STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SANTECIA HALTHON, Minor.	UNPUBLISHED November 28, 2000
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SANTECIA HALTHON, Defendant-Appellant.	No. 215648 Wayne Circuit Court Juvenile Division LC No. 98-366107

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following delinquency proceedings, the family court found that defendant Santecia Halthon, a minor, came within the court's jurisdiction for having committed assault with intent to maim[1] and aggravated assault.[2] The family court committed Halthon to the Family Independence Agency under the Youth Rehabilitation Services Act[3] for placement at a suitable facility. Halthon appeals as of right. We affirm.

I. Basic Facts And Procedural History

In early April 1998, on Halthon's second day at the Eastside Academy in Detroit, she was in the gymnasium playing basketball when she got into a fight with another female student. A male physical education instructor was the only adult in the gymnasium at the time of the altercation. Although he did not see who started the fight, he moved to separate the two students by forcing his arms between them. According to the instructor, as he was separating the two students, Halthon bit him on the arm severely enough to leave a permanent scar. He managed to get the two girls away from each other and to stop Halthon from biting him further, but Halthon

[1] MCL 750.86; MSA 28.281.

[2] MCL 750.81a(1); MSA 28.276(1)(1).

[3] MCL 803.301 *et seq.*; MSA 25.399(51) *et seq.*

and the other student started fighting again. The instructor tried to separate them again and this time, by exerting greater force, he was able to propel both students into the hallway where, with help from other teachers, he finally separated the girls. At this point, according to the instructor, he noticed that the other student involved in the fight had lost the tip of her finger, which he saw lying on the gymnasium floor.

Halthon's recollection was significantly different from that of the instructor. She claimed that the students were playing basketball in the gymnasium when another student started calling her names and threatened to "kick her butt." Halthon dropped the basketball, "told her to do it," and the other student walked over and pushed her. Halthon responded by hitting the other student. The confrontation escalated into a full-blown fight with both students grabbing and pulling each other until they were up against the gymnasium wall and the instructor intervened. Halthon said that she bit both the student and instructor while the instructor and other teachers were holding her in the gymnasium. She claimed that she was acting in self-defense.

Following summations by counsel at the hearing in this case, the hearing referee described the incident as vicious and unjustified. The hearing referee recommended that Halthon be adjudicated guilty and placed in the family court's temporary custody. The family court agreed and determined that Halthon had committed both assault with intent to maim and aggravated assault. Following the dispositional hearing, the family court committed Halthon to the Family Independence Agency for placement and supervision.

II. The Great Weight And Sufficiency Of The Evidence

A. Preservation And Standard Of Review

Halthon argues that her convictions were against the great weight of the evidence. She failed to preserve this issue for appeal by moving for a new trial.[4] However, her argument encompasses a challenge to the sufficiency of the evidence. She did not need to move for a new trial in the family court in order to preserve this aspect of her issue for appeal, so we restrict our attention to this singular facet of her argument.[5] "In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt."[6] This essentially entails review de novo.

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[4] *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); see, generally, *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

[5] *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 243 (1998).

[6] *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

B. Assault With Intent To Maim Or Disfigure

MCL 750.86; MSA 28.281, the statute proscribing assault with intent to maim, provides:

> Any person who shall assault another with intent to maim or disfigure his person by cutting out or maiming the tongue, putting out or destroying an eye, cutting or tearing off an ear, cutting or slitting or mutilating the nose or lips or cutting off or disabling a limb, organ or member, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by fine of not more than 5,000 dollars.

This is a specific intent crime.[7] As a result, and given the factual circumstances of this case, the prosecutor had to prove beyond a reasonable doubt that when Halthon assaulted the other student, she did so intending to maim or disfigure the student by cutting off or disabling the student's finger. Halthon, however, claims that the prosecutor failed to prove that she had this specific intent because the evidence supported her claim that she was defending herself from the other student's attack.[8]

For Halthon to assert a successful self-defense claim, the evidence had to demonstrate that (1) she honestly believed that she was in danger, (2) the danger she feared was death or serious bodily harm, (3) the action she took appeared to be immediately necessary at the time, and (4) she was not the initial aggressor.[9] Viewed in a light most favorable to the prosecutor, the evidence presented in this case belies any claim of self-defense. The instructor's testimony contradicted Halthon's contention that the biting occurred while he and other teachers were restraining her. She apparently was a full and free participant in the fight when she bit the other student, not at some perilous disadvantage threatening her life or bodily safety. Indeed, the instructor merely observed some scratches on Halthon's neck after the fight. Thus, under the perspective from which we must view the evidence, there was no evidence that the biting was immediately necessary as a reaction to danger and negated this intent element.

Additionally, the evidence of Halthon's intent to maim or disfigure was manifest from the bite itself.[10] This was not merely a superficial wound that could be interpreted as a warning to the other student to cease the fight. Rather, Halthon bit the other student in a way that unequivocally displayed her intent to prevent the other student from defending herself and to cause serious and permanent damage. This fit the definition of maiming, which means "[t]o cripple or mutilate in any way. To inflict upon a person any injury which deprives him of the use

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[7] See, generally, *People v Ward*, 211 Mich App 489, 491; 536 NW2d 270 (1995).

[8] Halthon also claims that there was insufficient evidence of her intent to maim or disfigure the student because she was acting under duress. She did not raise this duress claim in the family court and so has forfeited it for appeal. See, generally, *In re SD*, 236 Mich App 240, 243, n 2; 599 NW2d 772 (1999).

[9] *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985); *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

[10] *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

of any limb or member of the body, or renders him lame or defective in bodily vigor. To inflict bodily injury; to seriously wound or disfigure; disable."[11] Further, the finger is not a hidden area of the body. By severing the tip of the student's finger, Halthon has negatively affected the other student's appearance. This fits within the common meaning of disfiguring, which means "to mar the appearance of beauty or beauty of; deform; deface."[12] Halthon bit the other student in a fight that merely started by an exchange of words and shoving; overall we have no reason to doubt her intent to maim or disfigure. There was sufficient evidence of this element of the offense.

C. Aggravated Assault

Halthon argues that there was insufficient evidence supporting aggravated assault against the physical education instructor. Specifically, she claims that biting the teacher was merely an accident, which she proved by apologizing to him immediately after the incident. Accident is an affirmative defense to specific intent crimes because it negates the intent element.[13] However, case law suggests that aggravated assault is a general intent crime, not a specific intent crime.[14] This conclusion comports with the plain language of the aggravated assault statute, which does not include any plain language about what intent a person must have in order to be guilty of the crime.[15] Accordingly, accident is not a defense to this particular crime.[16]

As a general intent crime, the prosecutor had to prove that Halthon intended to commit the conduct prohibited in the statute.[17] The aggravated assault statute prohibited Halthon from "inflict[ing] serious or aggravated injury" on her instructor.[18] Whether an injury was "serious" or "aggravated" is a question for the factfinder and Halthon does not dispute that the bite she inflicted on her instructor was serious.[19] Her intent to commit this conduct is apparent from her protracted struggle with the instructor, the ferocity with which she bit him, and the length of time

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[11] Black's Law Dictionary (6th ed).

[12] *Random House Webster's College Dictionary* (2d ed).

[13] See *People v Hess*, 214 Mich App 33, 37-38; 553 NW2d 332 (1995).

[14] See *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977) (aggravated assault is distinguishable from other types of assault because it lacks a specifically intended result as an element); *People v Compian*, 38 Mich App 289, 299-300;196 NW2d 353 (1972) (implicitly agreeing with the defendant's argument that aggravated assault is not a specific intent crime).

[15] MCL 750.81a(1); MSA 28.276(1)(1).

[16] *Hess*, *supra*; see also *People v Cummings*, 229 Mich App 151, 161; 580 NW2d 480, rev'd on other grounds 458 Mich 877 (1998).

[17] *People v Langworthy*, 416 Mich 630, 639; 331 NW2d 171 (1982).

[18] MCL 750.81a(1); MSA 28.276(1)(1).

[19] *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980).

the bite persisted.[20] Viewed in a light most favorable to the prosecutor, there was sufficient evidence that Halthon committed this offense.

III. Burden Of Proof

Halthon claims that the referee who presided at the delinquency hearing did not articulate the proper burden of proof. However, she failed to raise this issue in the statement of questions presented, making review inappropriate.[21] In any event, the referee informed Halthon of her right to be proven guilty beyond a reasonable doubt, which was proper.[22] Halthon does not point us to another place in the record indicating that the referee may have applied an incorrect burden of proof. Accordingly, we conclude that reversal on this basis is not warranted.

IV. Ineffective Assistance Of Counsel

A. Legal Standard

Halthon argues that she was denied the effective assistance of counsel because her attorney in the family court failed to call a witness to support her self-defense claim. To establish that she was denied the effective assistance of counsel, Halthon must show that (1) defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different.[23] Because she did not move for a new trial, our review is effectively limited to the facts already on the record.[24] Effective assistance of counsel is presumed, and Halthon bears a heavy burden of proving otherwise.[25]

B. Trial Strategy

The record reveals that, at the dispositional hearing, a school attendance agent testified that four or five girls were attempting to beat Halthon when the physical education instructor intervened in the fight. The family court sustained the prosecutor's objection that the testimony was irrelevant to the question of disposition. While this testimony would have supported Halthon's self-defense theory, it was inconsistent with her testimony that she was in a fight with one other student. As a result, we see the distinct possibility that defense counsel's strategy was to avoid partly impeaching his own client with this inconsistent testimony. This was a matter of

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[20] *Leach, supra*.

[21] MCR 7.212(C)(5); *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

[22] See, generally, *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[23] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

[24] *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987); see also *In re Whittaker*, 239 Mich App 26, 30; 607 NW2d 387 (1999) (assuming that a post-trial evidentiary hearing for an ineffective assistance of counsel claim would apply to juvenile proceedings).

[25] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

trial strategy, which we will not second guess with the benefit of hindsight.[26] We conclude that Halthon was not denied the effective assistance of counsel.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[26] *Id*. at 76; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).