra*, 454 Mich 158; *McFadden, supra*, 159 Mich App 800.

Defendant also argues that defendant is entitled to have certain challenged information stricken from the presentence investigation report. We agree. Defendant challenged information in the presentence investigation report that indicated defendant had used weapons in the assault. Because the trial court indicated that it would not consider information regarding any weapons used in the assault upon complainant but did not strike that information from the report, defendant is entitled to have his case remanded for clerical correction of the report. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

Defendant argues that the trial judge should have *sua sponte* disqualified himself because he was influenced by facts outside of the instant case. Specifically, defendant asserts the trial judge was influenced by the fact that the trial judge, like complainant, only has one eye and wears a glass eye and as a result the trial judge empathized with complainant. We disagree. As discussed, *supra*, except for stating the fact that the trial judge and complainant both wear a glass eye, defendant has not shown any actual, personal bias or prejudice against defendant. *Cain, supra*, 451 Mich 595. There is no evidence that the trial judge harbored a deep-seated antagonism toward defendant, and, therefore, defendant has failed to overcome the presumption of judicial impartiality. *In re Hamlet*, 225 Mich App 505, 524; 571 NW2d 750 (1997).

Finally, defendant argues that there was insufficient evidence of the necessary intent to support his conviction for assault with intent to commit great bodily harm. We disagree. The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997); MCL 750.84; MSA 28.279. The term "intent to do great bodily harm less than murder" has been defined as an intent to do serious injury of an aggravated nature. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Complainant testified that defendant entered complainant's bedroom with a stick about one yard long and choked complainant with it. Defendant repeatedly hit complainant on the left side of his head. Complainant said, "I'm sick. I think you knocked my eye out." Complainant lost the vision in his left eye while defendant was punching him. Complainant said, "And he hit me until he just finally decided I wasn't going down." As a result of the beating, complainant lost his left eye and now wears a glass eye.

Defendant's intent to cause complainant great bodily harm can be proven by inference from his conduct and the surrounding circumstances from which it logically and reasonably follows. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). The prosecution presented sufficient evidence to convict defendant of assault with intent to do great bodily harm.

Defendant's conviction and sentence are affirmed, but the case is remanded to the circuit court so that the challenged information may be stricken from the presentence investigation report and the trial court can address defendant's remaining challenges to the presentence investigation report. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad