STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 248599 Wayne Circuit Court
WILLIAM DEREK MOTLEY-BEY, Defendant-Appellant.	LC No. 03-001270-01

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant William Derek Motley-Bey was charged with assault with intent to commit murder, MCL 750.83, and malicious destruction of personal property (MDOP) under $200, MCL 750.377a(1)(d). A jury convicted Motley-Bey of assault with intent to do great bodily harm less than murder (assault GBH), MCL 750.84, and MDOP under $200. The trial court gave Motley-Bey a suspended sentence on the misdemeanor conviction and sentenced him as an habitual offender, second offense, MCL 769.10, to 47 to 180 months on the assault conviction.

I. Basic Facts And Procedural History

This case arose out of an incident that occurred between Motley-Bey and his live-in girlfriend, Yvonne McGee on the evening of September 17, 2001. That night, as McGee was driving Motley-Bey, McGee's two daughters, sixteen-year-old Frances and eleven-year-old Cierra, and her aunt, Linda McGee, McGee and Motley-Bey got into an argument, and McGee told Motley-Bey that it would be best if he moved in with his mother. According to McGee and Frances, Motley-Bey got angry and jumped out of the car, which was not moving very fast, and McGee then stopped the car. According to Linda McGee, McGee stopped the car and told Motley-Bey to get out. In any event, once Motley-Bey was out of the car, he slashed the rear passenger tire, causing it to deflate.

McGee said she told Frances to get out of the car and come up to the front, but Frances denied this and said she remained in the back seat. According to Linda McGee and Frances, McGee got out of the car and confronted Motley-Bey, who had started to walk away, and asked Motley-Bey why he had cut her tire. According to McGee, she remained in the car when she confronted him. Either way, Motley-Bey reached out and cut McGee's throat with a razor blade knife and then ran away. McGee recognized the weapon as one Motley-Bey habitually carried.

Driving on the flat tire, McGee picked up her sister, also named Linda McGee. Because her sister did not have a telephone, they proceeded to the home of a friend, Jacqueline Baker, and had her call an EMS unit. McGee, who was losing a lot of blood and becoming weak and dizzy and nauseated, held a towel to her neck and waited at Baker's house for the paramedics, who eventually arrived and took her to the hospital.

Dawn Johnson, a police officer dispatched to the scene, found McGee outside "holding a bloody towel around her neck." McGee had "a large laceration . . . across her chin and around her neck," and blood was squirting from the wound. Johnson also noticed that the rear passenger-side tire on McGee's car had been slashed and was flat. McGee told Johnson that Motley-Bey had injured her and said he might be found at his mother's address. Johnson went to that address but no one answered the door.

Paramedics Anthony Shudell and Jason Hawkins arrived and found McGee pale, sweating, and holding a blood-soaked towel across her neck. When the paramedics removed the towel, they found a "quite extensive" laceration to her neck that was four to six inches long and oozing blood and tissue. Shudell said the edges of the cut were clean, as if McGee had been cut "with a razor or a scalpel or something like that." Shudell and Hawkins took McGee to the hospital.

Larry Lloyd, a physician at St John Hospital, testified that the laceration to McGee's neck was approximately six inches long and required some inner sutures and a long outer suture to close. Although McGee testified that she was in the hospital for three or four days, Lloyd said the records reflected that she was admitted on September 17 and released the following day.

Motley-Bey did not testify, and defense counsel presented no other witnesses. The jury found Motley-Bey guilty of the lesser offense of assault with intent to do great bodily harm as to Count I and guilty as charged as to Count II, malicious destruction of property under $200.

II. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, viewing both direct and circumstantial evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[1]

B. Establishing The Elements Of The Crimes

Motley-Bey first contends that the evidence was insufficient to sustain the verdicts. Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the

[1] *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

elements of a crime.[2] It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.[3] All conflicts in the evidence are to be resolved in favor of the prosecution.[4]

The elements of assault GBH are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder."[5] "Great bodily harm means a physical injury that could seriously and permanently harm the health or function of the body."[6] This is a specific intent crime,[7] and the defendant's intent may be inferred from his conduct and from facts and circumstances established beyond a reasonable doubt.[8] The defendant's intent can be inferred from the defendant's acts, the means employed to commit the assault itself, and the extent of the victim's injuries, although actual physical injury is not a necessary element of the crime.[9]

The evidence here shows that Motley-Bey assaulted McGee by attacking her with a razor blade knife. He sliced her throat and opened a large wound that bled profusely, although he missed the carotid artery. This evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Motley-Bey acted with the intent to cause great bodily harm.

The elements of MDOP under $200 are (1) that the property belonged to another person, (2) that the defendant destroyed or damaged the property, (3) that the defendant knew what he did was wrong and acted with the intent to damage or destroy the property, and (4) the amount of the damage was under $200.[10] The defendant's intent may be inferred from his conduct and from facts and circumstances established beyond a reasonable doubt.[11]

The evidence showed that Motley-Bey slashed a tire of McGee's car, causing it to go flat. This evidence clearly established the first two elements of the crime and, given that Motley-Bey slashed the tire immediately after arguing with McGee, one could reasonably infer that Motley-Bey intentionally damaged the tire.[12] The prosecutor did not present any direct evidence as to

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[2] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[3] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

[4] *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

[5] *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

[6] See CJI2d 17.7(4).

[7] *Parcha*, *supra*.

[8] *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

[9] *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970); CJI2d 17.7(4).

[10] CJI2d 32.2; MCL 750.377a(1)(d).

[11] *Strong*, *supra.*

[12] See *People v Nelson*, 234 Mich App 454, 459-460; 594 NW2d 114 (1999).

the value of the tire, but the circumstantial evidence was sufficient to prove that it did have some value, which value was destroyed when Motley-Bey slashed the tire. Because the evidence did not prove that the value of the tire was over the statutory minimum to make the offense a one-year misdemeanor or a felony, the jury properly convicted Motley-Bey of a ninety-three-day misdemeanor.[13]

To the extent Motley-Bey argues that the evidence was insufficient because McGee's testimony was not credible, we find no basis for reversal. A positive identification of Motley-Bey by witnesses may be sufficient to support a conviction despite the potential unreliability of such testimony.[14] The credibility of identification testimony is a question for the trier of fact to determine and will not be resolved anew on appeal.[15]

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[16] We review the factual issue for clear error and review de novo the constitutional issue.[17] Because Motley-Bey failed to raise this claim below in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record.[18]

B. Failure To Call Witnesses

Motley-Bey contends that he is entitled to a new trial because his counsel was ineffective. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[19] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[20] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[21] In so doing, the defendant must overcome

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[13] See *People v Toodle*, 155 Mich App 539, 552; 400 NW2d 670 (1986).

[14] See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

[15] *Id.*

[16] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[17] *Id*.

[18] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[19] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[20] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[21] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

a strong presumption that the challenged conduct might be considered sound trial strategy.[22] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[23]

Motley-Bey contends that counsel was ineffective for failing to call Kim McCray[24] as an alibi witness and to call Motley-Bey to testify on his own behalf. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."[25] "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."[26] "Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense."[27] "A substantial defense is one that might have made a difference in the outcome of the trial."[28]

In this case, Motley-Bey's representations regarding the likely substance of McCray's testimony is not sufficient to show that her testimony would have benefited Motley-Bey had she been called as a witness.[29] Likewise, there is nothing in the record to show what testimony Motley-Bey would have offered if called. Because there are no errors apparent on the record, Motley-Bey's argument that he was denied ineffective assistance of trial counsel is without merit.[30]

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

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[22] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[23] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[24] The correct spelling of the witness's name is unclear from the record, but might have been "McCrea" rather than "McCray."

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

[26] *Id.* at 76-77.

[27] *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866; 577 NW2d 667 (1998).

[28] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[29] *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

[30] *Id.*