

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CANDACE NICOLE SIMS,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 280435

Saginaw Circuit Court

LC No. 05-026090-FH

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced to concurrent terms of 18 to 120 months for the assault conviction and 18 to 60 months for the carrying a dangerous weapon with unlawful intent conviction. Defendant appeals as of right and we affirm.

Defendant's convictions arise from a fight that occurred at Saginaw High School on May 9, 2005. The victim testified that defendant cut her with a razor blade.

Defendant argues that her Sixth Amendment and Fourteenth Amendment due process rights were violated when the trial court excluded exculpatory evidence. Her cousin, who gave a written confession to the crimes of which defendant was charged, invoked her Fifth Amendment right against self-incrimination. Defendant asserts the trial court erred in rejecting defendant's attempt to introduce the confession through the investigator who obtained it. See MRE 804(b)(3). The trial court held that it was inadmissible as a statement against penal interest under MRE 804(b)(3) because defendant failed to produce evidence to corroborate the confession.

US Const, Am 6 guarantees defendants a meaningful opportunity to compel witnesses to testify on their behalf as part of their defense. *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). This right is essential to due process. *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). However, this right is not absolute. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). "In the exercise of this right, the accused, as required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers, supra* at 302. To be admissible under MRE 804(b)(3), the proponent

must show that the statement made was truly against the declarant's penal interest. *People v Underwood*, 184 Mich App 784, 787; 459 NW2d 106 (1990). The trial court must examine the circumstances in which the statement was made. *Id.* "If it appears that the declarant had some other motive in making the statement, whether self-interest or otherwise, the declaration should be excluded since it lacks the requisite indicia of reliability that underlies this exception." *Id.*

Given the close family relationship between defendant and her cousin, it was reasonable for the trial court to presume that the cousin's purpose in confessing was to protect defendant and not because she was guilty of a crime. Furthermore, since the confession would subject her to criminal liability and exculpate defendant, defendant had to show that there was corroborating evidence to support the confession. MRE 804(b)(3). Defendant failed to present any evidence other than the confession to show that the cousin, and not defendant, was responsible for the victim's injuries. No one testified that the cousin had a razor blade or any weapon. In fact, the testimony revealed that only defendant, her codefendant, and/or defendant's other cousin were in possession of a razor blade or a weapon of some sort. Under these circumstances, it cannot be said that the trial court erred in excluding any evidence regarding the cousin's confession.

Defendant next argues that she was deprived of her Sixth Amendment and due process rights when the trial court denied her motion for a new trial based on a determination that the jury's verdict was not against the great weight of the evidence.

Here, the victim testified that she was positive defendant assaulted her because she saw the razor blade in defendant's hand and saw defendant come at her with it. Another witness corroborated this testimony. On the other hand, defendant presented several witnesses who testified that she did not have a weapon and that she did not hit the victim. Thus, the jury was presented with conflicting evidence that could only be resolved by assessing the weight and credibility of the witnesses. It is a well-settled principle that questions regarding the credibility of witnesses are left to the trier of fact. See, e.g., *People v Palmer*, 392 Mich 370, 375; 220 NW2d 393 (1974). A grant of a new trial because the verdict was against the great weight of the evidence is disfavored, and the jury's verdict should not be set aside if there is competent evidence to support it. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). Moreover, contrary to defendant's argument, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial," as credibility questions should be left to the jury. *Lemmon*, *supra* at 642-643, 647. Based on the victim's direct testimony that defendant was the one who assaulted her and defendant's admitted involvement in the fight, it cannot logically be said that the jury's verdict was against the great weight of the evidence. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

Next, defendant argues that it was a denial of her Sixth Amendment and due process rights when she was tried jointly with her codefendant. Specifically, defendant argues that she and her codefendant had antagonistic defenses, and that she was therefore entitled to severance as a matter of law. This issue is unpreserved and therefore it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *People v Hana*, 447 Mich 325, 348; 524 NW2d 682 (1994), our Supreme Court held that a defendant is not entitled to severance as a matter of law simply because the defendant and his or her codefendant have antagonistic defenses. Instead, the Court held, "the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. In other words, the "tension between

defenses must be so great that a jury would have to believe one defendant at the expense of the other.’ ” *Id.* at 349, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

Defendant has failed to present any evidence that she and her codefendant’s defenses were “mutually exclusive” or “irreconcilable.” It was alleged that both defendants were armed with razor blades. Further, the defendants were charged with assaulting different people. Accordingly, there was no plain error.

Lastly, defendant argues that she was denied effective assistance of counsel because her trial attorney failed to object to joinder. The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to have counsel effectively assist in the presentation of one’s case. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination of whether a defendant received effective assistance requires a focus on the assistance actually received. *Id.* at 596. Since effective counsel is presumed, a defendant who challenges his counsel’s assistance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show (1) trial counsel’s actions fell below that of a reasonably competent attorney when objectively viewed and (2) but for trial counsel’s unreasonable conduct, there was a reasonable probability the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Because we find that defendant was not entitled to severance as a matter of law, it cannot be said that her trial counsel’s failure to object to joinder fell below that of a reasonably competent attorney. Even though the trial court would have had discretion to grant severance, *People v Webb*, 82 Mich App 182, 184; 266 NW2d 483 (1978), there is no indication that the trial court would have granted the motion. The motion would not have had any sound basis and presumably would have been futile. Counsel is never required to make a futile motion. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Simply put, defendant cannot overcome the presumption of effective assistance, and cannot show a reasonable probability that a motion for severance would have been granted. Accordingly, there was no ineffective assistance.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey