

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED ROBERT RUSSELL, III,

Defendant-Appellant.

FOR PUBLICATION

September 4, 2012

9:00 a.m.

No. 304159

Wayne Circuit Court

LC No. 10-013518-FH

Advance Sheets Version

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

K.F. KELLY, P.J.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and reckless driving causing serious impairment of a body function, MCL 257.626. Defendant was sentenced to 19 to 120 months' imprisonment for his assault with intent to do great bodily harm less than murder conviction and 5 to 60 months' imprisonment for his reckless driving causing serious impairment of a body function conviction. We previously entered an order granting defendant's motion to remand so that

the trial court can conduct an evidentiary hearing and defendant-appellant may move for a new trial on the issue of ineffective assistance of counsel. In addition to the issue of defense counsel's failure to produce a witness, the parties may also address whether defense counsel was ineffective for not objecting to the closure of the courtroom during voir dire and the reasons for closing the courtroom. [*People v Russell*, unpublished order of the Court of Appeals, entered December 15, 2011 (Docket No. 304159).]

The trial court held a *Ginther*¹ hearing, found that trial counsel had been ineffective for failing to call a witness, and granted defendant's motion for a new trial. We hold that the trial court complied with the remand order but erred by granting defendant's motion for a new trial. We affirm defendant's convictions and sentences.

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

I. BASIC FACTS

The victim, Deshun Battle, and an associate of the victim, Dijon Deal, went to defendant's hotel room, seeking the return of Deal's laptop computer. After defendant had failed to emerge from the hotel room to return the computer, Battle observed a computer in defendant's truck and pointed it out to Deal. Deal grabbed a crowbar and began applying the crowbar against the window of defendant's truck, as if to break the window. Defendant came out to the parking lot and indicated that he would retrieve the computer. At that point, Battle decided that he did not want anything more to do with the situation. Battle got into his own vehicle, drove it around a corner and parked it in order to fix his speakers. Instead of retrieving the computer as promised, defendant got in his truck, and drove away. Deal pursued defendant on foot. Defendant claimed that he had been looking in his rearview mirror when he crashed into the back of Battle's vehicle, pinning Battle between the two vehicles. Battle suffered extensive injuries, including the amputation of one of his legs. The prosecution argued that defendant had intentionally rammed his vehicle into Battle. Defendant denied that his driving was reckless or that he had intended to cause Battle harm; instead, defendant explained that it was simply an accident and that he had not been looking where he was driving because he had been watching Deal in his rearview mirror.

The jury convicted defendant of assault with intent to do great bodily harm less than murder and reckless driving causing serious impairment of a body function. Defendant appealed his convictions and we granted his motion to remand for a *Ginther* hearing on defendant's claim that defense counsel was ineffective for failing to investigate and call a key witness and for failing to object to the closing of the courtroom during voir dire.

II. THE *GINTHER* HEARING

At the *Ginther* hearing defendant's girlfriend, Kiesha Yates, testified that she was with defendant at the hotel. She heard loud noises outside their hotel room and saw two men banging on defendant's truck, one with a crowbar, and one with a "shiny metal thing." Defendant then exited the room. Yates saw defendant get into his truck and drive off. She testified that the two men had chased after defendant's vehicle with objects in their hands. Yates gave the police a written statement at the scene; however, she was not contacted by defense counsel David Lankford.

Defendant testified that during trial preparation he told Lankford that Yates was with him at the time of this incident and wished to have her called as a witness. Lankford told defendant that he did not feel comfortable calling civilian witnesses.

Lankford testified that he was aware of Yates and another woman being witnesses to this incident. Lankford never talked to Yates or the other woman personally; however, he did review Yates's police statement. Lankford believed that Yates's statement that two men had chased defendant's vehicle was inconsistent with and contradictory to his theory of the case that Battle was hit with the front of defendant's vehicle. Lankford assumed that the two men Yates referred to in her statement were Battle and Deal.

The trial court ruled as follows:

The witness that was not called is Kiesha Yates. She testified that Mr. Russell was her boyfriend. She was in the motel room and she heard loud banging noises outside. She looked out the window and saw two men banging on Mr. Russell's S.U.V. One had a crowbar and the other man had a bright, shiny object in his hand. Mr. Russell then went outside and got into the truck, started the engine and drove away. The two men ran after him both holding onto the objects that they had in their hand.

This testimony is extremely important. It contradicts the testimony of both alleged victims Mr. Battle and Mr. Deal.

David Lankford, the defendant's attorney, testified that Mr. Russell did tell him about the testimony of Miss Yates and another woman. He believed that Miss Yates' testimony as told to him by Mr. Russell contradicted his theories and the physical evidence. He did not, however, indicate a theory that was contradicted or the physical evidence that was contradicted.

Mr. Russell did say that he only saw one man running after his S.U.V., but the statement is not contradicted by Miss Yates because she had a view entirely different than Mr. Russell. She was viewing the vehicle from the outside and Mr. Russell was viewing whoever was chasing him only through the windows of the car.

It was ineffective assistance of counsel for Mr. Lankford not to call Miss Yates, and even more so not to speak with her, the other female witness and any other witnesses. It is often a mistake to rely only on witnesses' statements and not speak with the witness in person or at least by telephone.

Not only does Miss Yates' testimony contradict and impeach the testimony of Mr. Battle and Mr. Deal, it supports the testimony of Mr. Russell. Clearly a different result could have occurred with this testimony.

The trial court rejected defendant's claim that the courtroom had been closed during jury voir dire and declined to grant relief on that basis.

The matter is now before us after remand.

III. SCOPE OF REMAND ORDER

From the outset, we reject the prosecution's argument that the trial court's order granting defendant a new trial exceeded the scope of this Court's remand order.

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). Again, in relevant part, the order provided:

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is GRANTED, and the matter is remanded to the trial court so that the trial court can conduct an evidentiary hearing and defendant-appellant may move for a new trial on the issue of ineffective assistance of counsel. In addition to the issue of defense counsel's failure to produce a witness, the parties may also address whether defense counsel was ineffective for not objecting to the closure of the courtroom during voir dire and the reasons for closing the courtroom.

. . . The trial court is to *hear and decide* the matter within 56 days of the Clerk's certification of this order. Defendant-appellant must also file with the Clerk of this Court copies of all *orders entered* on remand within 14 days after entry.

The *trial court is to make findings of fact and a determination* on the record. [Emphasis added.]

We also retained jurisdiction "in the cause and the time for proceeding with the appeal in this Court begins upon issuance of an order in the trial court that finally disposes of the remand proceedings." It would be meaningless for this Court to explicitly direct that a motion be filed without necessarily permitting the trial court to either deny or grant the motion. This is particularly true when the trial court was specifically directed to make a "determination on the record." We could not have been clearer that the trial court had the ability to and was, in fact, directed to make such a determination. Therefore, the lower court order granting defendant's motion for a new trial did not exceed this Court's remand order.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel. We disagree. "We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *People v Terrell*, 289 Mich App 553, 558-559, 797 NW2d 684 (2010) (citation omitted). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. We review the trial court's findings of fact at a *Ginther* hearing for clear error, and review questions of constitutional law de novo." *People v McCauley*, 287 Mich App 158, 162, 782 NW2d 520, 523 (2010) (citation omitted).

A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

A. FAILURE TO CALL KIESHA YATES

Defendant argues that counsel was ineffective for failing to call Yates as a witness at trial. We disagree.

Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Similarly, “[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial’s outcome.” *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

In his appellate brief, defendant writes:

The evidence in this case was not overwhelming. Battle and the other witness, Mr. Deal, gave completely different accounts of the incident. The only evidence linking [defendant] to the assaultive offense was the testimony of Mr. Battle. Clearly, Mr. Battle’s version of the events (that he was basically in the wrong place at the wrong time) would have been severely contradicted by Ms. Yates, who would have testified that not only was Mr. Battle an active participant, but that he was also armed with a weapon at the time [defendant] was attempting to flee the area.

At trial, defendant’s theory of the case was that this was a terrible accident and that he simply did not see Battle before the point of contact. During opening statements, defense counsel stated:

Folks, this is -- it is truly a tragedy. My heart goes out to this young man. He’s 20 years old. He’s without a leg. But here they have to show one of the three charges intentional act And I think the evidence will on that last, which is that last count reckless, I think there is some evidence to support the statement that I was being chased by Mr. Deal and didn’t realize, didn’t see him.

And during closing argument, defense counsel argued:

Now we know that [defendant] struck Battle who was standing at the back of a Dodge Durango, so let’s look at the first part of that. Looking out of his rearview mirror at Deal.

All right. Is there any reason that Mr. Russell would be looking out of his rearview mirror at Deal? Yes, lots of reasons. And, folks, with regards to well Battle had left and he allegedly had a shotgun and whatever, let me just put that to rest real quick. There is no way, there is no evidence that Mr. Russell knew

where Mr. Battle was with the Durango. It was on the other side of the building. It obstructs views and it is not until the last possible moment that he could have even been aware of it. That is -- that's a fact.

At the *Ginther* hearing, defense counsel testified that Yates's "statement was, in my opinion, contradictory, inconsistent with the theory of the case" and "entirely inconsistent with the physical evidence." Counsel explained that "I didn't see how Mr. Battle could be chasing that vehicle and then basically end up in front of the path of the Tahoe."

We believe that the trial court abused its discretion by granting defendant a new trial. Specifically, we fail to see how defense counsel's decision not to call Yates as a witness was anything other than sound trial strategy. Defendant argues that Yates's potential testimony would have contradicted Battle's testimony that Battle was simply in the wrong place at the wrong time when he was struck by the vehicle. Defendant believes that defense counsel should have set forth a theory that defendant was racing out of the parking lot in order to avoid Deal, who was wielding a crow bar, and Battle, who was wielding a gun. But Yates's statement conflicted with the physical evidence. Michigan State Police Sergeant Kevin Lucidi testified that defendant's vehicle was traveling at a rate of approximately 19 miles per hour just prior to his airbag deploying. Assuming (as does defendant) that Battle was one of the two individuals who had pursued defendant's vehicle on foot, an untenable conclusion would have to be drawn—that Battle initially ran behind defendant's vehicle, passed it on foot at a speed of over 19 miles per hour, and then positioned himself behind his own vehicle before the point of impact. We cannot fault defense counsel for failing to call Yates as a witness when her testimony would have required Battle to be in two places at the same time.

Furthermore, even if defense counsel's decision not to further investigate Yates fell below an objective standard of reasonableness, defendant has failed to show that defense counsel's decision not to call Yates as a witness prejudiced him. Defense counsel argued that this incident was an accident; defendant was looking in his rearview mirror at Deal when he hit Battle, who was in front of him. Defendant was not denied a substantial defense. Furthermore, it is unclear how Yates's testimony would have contributed to this defense given that it seems contradictory. Defendant failed to show that he was denied the effective assistance of counsel, and the trial court abused its discretion by granting defendant's motion for a new trial.

B. FAILURE TO OBJECT TO CLOSURE OF THE COURTROOM

Defendant argues that defense counsel was ineffective by failing to object to the partial closure of the courtroom during jury voir dire, thereby depriving defendant of his right to a public trial, as guaranteed by the Sixth Amendment, US Const, Am VI. We disagree.

Defense counsel and the trial court engaged in the following dialogue before trial:

Mr. Lankford: There are a couple of family members on both sides.

We are -- not going to be a lot of room here while selecting the jury, so I don't know if you want to deal with the people that are here for support for one side or the other.

The Court: Each side can have one person sit on that special bench right there.

Now, Mr. Lankford, are you calling witnesses?

Mr. Lankford: It would be only the defendant possibly, judge.

The Court: Okay. So none of the people here in support of the defendant would be called as witnesses?

Mr. Lankford: No.

The Court: Well of course they can be in the courtroom the whole time then but not while we pick -- only one while we're picking the jury or two maybe.

Defendant did not object to the partial closure. Our Supreme Court recently held that the forfeiture rule stated in *People v Carines*² applies with equal force to a defendant's claim that the trial court violated his Sixth Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664 821 NW2d 288 (2012). As such, defendant must establish (1) that an error occurred, (2) that the error was "plain," (3) that the error affected his substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* at 664-665.

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. *Id.* at 650-652. However, the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required. *People v Kline*, 197 Mich App 165, 170; 494 NW2d 756 (1992).

The record reveals that the voir dire proceedings were partially closed as a result of the limited capacity of the courtroom. The limited capacity of the courtroom was a substantial reason for the closure, and thus, this partial closure did not deny defendant his right to a public trial. Furthermore, defense counsel was not ineffective by failing to object, because there was no error. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004) ("[T]rial counsel is not ineffective when failing to make objections that are lacking in merit.").

V. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence was insufficient to establish the intent element of assault with intent to do great bodily harm less than murder. We disagree.

² *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“This Court reviews de novo challenges to the sufficiency of the evidence to 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 Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (quotation marks and citation omitted). This Court reviews the evidence in the light most favorable to the prosecution. *Id.*

“The elements of assault with intent to do great bodily harm less than murder 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.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and emphasis omitted). Intent to do great bodily harm is intent to do serious injury of an aggravated nature. *Id.* “An actor’s intent may be inferred from all the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003) (quotation marks omitted). “[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented.” *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

The evidence established that Battle and Deal went to defendant’s hotel room to confront defendant about Deal’s laptop and to retrieve it from defendant. Battle and Deal asked for the laptop once or twice. Defendant assured them that he was going to get the laptop. After defendant neglected to retrieve Deal’s laptop, which Battle saw in defendant’s truck that was parked right in front of defendant’s hotel room, Deal went to defendant’s truck, acted like he was going to smash defendant’s window, and then actually hit the window once. When defendant saw Deal hit his truck window, he came out of the hotel room and said, “Wait. Hold on.” Defendant initially acted as though he was going to retrieve the laptop, but instead got into his truck, backed up, and pulled away. As defendant was backing up, Deal threw the crowbar at defendant’s vehicle and then chased the vehicle. Defendant then struck Battle with his vehicle.

Michigan State Police Sergeant Kevin Lucidi testified as an expert in crash reconstruction. Lucidi testified that just before the airbag of defendant’s vehicle deployed, the vehicle was accelerating and going approximately 19 miles per hour.

A rational jury could have inferred from the recent confrontation, coupled with the evidence that defendant was accelerating his vehicle before hitting Battle, that defendant had intended to cause Battle great bodily harm. Additionally, the jury was free to disbelieve the evidence that defendant was looking into his rearview mirror when he struck Battle. Therefore, the evidence was sufficient for a rational trier of fact to find that defendant committed assault with intent to do great bodily harm less than murder.

VI. INCONSISTENT VERDICTS

Finally, defendant argues that his verdicts were inconsistent and require reversal of his conviction of assault with intent to do great bodily harm less than murder. We disagree.

This Court reviews de novo questions regarding inconsistent verdicts, which are constitutional issues. See *People v Vaughn*, 409 Mich 463, 465-467; 295 NW2d 354 (1980). Under Michigan law, each count of an indictment is regarded as if it were a separate indictment

and consistency in jury verdicts is not necessary. *Id.* at 465-466. Also, “it is possible for a jury to reach separate conclusions on an identical element of two different offenses.” *People v Garcia*, 448 Mich 442, 464; 531 NW2d 683 (1995).

The Michigan Vehicle Code, MCL 257.1 *et seq.*, defines reckless driving as driving “in willful or wanton disregard for the safety of persons or property” MCL 257.626(2). Anyone who violates MCL 257.626(2), and in doing so causes serious impairment of a body function to another person, is guilty of a felony. MCL 257.626(3). “The elements of assault with intent to do great bodily harm less than murder 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.” *Brown*, 267 Mich App at 147 (quotation marks and emphasis omitted). This Court has recognized that “[s]pecific intent has been defined as ‘meaning some intent in addition to the intent to do the physical act which the crime requires,’ while general intent ‘means an intent to do the physical act—or, perhaps, recklessly doing the physical act—which the crime requires.’” *People v Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976), quoting LaFave & Scott, *Criminal Law*, p. 343.

Defendant asserts the inconsistency of the verdicts with regard to the intent elements of the respective charges. Defendant’s verdicts were not necessarily inconsistent. Defendant’s act of driving his vehicle into Battle could have been in willful disregard of Battle’s safety and simultaneously with the intent to do Battle great bodily harm. Even so, consistency in jury verdicts in criminal cases is not necessary. *Garcia*, 448 Mich at 464; *Vaughn*, 409 Mich at 465-467. Defendant’s claim is without merit.

Defendant’s convictions and sentences are affirmed and the order granting new trial is reversed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer