STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2001
v	No. 218489 Oakland Circuit Court
DARNELL DEWAYNE DONALSON, Defendant-Appellant.	LC No. 98-162406-FC

Before: Hood, P.J., and Doctoroff and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, felonious assault, MCL 750.82; MSA 28.277, and assault and battery, MCL 750.81; MSA 28.276. Defendant was sentenced, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to six years and six months to twenty years for the assault with intent to do great bodily harm conviction, two to fifteen years for the felonious assault conviction, and ninety days in jail for the assault and battery conviction. We affirm.

Defendant's first issue on appeal is that the prosecution failed to present sufficient evidence on the identification of defendant to support the jury's determination that defendant was guilty of assault with intent to do great bodily harm, felonious assault, and assault and battery. When determining whether sufficient evidence has been presented to sustain a conviction, we review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The offense of assault with intent to do great bodily harm is a specific intent crime and requires proof that the defendant (1) made an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) with an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Felonious assault requires proof that the defendant assaulted a victim with a dangerous weapon and with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The offense of assault requires proof that the

defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). "A battery is the consummation of an assault." *Id*.

In this case, the prosecution presented sufficient evidence to establish that defendant was the person who committed these crimes. Bryant and Grimes both identified defendant as the person who shot Bryant. In fact, Bryant testified that there was no doubt in his mind that defendant was the person who shot him. Grimes identified defendant as the person who beat her in the head with his fist, kicked her, and then pointed a gun at her head, threatening that he ought to kill her. Grimes testified that defendant was standing over her and pointed the gun at her with the barrel of the gun only an inch or two from her head. Grimes further testified that she was scared to death and thought she was going to die. Furthermore, Jones and Beasley also observed defendant beating Grimes in the face and kicking her. The testimony of these four witnesses, when viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant committed assault with intent to do great bodily harm, felonious assault, and assault and battery.

Defendant's argument regarding the validity of his convictions is really one of credibility of the witnesses, not sufficiency of the evidence. Defendant claims that all the evidence related to the identification of defendant was inconsistent and unreliable, and reasonable persons could not have found beyond a reasonable doubt that defendant committed these acts. However, questions of credibility are left to the trier of fact and will not be decided on appeal. *Avant, supra* at 506. The jury had the opportunity to hear and observe the witnesses, found the witnesses credible, and convicted defendant accordingly.

Defendant next argues that the admission of evidence regarding his silence was violative of his Fifth Amendment right against self-incrimination. We review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

A criminal defendant has a right not to be compelled to testify against himself at trial, and a defendant's decision to remain silent in the face of accusation cannot be used against him. US Const, Am V; Const 1963, art 1, § 17; *People v Bobo*, 390 Mich 355, 360; 212 NW2d 190 (1973). The prosecution may not introduce evidence of a defendant's postarrest silence except to contradict the defendant's own assertion that he made a statement. *People v Sutton*, 436 Mich 575, 599-600; 464 NW2d 276 (1990); *Bobo*, *supra* at 359.

In this case, during cross-examination of Sergeant Hunt, defendant elicited information that the police swabbed defendant's hands to test for gunshot residue, but the swabs were not submitted to a lab. Out of the presence of the jury, the prosecution asked Hunt why the swabs were not submitted and he stated that one of the reasons was because it was used as an investigative tool to extract confessions. Defendant objected to this line of questioning, arguing that the prosecution was improperly introducing testimony regarding his postarrest silence. The trial court ruled that the question was proper as long as the officer did not mention that the swabs were a technique to obtain confessions. Hunt further testified outside the presence of the jury that the swabs were not submitted for testing because the FBI and Michigan State Police do not consider them reliable. Defendant objected on hearsay grounds, and the court agreed that the

statement would be hearsay. On redirect examination in the presence of the jury, Hunt testified simply that the swabs were not submitted for testing because the FBI and the Michigan State Police do not accept them.

We disagree with defendant's assertion that this line of questioning and the responses constituted evidence of defendant's postarrest silence. Although Hunt admitted outside the presence of the jury that the swabs were used as a technique to extract confessions, this testimony was never presented to the jury. The sole explanation for not submitting the swabs for testing was that neither the FBI nor the Michigan State Police accept them. We reject defendant's argument that this "incomplete" testimony somehow allowed the jury to infer that defendant remained silent. Further, the prosecution did not introduce testimony regarding why the swabs were not submitted for testing until defendant elicited on cross-examination that Hunt did not submit the swabs. We agree with the trial court that defendant opened the door to Hunt's testimony explaining why the swabs were not submitted, and he cannot now seek reversal based on an alleged error to which he contributed at trial. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Defendant's next issue on appeal is that the trial court abused its discretion in finding that the prosecution exercised due diligence in attempting to produce res gestae witness April Parker and by failing to give the appropriate jury instruction regarding missing witnesses. However, pursuant to MCL 767.40a; MSA 28.980(1), due diligence is not required. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995); *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). The statute as amended provides that "the prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4); MSA 28.980(1)(4); *People v Wolford*, 189 Mich App 478, 483; 473 NW2d 767 (1991). The appropriate inquiry in this case is whether the trial court abused its discretion in allowing the prosecution to delete a witness from its list. *Burwick*, *supra* at 291.

A police officer testified that he notified Parker of the trial date when he visited her home. Another officer also attempted on three different occasions to deliver a subpoena to Parker at her home and, on each occasion, he spoke with Parker's mother, told her of the trial date and that Parker would be called as a witness, and delivered the subpoena to Parker's mother. Parker's mother indicated to the officer that she would give the subpoenas to Parker. From the first day of the trial, the police attempted on a daily basis to try to locate Parker by visiting her home and calling her work. The police were told by Parker's employer and by family members that she had gone up north and would not be back for a few days. From this record, there is ample evidence that efforts were made to locate and subpoena Parker, to no avail. Furthermore, it appears Parker was aware of the court dates and chose not to appear.

We find that the trial court did not abuse its discretion in excusing production of Parker because the prosecution showed good cause to strike her as a witness when it was unable to locate her. *Snider, supra* at 422. Because the trial court did not abuse its discretion in excusing

Parker, the instruction on the prosecutor's failure to produce a witness was unnecessary.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly